OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 6 November 2008 [1]

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I — Background, procedure and forms of order sought

1. By Article 1 of Decision 2002/742/EC of 5 December 2001 ('the contested decision'), [2] the Commission found, on conclusion of a proceeding conducted under Regulation No 17 of the Council of 6 February 1962, [3] that Archer Daniels Midland Co. ('ADM') and other undertakings had infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) by participating in a continuing agreement and/or concerted practice in the citric acid sector.

2. In recital 158 of the contested decision, the Commission identified the following as factors material to its finding of an infringement in this case: the allocation of markets and market share quotas; the freezing/restricting/closing down of production capacity; the agreement of concerted price increases; the designation of a producer to 'lead' price increases in each national market; the circulation of lists of current and future target prices in order to coordinate price increases; the devising and applying of a reporting and monitoring system to ensure the implementation of restrictive agreements; the sharing-out or allocation of customers; participation in regular meetings and the maintenance of other contacts in order to agree on those restrictions and to implement and/or modify them as required.

3. By Article 3 of the contested decision, fines were imposed on the undertakings held

2 — Commission decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18).

3 — First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), as amended.

responsible for the infringement. In calculating the fines, the Commission applied — albeit without expressly saying so — the method set out in its 1998 guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ('the Guidelines') [4] and, where appropriate, it also applied — and expressly referred to — its 1996 notice on the non-imposition or reduction of fines in cartel cases ('the Leniency Notice'). [5]

4. The fine imposed on ADM was in the amount of EUR 39.69 million.

5. When determining the amount of the fines, the Commission, in its assessment of the gravity of the infringement, took account in particular of the fact that the cartel had had an actual impact on the citric acid market in the EEA. To the basic amount of the fine calculated for ADM, set at EUR 58.8 million on the basis of the gravity and duration of the infringement, the Commission applied a 35% increase on account of aggravating circumstances, on the ground that ADM, together with another undertaking, had enjoyed leadership status within the cartel. In addition, ADM was denied the benefit provided for in Section B of the Leniency Notice — 'non-imposition of a fine or a very substantial reduction' of the amount which would have been imposed in the absence of cooperation — which was granted instead to another undertaking, Cerestar Bioproducts BV ('Cerestar'). The Commission took the view that the first to provide decisive evidence of the cartel's existence, within the meaning of Section B(b) of the Leniency Notice, was not ADM, but Cerestar, and that ADM, as one of the ringleaders of the cartel, also failed to meet the conditions laid down in Section B(e) of that notice. However, under Section D of the notice, the Commission granted ADM a 'significant reduction' (50%) of its fine.

6. By application lodged at the Registry of the Court of First Instance of the European Communities on 28 February 2002, ADM claimed, first, that Article 1 of the contested decision should be annulled in so far as it found that ADM had infringed Article 81 EC and Article 53 of the EEA Agreement by participating in the limitation of production capacity in the relevant market and in the designation of a producer who was to 'lead' price increases in each national segment of that market and, secondly, that Article 3 of that decision should be annulled in so far as it related to ADM or, failing which, that it should be amended so as to cancel or reduce the fine imposed on ADM.

4 — OJ 1998 C 9, p. 3.
5 — OJ 1996 C 207, p. 4.

7. By judgment of 27 September 2006 ('the judgment under appeal'), [6] the Court of First Instance upheld ADM's claim for the partial annulment of Article 1 of the contested decision, but rejected its claims concerning the fine imposed on it in Article 3 of that decision, ordering the Commission to pay one tenth of the costs incurred by ADM and ADM to bear the remainder of its own costs and to pay those incurred by the Commission.

8. By application lodged at the Registry of the Court of Justice on 11 December 2006, ADM appealed against that judgment, claiming that the Court should set it aside in so far as it dismisses the action brought by ADM against the contested decision and also that the Court should annul Article 3 of that decision in so far as it relates to ADM or amend that article so as to cancel or reduce the fine imposed on ADM, or, in the alternative, refer the case back to the Court of First Instance for the latter to give judgment in accordance with the legal principles established by the Court of Justice and, in any event, order the Commission to pay the costs of both sets of proceedings.

9. The Commission contends that the Court of Justice should dismiss the appeal and order ADM to pay the costs.

6 — Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627.

10. The representatives of the parties presented oral argument at the hearing on 8 May 2008.

II — Legal analysis

A — *Preliminary remarks*

11. In support of its appeal, ADM puts forward nine pleas in law ('pleas on appeal'), all relating to the determination of the amount of the fine imposed on it.

12. By the first five pleas on appeal, ADM criticises the assessments which prompted the Court of First Instance to reject its arguments against the 35% increase applied by the Commission to the basic amount of the fine on account of aggravating circumstances, namely the leadership role allegedly played by ADM in the citric acid cartel. The first of those pleas on appeal relates to the fact that the Court of First Instance did not make a finding that ADM's rights of defence had been breached by virtue of the Commission's failure, in the course of the administrative proceeding, to object to that aggravating circumstance or to the facts relating thereto. The next four pleas on appeal, on the other hand, are directed, on various grounds, against the assessments relied on by the Court of First Instance in rejecting ADM's

argument that the considerations set out in the contested decision as the basis for attributing leadership status to ADM were not capable of justifying that imputation.

13. The last four pleas on appeal concern the failure to accept the existence of an attenuating circumstance, the assessment of the actual impact of the cartel on the market and the assessment of the cooperation provided by ADM to the Commission in the course of the administrative procedure.

14. Let me say straight away that some of those pleas on appeal appear to me to be well founded, so that the judgment under appeal should in my opinion be set aside on certain points, and that I consider that the state of the proceedings is such that the Court of Justice may, under the first paragraph of Article 61 of its Statute, give final judgment in the matter, as requested by ADM. For ease of exposition, having regard to the number of pleas on appeal, my examination of those I consider to be well founded shall immediately be followed by an examination of the relevant pleas in law relied upon at first instance which were rejected in the parts of the judgment under appeal which, it is submitted, should be set aside.

B — *The first plea on appeal: breach of the rights of the defence as regards the attribution to ADM of leadership status within the cartel*

1. Appraisal by the Court of First Instance

15. Before the Court of First Instance, ADM claimed that the Commission had infringed its rights of defence because the accusation that it had been one of the ringleaders of the cartel had not been put to it during the administrative procedure and because the statement of objections did not indicate the elements (in particular those relating to the role played at cartel meetings by certain of ADM's representatives) relied on to substantiate that accusation in the contested decision. ADM also complained that it did not have an opportunity during that procedure to give its views on the use as evidence, in support of that accusation, of the report by the United States Federal Bureau of Investigation (FBI) concerning statements made to FBI agents on 11 and 12 October 1996 by a former representative of ADM ('the FBI Report') and the written statement of 18 March 1999 sent to the Commission by Cerestar [7] ('Cerestar's written statement').

7 — The contested decision mentions the Cerestar statement of 25 March 1999. However, there are not two separate statements, only one. As is apparent from paragraph 371 of the judgment under appeal, Cerestar's statement bears the date 18 March 1999 but was communicated to the Commission on 25 March 1999.

16. The Court of First Instance first of all referred to the judgment of the Court of Justice in *Musique diffusion française and Others* v *Commission*, [8] according to which, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the parties concerned and provided that it sets out the principal elements of fact and of law that may give rise to a fine — such as the gravity and duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently' — it fulfils its obligation to respect the undertakings' right to be heard, thereby providing them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined. [9]

17. The Court of First Instance then rejected ADM's complaints, taking the view that, in the statement of objections, the Commission had set out the principal elements of fact and of law that could justify the fine which it planned to impose on ADM and stating that '[o]bservance of the rights of defence of the undertakings concerned does not require the Commission to state more precisely in the statement of objections the manner in which it will take account, where relevant, of each of those factors when setting the level of the fine'. Referring to *Michelin* v *Commission*, [10] the Court observed, in particular, that 'the Commission was not required to state either that ADM could be considered to be a ringleader of the cartel or the size of the increase which it might apply to ADM's fine for that reason'. As regards the use in evidence of the FBI Report and Cerestar's written statement, the Court observed that 'the Commission [had] annexed those documents to the statement of objections and … the parties [had] therefore [been] able to express a view on this point, including as regards their use as evidence'. [11]

2. Arguments of the parties

18. By the plea on appeal under consideration here, ADM alleges that the Court of First Instance infringed the principle of protection of the rights of the defence by concluding that the Commission is not required in the statement of objections to inform the addressee of the possibility that it may be considered to be a ringleader of the cartel and that the Commission is not obliged to indicate the facts on which such a finding might be based. Moreover, according to ADM, the second of those conclusions was not supported by an adequate statement of reasons.

19. In ADM's view, the role of cartel leader is one of the principal elements of fact which characterises the gravity of the conduct of an undertaking that has committed an infringement and which must be mentioned in the statement of objections, [12] also because the increase applied by the Commission for such

8 — Joined Cases 100/80 to 103/80 [1983] ECR 1825, paragraph 21.
9 — Judgment under appeal, paragraph 434.
10 — Case 322/81 [1983] ECR 3461, paragraph 20.
11 — Judgment under appeal, paragraphs 436, 438 and 439.
12 — In that connection, ADM relies on Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 316 and 317; Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 203 to 205; and Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 153.

an aggravating circumstance usually accounts for between 30% and 50% of the amount of the fine.

20. Furthermore, in ADM's view, the facts underlying the attribution of cartel leadership status must be mentioned in the statement of objections or at least be reasonably inferable from the documents annexed to it. [13] In the present case, however, there was no mention of those facts in the statement of objections nor any possibility of inferring them from the documents attached to it, the reasons for this being: (i) the Commission had expressly stated in the statement of objections that, in calculating the amount of the fine and, in particular, in assessing the role played by each undertaking, it would take account of the facts as described in that statement; (ii) identification of the leader of the cartel was difficult because of the complexity of the facts, as was recognised in the contested decision (recital 273) and in the judgment under appeal (paragraph 300); (iii) the Commission, by indicating to ADM in the course of the administrative procedure that it could benefit under Section B of the Leniency Notice, had given the impression that it did not regard ADM as one of the leaders of the cartel; (iv) an undertaking cannot, without being specifically advised to that effect, be required to examine and refute, on the basis of counter-evidence, every fact set out in the range of voluminous documents annexed to a statement of objections: if it did so, the undertaking could well lose the benefit of the application of Section B of the Leniency Notice, which presupposes inter alia constant and total cooperation on the part of the undertaking.

13 — Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 62.

21. The Commission contends that ADM's complaints are unfounded. They are based, it says, on a specious distinction between the fact of leadership of the cartel and the consequences of that leadership for the calculation of the fine. ADM has lost sight of the fact that a leadership role has an impact on the amount of the fine, not on the establishment of the infringement. There is no need, therefore, for the Commission to set out in greater detail in the statement of objections 'facts which are in reality an anticipation of the level of the fine'. On the contrary, in the present case, it was sufficient, according to the Commission, to state — as it did — that in assessing the gravity of the infringement it would take account of the role played by each of the undertakings concerned.

22. The Commission observes that the FBI Report and Cerestar's written statement were among the eight documents annexed to the statement of objections.

23. It adds that the role played by ADM in the cartel is mentioned in the main part of the statement of objections (referring, by way of example, to paragraphs 63, 71, 84, 85, 93, 94 and 104 of the statement of objections). Moreover, in its reply to that statement, ADM made express reference to both the FBI Report and Cerestar's written statement, and made extensive comments on its role in the cartel, rejecting the view that it was a leader or an instigator and actually relying on the FBI Report in support of that contention. This proves that ADM was in a position to construct its own defence on the basis of the content of the statement of objections.

3. Assessment

24. Although there is no lack of isolated dicta that could be interpreted to the contrary, [14] it may be regarded as settled case-law that undertakings which are the subject of a proceeding for the suspected infringement of the EC Treaty competition rules have a right to be heard by the Commission not only as regards the existence of the alleged infringements but also as regards the imposition of a fine and the criteria for setting the fine.

25. As noted by the Court of First Instance in the judgment under appeal, the Court of Justice has held that, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the parties concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard, since in that way it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined. [15]

26. In particular, in *Michelin* v *Commission*, [16] the Court appears to some extent to have departed from the suggestions made by Advocate General Verloren Van Themaat, who considered it 'self-evident that the Commission cannot indicate in the administrative procedure itself what the fine or the *criteria for its assessment* will be since the degree of guilt or negligence can be determined only at the end of the administrative procedure.' [17] As regards the criteria for setting the fine, the Court considered it necessary to observe in that judgment that 'in the statement of objections … the Commission [had] expressly indicated that it intended to fine [the undertaking concerned] in an amount to be fixed by taking into account the duration and gravity of the infringement *which it regarded as serious*', thereby giving that undertaking 'the opportunity to defend itself not only against the finding of an infringement but also against the imposition of a fine'. [18]

14 — See 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 Maatschappij and Others* v *Commission* [2002] ECR I-8375 ('*PVC II*'), paragraph 91, according to which 'the parameters of the rights of defence as laid down by Regulations Nos 17 and 99/63 … are *limited* to questions concerning the truth and relevance of the facts and matters alleged and the documents used by the Commission to support its claim *that there has been an infringement* of competition law' (emphasis added).

15 — *Musique diffusion française and Others* v *Commission*, cited in footnote 8 above, paragraph 21, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 428.

16 — Cited in footnote 10 above.

17 — Opinion of 21 June 1983 in *Michelin* v *Commission*, cited in footnote 10 above, point 7. Emphasis added.

18 — *Michelin* v *Commission*, cited in footnote 10 above, paragraph 20. Emphasis added.

27. More recently, in *Showa Denko* v *Commission*, [19] the Court observed, in absolutely clear terms, that undertakings involved in a proceeding for the suspected infringement of Article 81 EC have a right to be heard 'not only on the principle of the penalty but also on each of the matters which [the Commission proposes] to take into account in setting the fines'.

28. The case-law to which I refer in point 25 above is framed, however, in somewhat general terms and does not give any guidance as to what is to be understood by 'principal elements of fact and of law' which are relevant to the fine and must be apparent from the statement of objections: in particular, no guidance is given as to whether it is sufficient for the Commission to indicate in the statement of objections that, in deciding whether to impose a fine and, if so, in what amount, it will take into account the gravity, the duration and the subjective element of the alleged infringement, or, on the other hand, whether it is necessary for the Commission to give details of its assessments of each of those aspects.

29. It is certainly out of the question that the Commission need only make an abstract reference to the gravity, the duration and the subjective element of the alleged infringement. As the Court of First Instance has observed, 'the obligation to give an indication of the gravity and intentional or negligent nature of the infringement would be rendered pointless if a simple paraphrase of Article 15(2) of Regulation No 17 were in itself sufficient to satisfy it'. [20] As regards the duration of the infringement, the Court of Justice has already made it clear that this must be specified in the statement of objections. [21]

30. On the other hand, it can be ruled out on the basis of the case-law that observance of the undertakings' rights of defence implies that they must be given precise details in the statement of objections as to the manner in which the Commission intends using each of those 'elements of fact and of law' in determining the amount of the fine. Indeed, to give indications as to the size of the fine before the undertakings are given an opportunity to put forward their defence regarding the charges against them would be equivalent to improperly anticipating the Commission decision. [22]

31. Given that the statement of objections must indicate both the duration of the infringement and whether it was committed intentionally or through negligence, it remains necessary, in the grey area between those two extreme approaches, to establish whether it is sufficient for the Commission to list in the statement of objections the criteria for determining the gravity of the infringement on which it intends to rely or whether it is required to specify the assessments which it

19 — Case C-289/04 P [2006] ECR I-5859, paragraph 70.

20 — *Corus UK* v *Commission*, cited in footnote 12 above, paragraph 145.

21 — *Musique diffusion française and Others* v *Commission*, cited in footnote 8 above, paragraph 15.

22 — See *Michelin* v *Commission*, cited in footnote 10 above, paragraph 19; *Musique diffusion française and Others* v *Commission*, cited in footnote 8 above, paragraph 21; *Dansk Rørindustri and Others* v *Commission*, cited in footnote 15 above, paragraphs 434 and 439; and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 58.

intends to carry out when applying those criteria. More precisely, in the present case, was it sufficient for the Commission to indicate in the statement of objections — as it did — that, in setting the amount of their respective fines, it was going to take account, inter alia, of the role played by each undertaking in the infringement (indication of the criterion), or should it already have pointed out in the statement of objections that the status of cartel leader might be attributed to ADM (assessment on application of that criterion)?

32. The case-law of the Court of Justice does not seem to me to give useful guidance on this question. The same may be said of the judgments of the Court of First Instance in *HFB and Others* v *Commission* and *LR AF 1998* v *Commission*, relied on by ADM in support of the second approach. [23] Whilst it is true that in those judgments the Court of First Instance pointed out that, in the statement of objections sent to the applicant undertakings, the Commission referred inter alia to the active role [24] or to the leading role [25] played by them in the cartel in question — going on to state that,'[i]n doing so, the Commission [had] set out in the statement of objections the elements of fact and of law on which it would base the calculation of the fine to be imposed on the applicant, so that, in that regard, the applicant's right to be heard was duly observed' [26] — it does not necessarily follow that the Court considered that such a reference was *necessary* in order to observe that right.

33. Conversely, it must be recognised that in *Corus UK* v *Commission*, [27] which is also relied on by ADM, the Court of First Instance in fact took a more stringent approach regarding the Commission's obligations regarding the content of the statement of objections, essentially taking the view that it was not sufficient simply to refer to a particular criterion for gravity without including a provisional assessment made in accordance with that criterion. After stating that the Commission 'is required to give, in the statement of objections, a brief provisional assessment as to the duration of the alleged infringement, its gravity and the question whether, in the circumstances of the case, the infringement was committed intentionally or negligently', the Court of First Instance held that in the case before it the statement of objections was 'vitiated by a defect, in that the Commission did not indicate in the statement of objections its provisional classification of the gravity of the infringement committed', having failed to clarify whether in its opinion it was a 'serious' or a 'very serious' infringement within the meaning of the Guidelines. [28] The Court of First Instance observed that that defect was nevertheless not a basis for annulment of the contested decision, since it had not been shown that, in the absence of that defect, ADM would have put forward, in its reply to the statement of objections, arguments appreciably different from the arguments, designed to play down the gravity of the infringement committed, which it actually had put forward in that reply. [29]

34. For my part, I wonder whether a somewhat different approach might be more

23 — Both cited in footnote 12 above.
24 — *HFB and Others* v *Commission*, cited in footnote 12 above, paragraph 316.
25 — *LR AF 1998* v *Commission*, cited in footnote 12 above, paragraph 204.
26 — *HFB and Others* v *Commission*, cited in footnote 12 above, paragraph 317, and *LR AF 1998* v *Commission*, cited in footnote 12 above, paragraph 205.
27 — Cited in footnote 12 above.
28 — Ibid., paragraphs 146, 151 and 153.
29 — Ibid., paragraphs 154 to 159.

correct. Rather than determining at the outset and in the abstract the scope of the Commission's obligations regarding the content of the statement of objections, and then going on to establish whether the failure to discharge those obligations actually affected the rights of the defence, it might be more appropriate to deduce the scope of those obligations from the need for those rights to be observed.

35. If — as is often asserted in the case-law, and as was recalled in paragraph 435 of the judgment under appeal — 'as regards determining the amount of fines, the rights of defence of the undertakings concerned are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement', [30] the Commission's obligations should be those — and only those — that are capable of ensuring that this is a genuine opportunity.

36. In that regard, it seems to me that once the Commission has indicated in the statement of objections — as it did in this case — that, in order to determine the fine to be imposed on an undertaking, it is going to take account, in assessing the gravity of the infringement, of the role played by that undertaking in the collusive agreements described in the statement of objections, the undertaking in question is well placed to submit observations on the conclusions to be drawn, regarding its role, from the facts mentioned by the Commission and to argue, for example, that those facts do not show that its role was active or indeed that of a leader.

37. I am therefore of the opinion that the Court of First Instance did not err in law in concluding that the Commission was not required to point out in the statement of objections that it might consider ADM to be one of the ringleaders of the cartel in question.

38. On the other hand, as regards the second part of the present plea on appeal, regarding the failure to indicate in the statement of objections facts subsequently relied on in the contested decision to support the attribution to ADM of the status of cartel leader, I consider that ADM's arguments deserve to be upheld in part.

39. The facts to which ADM refers in this part of the plea on appeal are the circumstances set out in recitals 265 and 266 of the contested decision, which were taken from the FBI Report and from Cerestar's written statement. According to the FBI Report, one of ADM's representatives devised the mechanics of the 'G-4/5' arrangement, played a fairly active role in the meeting of 6 March 1991 in Basle, where the citric acid arrangement was formulated, was regarded as the 'wise old man' and

30 — That statement, which is found in other judgments of the Court of First Instance (T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235; *HFB and Others* v *Commission*, paragraph 312, and *LR AF 1998* v *Commission*, paragraph 200, both cited in footnote 12 above; judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, paragraph 140; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 51; and Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 49), was reaffirmed by the Court of Justice in *SGL Carbon* v *Commission*, cited in footnote 22 above, paragraph 57.

was nicknamed 'the preacher' by a Jungbunzlauer representative (recital 265). According to Cerestar's written statement, a different ADM representative played a leading role and chaired the 'Sherpa' meetings (in other words, those which operated at a technical level, as opposed to the so-called 'Masters" meetings, held at a higher level), dealing with the preparation of matters and the putting forward of proposals for the price lists to be agreed (recital 266). The Commission regarded those circumstances as 'enough additional elements to conclude that ADM was a leader of the cartel', after finding that 'the fact that a round of bilateral meetings took place between ADM and its competitors shortly before the first multilateral cartel meeting [was] not sufficient to show that ADM was the instigator of the cartel' (recital 264). Those factual circumstances thus appear to have been decisive as regards the attribution to ADM of the status of cartel leader.

40. The plea alleging that the reasoning in the judgment under appeal was inadequate in relation to ADM's arguments concerning the failure to indicate those circumstances in the statement of objections can be regarded as unfounded. Although the Court of First Instance did not illustrate very clearly the reasons for which that omission did not in its opinion add up to a breach of ADM's rights of defence, it may be concluded that those reasons are implicit in paragraph 439 of the judgment under appeal. Admittedly, paragraph 439 refers mainly to a different argument — which it rejects — whereby ADM complained of not having had an opportunity to give its views in the administrative procedure on the use of the FBI Report and Cerestar's written statement as evidence. However, the scope of that paragraph is wider, as is apparent from the phrase 'including as regards their use as evidence', in so far as the Court of First Instance appears to be expressing the view that the Commission's annexing of those two documents to the statement of objections was sufficient to enable the parties to give their views not only on their use as evidence but also on the factual circumstances described in them.

41. On the other hand, I am of the opinion that the Court's assessment to the effect that it was unnecessary for the statement of objections to set out the factual circumstances referred to in recitals 265 and 266 of the contested decision is wrong in law.

42. Observance of the rights of defence requires, as I see it, that the statement of objections should disclose to the addressee undertaking at least the facts and the associated evidential material on which the Commission intends to rely as a basis for its assessment in the final decision. [31]

43. According to the Court of Justice, '[r]espect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the

31 — See, in that regard, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, according to which the Commission could not take account in the final decision, as not being mentioned in the statement of objections, either particular events (see paragraphs 21 and 28) or particular documents (see paragraphs 21 and 27).

administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement'. [32]

44. The obligation for the Commission to give advance notice of the facts and associated evidence which it intends using in the final decision — which has thus been confirmed with regard to the establishment of an infringement — must, in my opinion, also apply with regard to the imposition of a fine and to the determination of the amount. [33]

45. The present case is characterised in particular by the fact that the Commission's conclusion regarding ADM's leadership role is based, as is common ground, on factual circumstances (those referred to in recitals 265 and 266 of the contested decision) which are not mentioned in the statement of objections, but which are said to be proved by documents which are both annexed to the statement of objections — as emphasised by the Commission — and mentioned in that statement of objections, albeit merely as proof of the facts set out in that statement.

46. Does the fact that those circumstances were apparent from those documents — which the statement of objections indicated would be used as evidence — necessarily mean that ADM was able to take a position as to the reality and relevance of those circumstances?

47. ADM suggests that reference be made to the judgment of the Court of First Instance in *Shell* v *Commission*, [34] from which the following in particular emerges:

— documents which are appended to the statement of objections, but are not mentioned in it, may be used in the decision as against the addressee undertaking only if that undertaking could reasonably have deduced from the statement of objections the conclusions which the Commission intended to draw from them; [35]

32 — Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 44 and the case-law cited.

33 — In Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 92, the Court repeats the dictum set out in point 43 of this Opinion, but uses terms which seem to extend its scope: 'the Court of First Instance … correctly pointed out that proper observance of that principle requires that the undertaking concerned should have been given an opportunity, as early as the administrative procedure, duly to put forward its views as to the reality and relevance of the alleged facts and circumstances and on the documents *relied on by the Commission in support of its allegations*' (emphasis added).

34 — Cited in footnote 13 above.

35 — Ibid., paragraph 56. To the same effect, see also Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 35; 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, paragraph 323; and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 162.

— documents which are appended to the statement of objections and mentioned in it in support of a particular objection may be used in the decision to support a different objection against the same undertaking only if the latter could reasonably have deduced from the statement of objections and from the content of the documents the conclusions which the Commission intended to draw from them. [36]

48. Those criteria appear to be sound, in that they permit a balanced reconciliation of requirements relating to the undertakings' defence and requirements relating to the efficient conduct of the Commission's administrative procedures. Moreover, documents annexed to the statement of objections may be (and often are) very numerous or voluminous, for which reason, as ADM rightly maintains, it is inconceivable that the addressee should bear the burden of finding every element in those documents which might in the abstract be interpreted as evidence against it and of contesting the reality or meaning thereof.

49. A criterion similar to those laid down in *Shell* v *Commission* should, in my opinion, be applicable also in cases — such as this one — in which documents annexed to the statement of objections and mentioned therein are used in the final decision as evidence of facts other than those set out in the statement of objections. Such use should be permissible only where it is found that the undertaking concerned could deduce, *on the basis of the statement of objections* and in the light of the content of those documents, the findings *of fact* that the Commission intends to draw from the latter.

50. I therefore consider that the Court of First Instance erred in law when, having failed to apply such a test, it took the view that the simple fact that the FBI Report and Cerestar's written statement were annexed to the statement of objections made it permissible for the Commission to rely as against ADM in the final decision on the factual circumstances referred to in recitals 265 and 266 of that decision.

51. That error of law cannot in my opinion be remedied by substituting other grounds, [37] an approach which is permissible only where grounds which are legally unsound can be replaced by grounds of pure law. [38] However, the application of that test, designed to determine whether ADM could deduce from the statement of objections and the content of the two documents in question that the Commission intended to base its imputations on the abovementioned factual circum-

36 — *Shell* v *Commission*, cited in footnote 13 above, paragraph 62.

37 — According to the case-law of the Court of Justice, where the grounds of a judgment of the Court of First Instance are found to be in breach of Community law, but the operative part of the same judgment appears to be properly founded on other legal grounds, the appeal against such a judgment must be dismissed (see, amongst many, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28; Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 37; and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58).

38 — See, in addition to the case-law cited in the preceding footnote, and more explicitly, the Opinion of Advocate General Léger of 4 July 1996 in Case C-294/95 P *Ojha* v *Commission* [1996] ECR I-5863, point 179, and my Opinion of 11 January 2007 in Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, point 123.

stances, implies an assessment of the facts which the Court of Justice cannot undertake when examining an appeal. The judgment under appeal should therefore in my opinion be set aside as regards the aspect mentioned in point 50 above, without it being necessary for that purpose to take into account either ADM's arguments as set out in point 20(i), (ii) and (iii) above, or the Commission's arguments as set out in point 23 above, which are relevant, if at all, in the different context of applying that test.

C — *The action against the contested decision: assessment as to whether the rights of the defence were infringed as regards the attribution to ADM of the status of cartel ringleader*

52. For the purposes of examining, to the extent relevant here, the plea at first instance alleging breach of ADM's rights of defence regarding the issue of cartel leadership, it is necessary — as I have indicated above — to check whether ADM could reasonably have deduced, from the statement of objections and having regard to the content of the documents annexed to that statement, that the Commission intended to use against it, as evidence of its leadership of the cartel, the facts which were later set out in recitals 265 and 266 of the contested decision.

53. It seems to me that that question cannot be answered in the affirmative. As ADM correctly emphasised, the statement of objections indicated, in paragraph 161, that in assessing the gravity of the infringement the Commission would take account of 'the facts as described and assessed above' and, in paragraph 162, that, in determining the fine to be imposed on each undertaking, it would take account, inter alia, of the role played by each of them in the collusive arrangements 'as described above'. The facts mentioned in recitals 265 and 266 of the contested decision are not described either in paragraphs 63, 71, 84, 85, 93, 94 and 104, to which the Commission refers in its defence, or in other paragraphs of the statement of objections. Also, although paragraph 50 of the statement of objections did in fact indicate that the Commission intended using as evidence, among other documents, the FBI Report and Cerestar's written statement, reference was nevertheless made to proof of the 'facts as set out in Section C' of that statement. [39]

54. As regards the fact, emphasised by the Commission, that in its reply to the statement of objections ADM referred to both the FBI Report and Cerestar's written statement and even relied on the FBI Report in order to contend that its role in the cartel was not that of a leader or instigator, that certainly cannot mean that ADM understood or should have understood that the circumstances which were later set out in recitals 265 and 266 of the contested decision were going to be used against it.

39 — Footnote not relevant to the English translation.

55. I do not see how it could reasonably be concluded that the content of the statement of objections, even considered in the light of the documents annexed to it, was such as to enable ADM to deduce that those circumstances were going to be used against it.

56. The plea at first instance alleging breach of ADM's rights of defence should therefore in my opinion be upheld, in the sense set out above.

57. In assessing whether ADM played a leadership role in the citric acid cartel, account cannot therefore be taken of the factual circumstances mentioned in recitals 265 and 266 of the contested decision, which — as I have noted in point 39 above — were nevertheless decisive, by its own admission, in the Commission's finding that ADM enjoyed leadership status. I would add that it is also unclear from the contested decision whether the elements relied on by the Commission in that connection include the series of bilateral meetings between ADM and its competitors which took place shortly before the first multilateral meeting of the cartel, reported in recital 263 of the contested decision. In recital 264, the Commission considered that those bilateral meetings strongly suggested that ADM had played the role of *instigator*, even though the fact of those meetings was not sufficient to prove it. The Commission added that nevertheless it was in possession of 'enough additional elements to conclude that ADM was a *leader* of the cartel'. [40]

40 — Emphasis added.

58. However, as suggested in Section 2 of the Guidelines, concerning aggravating circumstances, it is necessary to distinguish between the role of 'leader' in the infringement, which concerns the functioning of the cartel, and that of 'instigator' of the infringement, which relates to the time of establishment or enlargement of the cartel. [41] Indicia regarding an undertaking's possible role as an instigator cannot therefore constitute evidence that it played the role of a leader. The bilateral meetings in question are not therefore relevant as a basis for identifying ADM as a leader of the cartel.

59. The Commission has not referred, either before the Court of First Instance or before this Court, to other circumstances relevant as such a basis, which the Community judicature could take into account by virtue of its unlimited jurisdiction in the matter of fines.

60. It follows that, since the conditions for considering that ADM's role in the cartel was that of a ringleader are not satisfied, the 35% increase applied by the Commission to the

41 — The Court of First Instance made a finding to that effect in *BASF* v *Commission*, cited in footnote 30 above, paragraph 316, adding that 'when examining the role of the applicant in the infringements in the present case it is necessary to distinguish between the concept of leader in and that of instigator of an infringement and to carry out two separate analyses to check whether the applicant was one or the other'.

basic amount of ADM's fine on account of aggravating circumstances should be cancelled.

61. I shall now examine the next four pleas on appeal, which also relate to the issue of leadership of the cartel, and in so doing I shall disregard the conclusions arrived at in the foregoing points, in view of the importance of certain issues raised by those pleas and in case the Court should find, contrary to my suggestion, that the plea on appeal examined above is unfounded.

D — *The second plea on appeal: non-observance of procedural safeguards as a result of the use of the FBI Report as evidence of ADM's leadership status within the cartel*

1. Appraisal by the Court of First Instance

62. Before the Court of First Instance, ADM accused the Commission of erring in law by basing its conclusion as to ADM's leadership status on certain extracts from the FBI Report. According to ADM, that report should not have been used by the Commission as evidence of its leadership status within the cartel. In that connection, ADM put forward grounds of a procedural nature and arguments concerning the reliability of that document. Regarding the first aspect, it stated in particular that: (i) the report had been drawn up by the authorities of a non-member country for the purposes of an investigation in which the procedural safeguards provided for under Community law did not apply; (ii) the statements of a former representative of ADM as reported in that document had not been reread, approved or signed by that representative or by his lawyer; (iii) ADM had not had an opportunity before the Commission to assert, regarding the statements in that document, its Community law privilege against self-incrimination; (iv) the US antitrust authorities had expressly declared that the statements made by ADM's former representative would not, without a court order, be divulged except in proceedings brought by the US authorities. As regards the second aspect, ADM contended that the FBI Report was not reliable, on account of its nature and internal contradictions, and because it conflicted with other evidential findings.

63. In the judgment under appeal, the Court of First Instance rejected the objections of a procedural nature, on the grounds set out in paragraphs 261 to 270 of that judgment, as well as those concerning the correctness of the Commission's assessment of the content of that report.

64. By the present plea on appeal, criticism is levelled only against the reasoning set out in paragraphs 261 to 270 of the judgment under appeal.

65. First of all, the Court of First Instance held that '[i]t is common ground that there is no provision that prevents the Commission from relying on a document as evidence that could be used to find that there has been a breach of Articles 81 EC and 82 EC and to set a fine, where, as in this instance, in the case of the FBI Report, the document was established in the context of a procedure which was not conducted by the Commission itself'. [42]

66. After noting that the Community case-law, dating from *Orkem* v *Commission*, [43] has recognised the right of undertakings not to be compelled by the Commission, under Article 11 of Regulation No 17, to admit their participation in an infringement, the Court of First Instance noted that the factual situation in the case before it differed from the situation examined in that case-law, which had been characterised by the fact that the Commission had put questions to undertakings. [44]

67. None the less, the Court of First Instance decided that 'where, as in the present case, the Commission, when freely assessing the evidence in its possession, relies on a statement made in a context different from that of the proceeding initiated before it, and where that statement potentially contains information that the undertaking concerned would have been entitled to refuse to provide to the Commission by reason of the *Orkem* v *Commission* case-law …, the Commission is required to guarantee to the undertaking concerned procedural rights equivalent to those conferred by that case-law'. [45]

68. According to the Court of First Instance, '[c]ompliance with those procedural safeguards entails, in a context such as this one, the need for the Commission to carry out an examination automatically if, prima facie, there is serious doubt as to whether the procedural rights of the parties concerned were complied with in the procedure during which they provided such statements. If there is no such serious doubt, the procedural rights of the parties concerned must be deemed to have been adequately safeguarded if, in the statement of objections, the Commission clearly indicates, if necessary by annexing the relevant documents to it, that it intends to rely on the statements in question. In this way, the Commission makes it possible for the parties concerned to comment not only on the content of those statements, but also on any irregularities or special circumstances concerning their composition or submission to the Commission'. [46]

69. Applying those criteria to the case before it, the Court of First Instance first observed that 'the FBI Report was submitted to the

42 — Judgment under appeal, paragraph 261.
43 — Case 374/87 [1989] ECR 3283.
44 — Judgment under appeal, paragraphs 262 and 263.
45 — Judgment under appeal, paragraph 264.
46 — Judgment under appeal, paragraph 265.

Commission by a competitor of ADM, Bayer, which had also taken part in the cartel … and … ADM did not claim that that document had been obtained illegally by Bayer or by the Commission'. [47]

70. Secondly, it found that 'the FBI Report is a document compiled by the competent US authority for the purpose of taking action against secret cartels, which was produced before the US courts during the trial relating to the same cartel' and that '[i]t contained no outward sign which should have automatically prompted the Commission to doubt its evidential value'. [48]

71. Thirdly, the Court of First Instance noted that in the statement of objections the Commission had stated that it intended to rely on that report, which it had appended to the statement, thus enabling ADM 'to comment not only on the content of that document, but also on any irregularities or special circumstances concerning its composition … or its submission to the Commission, irregularities or circumstances which, according to ADM, meant that the Commission could not rely on that document without infringing the procedural rights guaranteed by Community law'. [49]

72. The Court of First Instance also observed that ADM did not complain in its reply to the statement of objections about the fact that the Commission had taken account of that document but, on the contrary, ADM itself expressly relied on that document in support of its arguments. The Court added that ADM did not claim even to have brought the unreliability of the FBI document to the Commission's attention at any other time during the administrative procedure or to have asked the Commission to question the former ADM representative about the veracity of comments which appear in that report. [50]

73. The Court therefore concluded that, '[i]n such a situation', the Commission had not infringed the procedural rights guaranteed by Community law by relying, in the context of 'its unfettered evaluation of the evidence in its possession', on the FBI Report. [51]

2. Arguments of the parties

74. ADM submits — relying on *Spanish Banks* [52] and *Otto* [53] — that, in a proceeding for the suspected infringement of Article 81 EC, the Commission is not entitled to use as evidence information obtained and used, even lawfully, by public authorities in

47 — Judgment under appeal, paragraph 266.
48 — Judgment under appeal, paragraph 267.
49 — Judgment under appeal, paragraph 268.
50 — Judgment under appeal, paragraph 269.
51 — Judgment under appeal, paragraph 270.
52 — Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785 ('*Spanish Banks*').
53 — Case C-60/92 [1993] ECR I-5683.

the context of other proceedings. The FBI Report was prepared in an entirely different legal context from that in which the Commission operates, where there are different procedural safeguards from those provided under Community law. ADM observes that neither the former representative of ADM nor his lawyer had an opportunity to reread, approve or sign that report. Moreover, it emphasises that the report should have remained confidential, as is apparent from its first page, and should have been used only in the context of proceedings in the United States, as is apparent from the written commitment to that effect given by the US antitrust authorities in a letter dated 13 June 1997, produced before the Court of First Instance. [54]

75. Specifically referring to the undertakings' privilege against self-incrimination, as upheld in *Orkem* v *Commission*, [55] ADM claims that it is apparent from *Otto* [56] that the Commission acts in breach of that privilege where it uses as evidence information obtained in other proceedings under compulsion, which it could not have obtained directly, as a result of that right, through the exercise of its own powers of compulsion. [57]

76. According to ADM, the criteria laid down by the Court of First Instance in paragraph 265 of the judgment under appeal (see point 68 above) conflict with the abovementioned rules which ADM infers from the Community case-law. Moreover, observance of the procedural safeguards provided for undertakings under Community law, in particular the privilege against self-incrimination, is in any event binding on the Commission, even if no request to that effect is made by the undertaking concerned, and no contrary inference can be drawn from the fact that there are no serious doubts as to whether procedural rights were respected in the 'external' proceedings in which the information was obtained or from the fact that the document containing the information was annexed by the Commission to the statement of objections. Likewise unimportant are other circumstances to which the Court of First Instance, on the other hand, attached significance in its analysis, doing so — according to ADM — inconsistently with the abovementioned criteria upheld by it, such as the fact that the document might have been legally obtained and transferred to the Commission by a third undertaking, or that it might have been drawn up by the competent US authority, or that — a possibility which ADM in fact rules out — it might have evidential value and have been produced before the US courts in proceedings concerning the citric acid cartel.

77. In that context, ADM also maintains that, by stating in paragraph 229 of the judgment under appeal that the statements recorded in the FBI Report were made in the course of an 'interview by the Grand Jury' and, in paragraph 267 of that judgment, that the report 'was produced before the US courts during the trial relating to the [citric acid] cartel', the Court of First Instance made a finding of fact which is vitiated by material inaccuracies apparent from the documents in the file, and as such open to censure in an appeal. First, it is apparent from the FBI Report itself that the former representative of ADM was heard not

54 — See the appeal, paragraph 42 and the end of paragraph 44.
55 — Cited in footnote 43 above.
56 — Cited in footnote 53 above.
57 — See the appeal, paragraphs 41 and 43.

by a grand jury but by lawyers of the Antitrust Division of the US Department of Justice and an FBI agent; secondly, there were no proceedings before any US courts on the citric acid cartel, all the undertakings involved in that cartel having concluded 'plea agreements'.

78. ADM also accuses the Court of First Instance of 'distorting the evidence' in that it concluded that the Commission could not entertain serious prima facie doubts as to the observance of procedural rights. According to ADM, certain circumstances of the present case, deriving from the FBI Report, clearly militated in favour of the applicability of the case-law initiated by *Orkem* v *Commission*, and the Commission should have noted such applicability on its own initiative.

79. Finally, ADM criticises the part of the judgment under appeal in which it is stated that ADM's failure, in its reply to the statement of objections, to contest the admissibility of the FBI Report as evidence is such as to 'justify an infringement of fundamental rights' and means that ADM has forfeited the right to raise that objection before the Community judicature.

80. The Commission maintains that the present plea on appeal is unfounded in every respect.

81. The Commission contends, first of all, that the Court of First Instance correctly found that the protection upheld by *Orkem* v *Commission* should, in the present case, be adjusted to the particular circumstances of the case, in view of the fact that the Commission had received the FBI Report from a third undertaking and had not requested it directly from ADM. In those circumstances, in the Commission's view, it was incumbent on the Commission itself to verify whether its use of the document might adversely affect ADM's procedural rights. The best way of doing so was — as was accepted by the Court of First Instance — to give ADM an opportunity to express its own views on the use of the document, which the Commission properly did by citing the document in the statement of objections and annexing it thereto.

82. At the hearing, the agent for the Commission observed that the right granted by *Orkem* v *Commission* can be waived, since the undertaking concerned can choose whether or not to exercise it, and that ADM did not raise objections against the use of the FBI Report in the course of the administrative procedure before the Commission, even though it was given the opportunity to do so. The Commission's agent added that the rights of the defence were respected by the US authorities who took the statements from the former representative of ADM and that, in

particular, in the United States, undertakings — in contrast to natural persons — have no right under the fifth amendment to the US Constitution to refuse to answer.

83. The Commission emphasises that, if ADM's complaint regarding the manner in which the Court of First Instance adapted the protection offered by *Orkem* v *Commission* to the circumstances of the present case were upheld, the 'incongruous' result would be that the use of any document containing statements against an undertaking which had been disclosed by another undertaking would be automatically excluded.

84. The Commission also maintains that, contrary to ADM's argument (see point 76 above), all the elements of assessment used by the Court of First Instance were relevant in that they were necessary so that the rule laid down in *Orkem* v *Commission* could be applied in a manner appropriate to the present case.

85. As regards the alleged distortion of evidence, the Commission finds it difficult to understand that complaint or to see in what way, even if it were tenable, it might demonstrate the illegality of the judgment under appeal. Next, the Commission regards as 'absurd' the complaint referred to in point 79 above, taking the view that there would have been a breach of ADM's fundamental rights if ADM had not been notified of the Commission's intention to use the FBI Report and given an opportunity to comment on the use of that document. As the Court of First Instance found, however, the Commission, through the statement of objections, duly advised ADM of that intention, thereby giving it an opportunity to contest the use of the FBI Report.

3. Assessment

a) Interpretation of the judgment under appeal

86. The reasoning of the Court of First Instance in paragraphs 261 to 270 of the judgment under appeal does not appear to be absolutely clear throughout.

87. The starting point of that reasoning is, however, clear and in essence reflects the following assertion: the Commission is not in principle precluded from using as evidence in one of its own proceedings for the suspected infringement of Articles 81 EC and 82 EC a document drawn up in the context of a proceeding other than that being conducted by the Commission itself. [58]

58 — Judgment under appeal, paragraph 261.

88. The second stage of the reasoning reflects, in essence, the following assertion: where the Commission uses as evidence a statement made in a proceeding other than the proceeding being conducted by the Commission itself, it is required to guarantee to the undertaking concerned 'procedural rights equivalent' to those available to the undertaking under Community law in a proceeding conducted by the Commission. [59] That assertion, although in itself clear, must nevertheless be clarified in the light of the observations made by the Court of First Instance when it goes on to describe the manner in which the Commission must fulfil that obligation.

89. In that regard, the Court of First Instance indicates that the Commission must, initially, 'carry out an examination automatically if, prima facie, there is serious doubt as to whether the procedural rights of the parties concerned were complied with in the procedure during which they provided such statements'. [60]

90. That passage — which is in apparent contradiction with the premiss concerning the necessary observance of rights equivalent to those conferred by Community law [61] and with the subsequent references to observance of 'procedural rights guaranteed by Community law' [62] — appears to refer to compliance with the procedural rights that may be relied on in the 'source' procedure, that is to say, in the present case, the procedural rights laid down by US legislation regarding investigations carried out by the US antitrust authorities. That seems also to be the meaning vaguely conveyed by the Court of First Instance's references to 'any irregularities' in relation to the composition of the FBI Report or its production to the Commission [63] (irregularities whose existence can only be assessed under US law) and also by the reference — in connection with what appears to be the application to the present case of that first criterion of prima facie verification of the absence of serious doubts as to the observance of procedural rights (see point 70 above) — to questions of US law, such as that of the competence of the authority which drew up the report in question.

91. Although the grounds of the judgment under appeal on this point are open to allegations of insufficiency or inconsistency, I nevertheless consider that those grounds can reasonably be interpreted, notwithstanding the infelicitous wording of some parts, to the effect that:

(a) the possibility of using statements made in a 'foreign' procedure as evidence in a proceeding conducted by the Commission presupposes, first, that the procedural safeguards provided for under that legal system in relation to the taking of

59 — Judgment under appeal, paragraph 264.
60 — Judgment under appeal, paragraph 265.
61 — Judgment under appeal, paragraph 264.
62 — Judgment under appeal, paragraphs 268 and 270.
63 — Judgment under appeal, paragraphs 265 and 268.

such statements have been observed *and*, secondly, that the modus operandi used by those foreign authorities for taking the statements is compatible with procedural rights under Community law;

(b) before using such statements as evidence in its own proceeding, the Commission is under an obligation to verify whether there are serious doubts concerning (i) the observance, in the foreign procedure, of the procedural rights conferred on the party concerned by the foreign legal order *and* (ii) the compatibility with procedural rights under Community law of the modus operandi used in that procedure for taking the statements in question.

92. The Court of First Instance goes on to say that, in the absence of serious doubts as to observance of 'procedural rights', the Commission must indicate in the statement of objections its intention to use the statements made in the foreign procedure. [64]

93. In that regard, in view of the literal wording of paragraph 265 of the judgment under appeal, the Court of First Instance appears to consider that the discharge of that obligation is in itself sufficient to guarantee the upholding of those rights. Such a conclusion is, in my opinion, clearly incorrect.

64 — Judgment under appeal, paragraph 265.

Indeed, it seems obvious that giving the undertaking concerned an opportunity to challenge, as being injurious to its procedural rights, the use of the document containing those statements cannot in itself exclude the possibility that such use may indeed impair those rights. It will also be necessary, where objections are actually made by the undertaking, for the Commission to consider them and to assess their merits on the basis of legally sound arguments.

94. What the Court of First Instance appears in reality to mean is that, in the absence of objections by the undertaking concerned as to the use as evidence in a proceeding conducted by the Commission of statements made in a foreign procedure, the Commission is authorised to conclude that such use is not injurious to the procedural rights to which the undertaking is entitled.

b) The correctness of the criteria for analysis used in the judgment under appeal

95. I shall now examine, in the light of the parties' arguments, the conformity with Community law of the criteria used by the Court of First Instance in its reasoning, as set out in point 87 (non-existence of a general prohibition on the use by the Commission of evidence produced in a proceeding other than that being conducted by the Commission itself), point 91(a) (the precondition for such

use, namely compliance with procedural rights), and points 91(b) and 94 above (steps that the Commission must take in order to be sure that those rights have been complied with).

96. The issue raised, concerning the evidential rules in proceedings for the suspected infringement of Articles 81 EC and 82 EC and the transfer of evidence from one proceeding to another, and even from one legal system to another, is of undoubted delicacy and therefore calls for an in-depth analysis.

i) The non-existence of a general prohibition on the use by the Commission of evidence produced in a proceeding other than that being conducted by the Commission itself

97. First of all, ADM questions the Commission's entitlement to use as evidence, in a proceeding for the suspected infringement of Article 81 EC, information obtained in a proceeding other than the proceeding being conducted by the Commission itself, and in that regard it relies on *Spanish Banks* and *Otto*.

98. In *Spanish Banks*, [65] the Court of Justice inferred from Article 214 of the EC Treaty (now Article 287 EC, concerning professional secrecy) and from the provisions of Regulation No 17 that the Member States, in the context of their competence to apply national and Community competition rules, may not use as evidence either unpublished information contained in replies given to requests for information addressed to undertakings under Article 11 of Regulation No 17 or information contained in the requests and notifications provided for in Articles 2, 4 and 5 of that regulation. ADM's reference to *Spanish Banks* is of little use, however, since that judgment concerns (and holds to be prohibited) the use of information obtained by the Commission in a proceeding conducted by it under Regulation No 17 as evidence *in a proceeding conducted by national competition authorities*, whereas that case did not involve the bringing-in of information as evidence *in the proceeding being conducted by the Commission*, the matter with which the present plea on appeal is concerned.

99. As regards *Otto*, [66] the prohibition on the Commission of using as evidence in one of its proceedings certain statements obtained in the context of a case before a national civil court was not seen in the judgment as a prohibition of a general nature attributable to the separation of procedures but was derived from the need to observe the undertaking's privilege against self-incrimination, as recognised in *Orkem* v *Commission*, on the assumption that such statements were self-incriminating.

65 — Cited in footnote 52 above, paragraph 55.
66 — Cited in footnote 53 above, paragraph 20.

100. On the other hand, more significant guidance in support of the view contended for by ADM could be derived from *Dow Benelux* v *Commission* [67] and *PVC II* [68] ('the *PVC* judgments'), from which it is apparent that information or documents obtained by the Commission in a proceeding under Regulation No 17 in the course of investigations carried out under Article 14 of that regulation may not be used directly as evidence for the purposes of a second proceeding *conducted by the Commission itself under that very regulation.*

101. It could be argued that, if those two judgments confirmed that the Commission may not use as evidence in a proceeding for the suspected infringement of the competition rules information which *the Commission itself* has obtained in another proceeding of the same kind, then a fortiori the Commission should be regarded as precluded from using as evidence in one of its proceedings information obtained by the public authorities of a non-member country in a proceeding conducted by those authorities for breach of the competition rules of that country.

102. To my mind, however, that a fortiori argument cannot be upheld.

103. In the *PVC* judgments, the Court of Justice held that information obtained during investigations under Article 14 of Regulation No 17 may not be used for purposes other than those specified in the order or decision under which the investigation was carried out and that this requirement is intended to protect both professional secrecy, as explicitly referred to in Article 20 of that regulation, and the undertakings' rights of defence, which Article 14(3) of that regulation is intended to guarantee. According to the Court of Justice, 'those rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof'.

104. The prohibition upheld by the *PVC* judgments thus appears to be designed for the protection of safeguards — those of professional secrecy and the rights of the defence — which, by virtue of rules of Community law, are *an integral aspect of the collection of information by the Commission in the proceeding being conducted by it*, binding the latter and its officials and agents regarding the use of such information. That being the rationale for that prohibition, [69] it cannot be inferred from it, automatically and a fortiori, that there is a general prohibition on the use as evidence by the Commission of information obtained in a foreign antitrust proceeding.

67 — Case 85/87 [1989] ECR 3137, paragraphs 17 to 19.

68 — Cited in footnote 14 above, paragraphs 298 to 300 and 305.

69 — The same rationale, according to *Spanish Banks*, cited in footnote 52 above, paragraphs 36 to 38 and 47 to 50, also underlies the prohibition of the use as evidence by the national competition authorities of information obtained by the Commission under Article 11 of Regulation No 17 or received by it in requests and notifications under Articles 2, 4 and 5 of that regulation.

105. The non-existence of any general prohibition in Community law on using as evidence in a proceeding conducted by the Commission for the suspected infringement of Article 81 EC information obtained in a proceeding conducted by other authorities is confirmed by the Court of Justice in *Dalmine* v *Commission.* [70]

106. In that judgment, the Court of Justice held, as did the Court of First Instance in the same case, [71] that it was permissible to use as evidence in a proceeding conducted by the Commission under Regulation No 17 minutes of the questioning of former executives of a company involved in that proceeding — Dalmine — by the prosecuting authorities of a Member State in connection with a criminal investigation.

107. Before the Court of First Instance, Dalmine had accused the Commission of seriously infringing the rules of procedure by using statements made in criminal proceedings wholly unconnected with the investigation entrusted to the Commission and it referred in that regard to *Spanish Banks*. The Court of First Instance rejected Dalmine's complaint, observing — on the basis that *Spanish Banks* concerned the use by national authorities of information obtained by the Commission under Article 11 of Regulation No 17 and that such a situation was expressly governed by Article 20 of Regulation No 17 — that whilst 'the lawfulness of the transmission to a national authority by the Commission of [such information] … and the lawfulness of the prohibition on the direct use of that information as evidence by that national authority are matters for Community law', '[o]n the other hand, the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law and its subsequent use by the Commission are in principle questions covered by the national law governing the conduct of investigations by those national authorities and also, in the case of court proceedings, by the jurisdiction of the national courts'. The Court of First Instance observed, however, that it did not appear that Dalmine had ever raised before a competent Italian court the question of the use at Community level of the abovementioned minutes and that it had not even provided evidence to show that such use was contrary to the applicable Italian legal provisions. In consequence, according to the Court of First Instance, Dalmine's arguments could only affect the credibility of the witness statements contained in those minutes and not their admissibility as evidence in the proceeding. [72]

108. In the appeal proceedings, the Court of Justice, following the Opinion of Advocate General Geelhoed on that point, [73] upheld that

70 — Cited in footnote 32 above.
71 — Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395.
72 — Ibid., paragraphs 84 to 87 and 90.
73 — Opinion delivered on 12 September 2006, points 66 and 67.

analysis by the Court of First Instance, on the following basis:

'62 As regards, next, the admissibility of those minutes as evidence, it must be held, as the Court of First Instance held..., that the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. Furthermore, as the Court of First Instance observed..., the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority...

63 As regards the use of that information by the Commission, the Court of First Instance correctly observed... that Dalmine's arguments could affect only "the reliability and therefore the probative value of its managers' statements and not the admissibility of that evidence in the … proceedings". As stated…., the principle which prevails in Community law is that of the unfettered [production [74]] of evidence and the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility. Accordingly, as the transmission of the minutes in issue was not declared unlawful by an Italian court, those documents cannot be considered to have been inadmissible evidence which ought to have been removed from the file.'

109. That judgment clearly excludes the existence of any general prohibition preventing the Commission from using as evidence, in a proceeding conducted by it under Regulation No 17, statements made in a foreign proceeding. In consequence, ADM's broad-based assertion, referred to in point 97 above, does not, in my opinion, deserve to be upheld.

ii) The breach of specific procedural safeguards

110. Apart from that broad-based assertion, by this plea on appeal ADM in any event claims, essentially, that the use of the FBI Report as evidence infringed specific procedural safeguards to which it was entitled, concerning both the proceeding before the US antitrust authorities and the proceeding before the Commission.

74 — In a number of language versions (such as the versions in English, German and Portuguese) of the judgment of the Court of Justice in *Dalmine* v *Commission*, the reference in the French text (French being the internal working language of the Court) to 'libre administration des preuves' — which was rendered in the Italian version of the judgment (the authentic version, by virtue of Article 31 of the Rules of Procedure of the Court) as 'libera produzione delle prove' — was misconstrued as a reference to the unfettered evaluation of the evidence.

— Existence of conditions for use by the Commission of evidence obtained in a proceeding other than that being conducted by the Commission itself: observance of procedural rights

111. In order to examine those more specific arguments put forward by ADM, it is necessary first of all to verify whether the Commission's use of evidence obtained in a proceeding other than that being conducted by the Commission itself is subject to restrictions. This verification is necessary in view of the reference made by the Court of Justice in *Dalmine* v *Commission* (see point 108 above) to the Community law principle of the 'unfettered [production] of evidence', a reference which calls, in my opinion, for certain important clarifications.

112. The Community law principle of the unfettered production of evidence cannot be construed as meaning that every *item* of evidence is always and in all circumstances usable and that all that counts is its credibility.

113. In evidential matters, it is important not to confuse different principles. In support of the statement, which it had also made in *Dalmine* v *Commission*, [75] that the principle prevailing in Community law is that of the unfettered production of evidence and that the only relevant criterion for the purposes of assessing the evidence adduced relates to its credibility, the Court of First Instance referred to the Opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc* v *Commission*, [76] and to the judgment in *Met-Trans and Sagpol*. [77] Judge Vesterdorf's observations, to which the Court of First Instance referred, seem to me rather to relate to a separate principle, namely, that of the *unfettered evaluation of the evidence*, in other words, the freedom of the courts to reach their own conclusions regarding the substantive content of the evidence, in terms of the significance to be attributed to it. [78] In *Met-Trans and Sagpol*, the Court of Justice was asked, inter alia, to specify what kinds of evidence were sufficient to demonstrate a given circumstance envisaged by a particular provision of Community law and, in particular, whether in that regard documentary evidence meeting certain requirements was mandatory. [79] Replying that it was apparent from the wording of that provision that the evidence of that particular circumstance is not limited to certain types of evidence and that, 'given that there is no legislation at Community level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible', the Court clearly upheld a principle of *freedom as to the form of evidence adduced*, which is to be interpreted as the right to rely, in order to

75 — Cited in footnote 71 above, paragraph 72.

76 — Opinion delivered on 10 July 1991 in Case T-1/89 [1991] ECR II-867, in particular, II-954.

77 — Joined Cases C-310/98 and C-406/98 [2000] ECR I-1797, paragraph 29.

78 — The situation where the courts are free to form their own view may broadly be contrasted with the situation in a number of national legal systems in which the courts are required to attribute meaning and weight to evidence in accordance with certain parameters laid down in legislation.

79 — The issue was, in particular, whether, for the purpose of proving the place at which an infringement actually took place in the course of a transport operation carried out under a TIR carnet within the meaning of the first subparagraph of Article 454(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 (OJ 1993 L 253, p. 1), a statement by the holder of the carnet and the testimony of the lorry driver who carried out the transport operation on behalf of that carnet holder were sufficient, or whether such evidence could be provided only by means of documents clearly showing that the competent authorities of the other Member State had ascertained that the infringement had been committed in their territory.

prove a particular fact, on *any form* of evidence (such as oral testimony, documentary evidence, confessions, and so on), that principle being subject to the exceptions expressly laid down by the Community rules. [80]

114. Whilst it is true, therefore, that in Community law — saving specific provision to the contrary — a particular fact may be proved by any *form of evidence* (freedom as to the form of evidence adduced) and determination of the probative value of an item of evidence is a matter for the Community judicature, not for legislation (unfettered evaluation of evidence), it cannot on the other hand, in my view, be maintained that every *item of evidence* produced is usable and has to be evaluated as to its merits by the Commission or the Community judicature. That would be inconceivable, for example, in the case of a statement found to have been obtained by the competent authorities through the use of violence. Quite apart from that academic example, it need merely be noted that, according to Community case-law, the Commission cannot use the following as evidence in a proceeding under Regulation No 17:

— statements or documents acquired by the Commission in an earlier proceeding under the same regulation (see point 100 above);

— documents in respect of which the undertaking under investigation has not had an opportunity to exercise its right to be heard during the course of that investigation; [81]

— communications between lawyers and clients of a legally protected confidential nature; [82]

— statements made by executives of an undertaking in reply to questions put to them in the course of a preliminary examination of witnesses prior to the initiation of national civil proceedings, where the reply entails admission of an infringement of the competition rules; [83]

— minutes of questioning from national criminal proceedings, where transmission thereof to the Commission has been declared unlawful by the competent national court (see points 107 and 108 above).

80 — It is to this problem that reference is also made in Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 297, in which it is stated that the 'convincing evidence' which the Commission must produce in order to demonstrate the probability of future anti-competitive conduct on the part of the entity deriving from a concentration need not necessarily take the form of economic studies, but in certain cases 'simple economic and commercial realities of the particular case may constitute the convincing evidence required by the case-law'.

81 — *AEG-Telefunken* v *Commission*, cited in footnote 31 above.

82 — See Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraphs 29 to 31, and Joined Cases T-125/03 and T-253/03 *Akzo Nobel and Akcros* v *Commission* [2007] ECR II-3523.

83 — *Otto*, cited in footnote 53 above, paragraph 20.

115. To those examples of evidence which the Commission is not permitted to use, the judgment under appeal in the present case adds another: that of statements made in a proceeding other than the proceeding being conducted by the Commission itself, where the interested party was not given benefit of the procedural rights to which he was entitled in that context or those he would have enjoyed under Community law if those statements had been taken directly by the Commission.

116. As regards the limits on the use as evidence in the proceeding conducted by the Commission of statements made in another proceeding, the judgment under appeal and the judgments in the *Dalmine* v *Commission* cases [84] appear, however, to diverge. The *Dalmine* v *Commission* judgments suggest that the problem of the impermissibility of such use can arise only in cases where the transmission to the Commission or the use by the Commission of the minutes containing those statements is unlawful under the legislation of the State of the authority which took the statements (and where that illegality is ascertained by the competent national court). [85] The judgment under appeal, in wider terms, attaches importance to the failure to observe the procedural safeguards which apply in the foreign proceeding — which may, in my opinion, be considered to include the limits placed by the foreign legal system, in the interests of the maker of the statements, on the transmission of the statements to other authorities and on their use by those authorities — and to the incompatibility with the procedural safeguards conferred by Community law of the modus operandi used in that proceeding for taking those statements.

117. The fact that the *Dalmine* v *Commission* judgments did not recognise, as a ground for the unusability of evidence, the non-observance of the latter safeguards may perhaps be attributed to the fact that Dalmine did not contest the legality of using the minutes of the questioning concerned as evidence in the proceeding conducted by the Commission, on grounds of breach of *specific* procedural rights (such as the privilege against self-incrimination upheld by Community law), but, more radically, on grounds of an alleged general incompatibility with the rights of the defence of the use as evidence in that proceeding of information deriving from another proceeding.

84 — Cited in footnotes 32 and 71 above.

85 — In fact, in paragraphs 62 and 63 of the judgment of the Court of Justice in *Dalmine* v *Commission* (see point 108 above), mention is made only of the question of the lawfulness of the *transmission* of the document to the Commission and not of the question of the lawfulness of its *use* as evidence by the Commission. Both the judgment of the Court of First Instance in *Dalmine* v *Commission* (see point 107 above) and the Opinion of Advocate General Geelhoed (cited in footnote 73 above, points 71 to 73 and 76), on the other hand, had explicitly mentioned, as a circumstance militating against use of the document by the Commission, the case where the competent national court has established the illegality of such use on the basis of national law, regardless of the lawfulness of the transmission of that document. I consider, however, that the judgment of the Court of Justice in *Dalmine* v *Commission* can, on this point, be interpreted in line with the Opinion of Advocate General Geelhoed, the term 'transmission' of the document being taken to refer to transmission thereof with a view to its use.

118. Moreover, it does not do to gloss over the fact that the particularly reductive approach, adopted by the Community judicature in the *Dalmine* v *Commission* case, to the limits on the Commission's use of evidence obtained in proceedings conducted by other authorities may also have to be seen as relating only to cases involving authorities of Member States of the European Community and as being ultimately based on the

implicit presumption that the level of protection of the rights of the defence at Community level and at the level of the Member States is essentially equivalent. [86] However, such a presumption obviously has no place when proceedings conducted in non-member countries are involved.

119. In any event, I fully endorse the view, expressed in the judgment under appeal and not disputed by the parties to the present proceedings, that, for the purposes of the use as evidence in a proceeding conducted by the Commission of information obtained in a proceeding conducted by authorities of a non-member country, there must be observance *both* of the procedural safeguards laid down for the latter proceeding *and* of those established for the proceeding conducted by the Commission. That approach — which reflects the cumulative application of the laws of the State where the evidence originates and those of the State where the evidence is received — is necessary, in my opinion, in view of the fact that we are operating in the area of public law, and in particular in the matter of penalties, and that observance of the rights of the defence in any proceedings in which penalties may be imposed, in particular fines or default penalties, constitutes a fundamental principle of Community law which must be complied with even in the case of proceedings of an administrative nature. [87]

120. It is therefore necessary, for the observance of procedural rights in a case such as this, for the evidence from the foreign proceedings to have been obtained in accordance with the formalities laid down by the relevant foreign laws; for its transmission to the Commission and its use by the Commission to be allowed under those laws; and for such use to be compatible with the specific safeguards that the undertaking concerned would have enjoyed, under Community law, if the evidence had been taken directly in the proceeding conducted by the Commission.

— The criteria laid down by the Court of First Instance regarding the modus operandi that the Commission must use in order to be sure of observing procedural rights, and the application of those criteria to the present case

121. In its appeal, ADM criticises the criteria laid down by the Court of First Instance, in paragraph 265 of the judgment under appeal, regarding the manner in which the Commission is required to uphold the abovementioned rights. Observance of those rights is

86 — In this context, it is important to note that Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1), which replaced Regulation No 17, expressly provides in Article 12(1) that 'for the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information'. Recital 16 in the preamble to Regulation No 1/2003 states, in that regard, that 'when the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that sanctions imposed on undertakings are of the same type in all systems', going on to add that '*the rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent*' (emphasis added).

87 — See — as being representative of all such cases — Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9, and Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, paragraph 19.

required in every case and, accordingly, the Commission could not — contrary to what was stated by the Court of First Instance — confine itself to ascertaining that in that regard there were no serious doubts, or objections on the part of the undertaking concerned. ADM points out that, according to the case-law, the Court of First Instance itself is required of its own motion to raise the issue of the observance of procedural safeguards.

122. In essence, the Court of First Instance took the view that there can be no infringement of an undertaking's procedural rights where the Commission uses as evidence statements taken in foreign proceedings where that undertaking, previously apprised of the Commission's intention to use those statements, has not raised objections in that regard and the Commission itself has no reason to entertain serious prima facie doubts as to the compatibility of such use with the observance of those rights.

123. I consider that ADM has grounds for complaining that that interpretation is unlawful. Procedural rights are to be observed by the Commission in all circumstances, including therefore in cases where the undertaking concerned fails to invoke them in the course of the administrative procedure. Community law contains no rule to the effect that, if an undertaking does not raise issues of law in the course of the administrative procedure before the Commission, its right to raise those issues will lapse. There is no rule that the application to the Community Court must in all respects match the reply to the statement of objections. Nor is the undertaking under any obligation to respond to the statement of objections. The Commission is required to adopt a final decision in conformity with law, regardless of whether the undertaking concerned has actually exercised its rights of defence in the administrative procedure or the extent to which it has done so.

124. I would also observe that the Commission is required, in the interests of the observance of the rights of the defence, to inform the addressee of the statement of objections *in all cases* of its intention to use statements originating from a foreign proceeding as evidence for the purposes of its final decision, that is to say, regardless of whether or not it entertains serious doubts as to the compatibility of such use with observance of procedural rights.

125. Even if it is conceded that, as the Commission observes, procedural rights may be waived, the mere fact of not submitting observations to the Commission regarding the use in evidence of information from a foreign proceeding, as announced in the statement of objections, cannot be construed as a waiver of the right to invoke procedural rights, but is to be seen simply as a failure by the undertaking to exercise its right to be heard by the Commission regarding the legality of such use.

126. On this point, it seems to me that the judgment under appeal is vitiated by an error of law.

127. Moreover, even if we regard the criteria set out by the Court of First Instance in paragraph 265 of the judgment under appeal as being in conformity with law, that judgment would appear to me in any event to be vitiated by an error of law in that the manner in which the Court of First Instance applied those criteria to the present case does not appear correct.

128. First, I would observe that the Court of First Instance was not entitled, without further analysis, to criticise ADM — and declare that its rights in that respect had lapsed — for not opposing, in its reply to the statement of objections, the use of the FBI Report in evidence by the Commission. In the proceedings at first instance, ADM objected to the use of that report as evidence of the factual circumstances indicated in recital 265 of the contested decision. Because, however, those facts did not appear in the statement of objections, which set out only circumstances not substantively contested by ADM, the Court of First Instance should, before making that criticism of ADM, have verified whether the latter could reasonably have deduced, from the statement of objections and in the light of the content of the FBI Report, which was mentioned in that statement and annexed to it, that the Commission intended using those circumstances against it, too (see points 46 to 50 above), and whether ADM therefore had an interest in complaining, in its response to the statement of objections, about the use of the FBI Report as evidence. ADM's silence regarding possible grounds precluding use of the document as evidence cannot be interpreted as acquiescence except with regard to the use specified in the statement of objections.

129. Secondly, in my opinion, there were grounds in the present case for seriously doubting, prima facie, whether use of the FBI Report in evidence was compatible with ADM's procedural rights.

130. In that regard, I am first of all in agreement with ADM that the elements taken into account by the Court of First Instance in paragraphs 266 and 267 of the judgment under appeal (see points 69 and 70 above) are, where not entirely irrelevant to the problem of observance of procedural safeguards, not such as to rule out serious doubts as to the compatibility of the Commission's use of that report with the procedural safeguards specifically invoked by ADM before the Court of First Instance and now before the Court of Justice. The issues, it should be remembered, are the privilege against self-incrimination; the obligation of the authority which obtains information to submit to the declarant for approval the written record, prepared by that authority, of the statements made; and protection of the confidential nature of the statements made by ADM's former representative to the US antitrust authorities in the context of the cooperation provided to those authorities by ADM itself.

131. I shall dwell, in particular, on the last aspect, which deserves particular attention because it touches on the delicate theme of bilateral relations between the European Community and the United States in the matter of cooperation between competition authorities.

132. In asserting that the FBI Report was intended to be used only in proceedings in the United States, ADM pointed out, first, that the first page of that report indicates that the disclosure of it to third parties is prohibited and, secondly, that the US antitrust authorities had expressly agreed with the lawyer of ADM's former representative that the information provided by the latter would not be disclosed except for use in proceedings conducted by the United States. Those facts are readily apparent from the documents produced before the Court of First Instance.

133. It is true that the Commission probably did not have in its possession the letter containing that commitment from the US authorities [88] and that the FBI Report was not forwarded to it by those authorities but by another undertaking involved in the proceeding conducted by the Commission.

134. However, the Commission could not in my view have been unaware of the possibility that the use of the FBI Report in its proceeding might conflict with safeguards under US law regarding the confidential treatment of the information supplied by ADM's former representative. That is so not only because, as emphasised by ADM, there was a notice on the first page of that document, forbidding disclosure to third parties, but above all because of the state of the relations between the European Communities and the United States in the sphere of cooperation between their respective competition authorities.

135. At the time of adoption of the contested decision, those relations were, as they are now, governed by a bilateral agreement concluded in 1991, [89] supplemented by a second bilateral agreement concluded in 1998. [90] Those agreements provide for consultation, cooperation and coordination between the Commission, on the one hand, and, on the other, the Antitrust Division of the US Department of Justice and the Federal Trade Commission in their endeavours to ensure the application of competition law. No provision of those agreements provides expressly for the exchange of information between those authorities *for the purposes of proving* infringements of competition law. The 1991 agree-

88 — Letter of 13 June 1997 signed by the Trial Attorney of the Antitrust Division of the US Department of Justice (produced by ADM as an annex to its reply to the written requests put to it by the Court of First Instance).

89 — Agreement between the Government of the United States of America and the European Communities of 23 September 1991 regarding the application of their competition laws and the Exchange of interpretative letters of 31 May and 31 July 1995 relating thereto (OJ 1995 L 95, p. 47). The agreement was approved on behalf of the European Community and the European Coal and Steel Community by Decision 95/145/EC, ECSC of the Council and the Commission of 10 April 1995 (OJ 1995 L 95, p. 45; corrigendum in OJ 1995 L 131, p. 38).

90 — Agreement between the European Communities and the Government of the United States of America of 4 June 1998 on the application of positive comity principles in the enforcement of their competition laws (OJ 1998 L 173, p. 28). The agreement was approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/386/EC, ECSC of the Council and the Commission of 29 May 1998 (OJ 1998 L 173, p. 26).

ment provides, in particular, with regard to the exchange of information between those authorities, that the contracting party possessing the information is not required to provide it to the other party if disclosure of that information is prohibited under the domestic law of the former and that each contracting party is required to maintain, to the fullest extent possible, the confidentiality of any information provided to it by the other party under the agreement and to oppose to the fullest extent possible any application for disclosure of such information by a third party that is not authorised by the contracting party that supplied the information (Article VIII). It is also made clear that the provisions of the agreement must be interpreted so as to be consistent with the existing laws of the contracting parties — or of their member States — and as not requiring any changes in the laws thereof (Article IX). Moreover, in the exchange of interpretative letters regarding that agreement, it was declared on behalf of the European Community, in relation to Articles VIII and IX of the agreement, that information covered by professional secrecy, as referred to in Article 20 of Regulation No 17, would not be disclosed by the Commission to the US antitrust authorities without the express consent of the 'source' concerned. The 1998 agreement also contains, in Article IV(2)(c)(iii) and Article V thereof, references to the need to obtain prior consent from the source concerned for the transmission of information of a confidential character to the competition authorities of the other contracting party.

136. In essence, on the basis of those agreements, the Commission and the US antitrust authorities are not allowed to share information which may not be disclosed under the laws of the authority possessing the information [91] and are, in particular, 'bound by their internal rules regarding the protection of the confidentiality of information gathered by them during their respective investigations'. [92]

137. The exchange of information between those authorities therefore takes place 'within the limits of the existing provisions on confidentiality' [93] and only if the interested party waives the right to confidentiality will the authorities in question be entitled to exchange confidential information. [94] The impossibility for the competition authorities, under their present cooperation agreements, to exchange confidential information without the consent of the source involved is also perceived as a significant limit on the effectiveness of cooperation in combating cartels,

91 — See Nazzini R., *Concurrent Proceedings in Competition Law*, Oxford University Press, New York, 2004, pp. 75 and 76.

92 — Report from the Commission to the Council and the European Parliament of 13 August 2003 on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their respective competition laws — 1 January 2002 to 31 December 2002, paragraph 1.1, available in EUR-Lex under code 52003DC0500.

93 — Ibid., paragraph 1.2.2.

94 — See the report from the Commission to the Council and the European Parliament of 17 September 2002 on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws — 1 January 2001 to 31 December 2001, paragraph 1.2.2, available in EUR-Lex under code 52002DC0505, in which the Commission states that in *Fine Art Auction Houses* 'one company involved provided a waiver which permitted the two agencies to exchange views regarding confidential evidence'.

so much so that in some institutional circles it is suggested that a 'second generation' agreement, designed to allow the exchange of confidential information as well, should be concluded. [95]

138. The limitation placed on the exchange of information between authorities because of the need to observe the confidentiality of information assumes particular importance in cases, such as this one, where information is provided voluntarily in the framework of an undertaking's cooperation designed to obtain leniency regarding penalties. It is clear that, if information of that kind could be transmitted to competition authorities of other countries by the authority that received it in connection with an application for leniency, the result — particularly in the absence of any coordination of the leniency programmes set up by the authorities concerned — would be an extremely powerful disincentive for undertakings to cooperate under such programmes. [96]

139. As stated by the Competition Committee of the Organisation for Economic Cooperation and Development (OECD), 'information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty programmes'; 'to that end, most member

95 — As indicated by the Commission in its report to the Council and the European Parliament of 4 October 2000 on the application of the agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws — 1 January 1999 to 31 December 1999, paragraph 2.2, which can be found in EUR-Lex under code 52000DC0618. See also the third report of the Competition Committee of the OECD of 2005 on implementation of the OECD Council recommendation of 25 March 1998 concerning effective action against hard core cartels, paragraph 4, which can be found on the OECD website (www.oecd.org). I would point out that the exchange and use as evidence of *confidential information as well* is at present allowed, within certain limits, under Article 12 of Regulation No 1/2003 for the purposes of cooperation within the network set up by the Commission and the competition authorities of the Member States.

96 — It is not therefore surprising to learn from the report cited in footnote 92 above (paragraph 1.2.2) that the Commission intervened in three US civil actions in order to protect the confidentiality of written information submitted under its leniency policy, and that it did so not in support of any party to those proceedings but to 'safeguard the integrity' of that policy. Moreover, significant indications are contained in the Commission notice on immunity from fines and reduction of fines in cartel cases: in the 2002 version (OJ 2002 C 45, p. 3, paragraph 33), the Commission made it clear that any statement received by it in relation to that notice could not be disclosed or used for any purpose other than the enforcement of Article 81 EC, whilst in the 2006 version (OJ 2006 C 298, p. 17, paragraph 35) it made clear that such statements may be transmitted, under certain conditions, only to the competition authorities of the Member States. In both versions of that notice (paragraphs 32 and 40 respectively), it is pointed out that the disclosure of such statements undermines protection of the objectives of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

countries [of the OECD] have adopted policies pursuant to which they do not exchange information obtained from an amnesty applicant without the applicant's prior permission'. [97]

140. In the light of the state of the bilateral relations between the European Community and the United States regarding the present issues and the problems inherent in the disclosure of information provided by undertakings seeking leniency arrangements — of which the Commission could not have been unaware — I consider that, having received the FBI Report from one of the other undertakings involved in the proceeding being conducted by it, the Commission should have taken appropriate precautions in deciding how that document should be used in that proceeding, in order to avert the risk of infringing any safeguards granted by US law regarding disclosure of the content of that document.

141. In particular, I do not think that the Commission was entitled to use the FBI Report in evidence without first asking the undertaking which had supplied it to clarify the manner in which it had obtained possession of it and without first asking the US antitrust authorities, in fulfilment of its obligations of cooperation with them under the existing bilateral agreements, whether, under US law, that report was a document regarded as confidential, as might be presumed until proved otherwise not only from its first page but also from the context, known to the Commission, in which it was drawn up (and as seems to be apparent from the letter of 13 June 1997 from the Antitrust Division of the US Department of Justice).

142. The fact that it was a third party which forwarded the FBI Report, and not those authorities, certainly cannot justify the Commission's failure to take those precautions. That fact could not entitle the Commission to consider that the document had lost all confidentiality. On the basis of an interpretation in good faith of Article VIII of the 1991 bilateral agreement, the Commission should in my opinion have avoided the risk that, by using that report in evidence, it might exacerbate the consequences of a possible infringement of the confidentiality thereof committed in the United States.

143. Moreover, the fact that the FBI Report was not transmitted to the Commission by the US antitrust authorities materially distinguishes the present case from that examined in the *Dalmine* v *Commission* judgments, [98] in which the Commission received the interview minutes directly from the national authorities

97 — See the October 2005 document entitled *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations*, which is available on the OECD website (www.oecd.org). It is interesting to note that the Commission itself stated in paragraph 40 of its notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) that, save in certain cases, 'information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of [Regulation No 1/2003] with the consent of the applicant'.

98 — Cited in footnotes 32 and 71 above.

which had recorded them. In the case of *Dalmine* v *Commission*, the Commission was authorised, according to the Court of Justice, to use those minutes as evidence, in the absence of any ruling by the national court declaring their transmission to the Commission to be illegal. [99] In the present case, on the other hand, since the FBI Report was not forwarded directly by the US antitrust authorities, no importance could be attached to the absence of any such ruling by a US court. The Commission was under a duty to consult the US antitrust authorities regarding the legality under US law of its use of the document specifically in order to obtain on that matter at least an initial pronouncement from the competent national authorities, albeit one that was not of a judicial nature.

144. For the reasons set out in point 121 et seq. above, I therefore consider that, in the event of the first plea on appeal being rejected as unfounded, the judgment under appeal should be set aside in so far as it rejected the claims, alleging breach of procedural safeguards, made by ADM in respect of the Commission's use of the FBI Report in evidence in order to show that ADM enjoyed ringleader status in the cartel.

99 — Judgment of the Court of Justice in *Dalmine* v *Commission*, cited in footnote 32 above, paragraph 63.

E — *The action against the contested decision: whether the Commission was entitled to use the FBI Report as evidence that ADM was one of the ringleaders of the cartel*

145. I have already observed in point 141 above that the Commission could not legitimately use the FBI Report in evidence without first obtaining from the undertaking supplying it and from the US antitrust authorities the clarifications needed to ascertain the legal status of that document as regards confidentiality. The plea in law at first instance alleging breach of procedural safeguards, in so far as it was based on the incompatibility of the Commission's use of that report with the confidentiality guaranteed for it by those authorities, should therefore, in my opinion, be upheld.

F — *The pleas on appeal (third, fourth and fifth) relating to Cerestar's written statement*

146. By three separate pleas on appeal, ADM criticises the reasoning which prompted the Court of First Instance to conclude that, contrary to ADM's claim at first instance, the Commission did not commit manifest errors in its appraisal of Cerestar's written statement as regards the role of ADM's former representative in the cartel.

147. In that connection, it should first of all be borne in mind that the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Indeed, provided that such evidence has been properly obtained and that the general principles of law and rules of procedure relating to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced before it. That appraisal does not therefore constitute — save where the clear sense of that evidence has been distorted — a point of law which, as such, is open to review by the Court of Justice. [100]

148. By the first of those pleas on appeal, however, that is precisely the complaint put forward by ADM, in that it alleges distortion of one item of evidence, namely the FBI Report. In its submission, in contrast to what the Court of First Instance concluded in paragraph 288 of the judgment under appeal, that report does not in fact corroborate Cerestar's written statement to the effect that ADM's former representative played a leading role in the cartel, chairing the 'Sherpa' meetings, preparing matters for discussion and putting forward proposals for the price lists to be agreed. According to that report, it was a different ADM representative who played a particularly active role in the cartel.

149. This plea on appeal does not in my opinion deserve to be upheld. First of all, as the Commission observed, in paragraph 288 of the judgment under appeal, it is not stated that the FBI Report corroborates Cerestar's written statement with regard to the point just referred to but simply that the two documents are consistent. Moreover, that finding was made by the Court of First Instance when examining the credibility of Cerestar's written statement, which conflicted with what was said to the Commission by ADM's former representative in the course of the administrative procedure. The Court of First Instance considered Cerestar's written statement to be more credible, not only because it was consistent with the FBI Report but also because it was common ground that Cerestar had not played an active role in the cartel and because the statements made to the Commission by ADM's former representative had been made *in tempore suspecto*. [101] ADM does not, however, level any criticisms against those further observations of the Court of First Instance.

150. By the second of these pleas on appeal, ADM alleges that the judgment under appeal did not give adequate reasons for rejecting ADM's argument that Cerestar's written statement concerning the role played by ADM's former representative in the 'Sherpa' meetings was devoid of any credibility, since Cerestar had not been able to identify any of those meetings or to give details of their subject-matter.

100 — Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 107 and the case-law cited.

101 — Judgment under appeal, paragraphs 288 and 290.

151. This plea on appeal must also, I think, be rejected. The Court of First Instance made it clear, in essence, in paragraph 289 of the judgment under appeal, that the fact of not being able to give details of certain cartel meetings did not prevent Cerestar from claiming that those meetings were organised and directed by ADM's former representative.

152. Finally, by the third of these pleas on appeal, ADM submits that, in paragraph 290 of the judgment under appeal, the Court of First Instance wrongly took the view that ADM could not challenge the accuracy of Cerestar's written statement before the Court, because it had not done so in the course of the administrative procedure. I agree with the Commission, however, that that complaint is vitiated by a manifest misreading of that paragraph, in which the Court of First Instance, far from confirming that ADM had forfeited any right, merely observed that Cerestar's written statement had 'greater evidential value' than that made by ADM's former representative, so that it could not be inferred from the mere inconsistency of the two statements that the first one was inaccurate.

153. The pleas on appeal relating to Cerestar's written statement should therefore, in my opinion, be rejected.

G — *The action against the contested decision: whether the Commission adequately demonstrated that ADM had been one of the ringleaders of the cartel*

154. It follows from the considerations I have set out regarding the Commission's use of the FBI Report to prove ADM's alleged leadership status within the cartel that, such use being unlawful, the Commission, in appraising ADM's role, should not have taken account of the factual circumstances mentioned in recital 265 of the contested decision, for which that report was the sole source.

155. It is therefore necessary to verify — as part of the examination of the action at first instance which I suggest that the Court of Justice make under the first paragraph of Article 61 of its Statute and after taking account of my observations in points 57 to 59 above — whether it is possible to justify the attribution to ADM of cartel leadership status solely in the light of the circumstances indicated in recital 266 of the contested decision on the basis of Cerestar's written statement. I refer to Cerestar's 'impression' that ADM's former representative played a leading role and the fact that he chaired the 'Sherpa' meetings and 'tended to prepare matters and make the proposals for the price lists to be agreed'.

156. In my opinion, no particular value can be attributed to Cerestar's 'impression' per se, since a finding that an undertaking was one of the ringleaders of a cartel must be based on specific facts and not on impressions or

opinions of other cartel participants. As regards specific facts, it seems to me that although chairmanship by ADM's former representative of the 'Sherpa' meetings and his preparation of matters for discussion and proposals clearly suggest that ADM played an active role in the cartel, they are nevertheless not sufficient to support a finding of leadership. Indeed, it is clear that the important cartel decisions were taken at the 'Masters" meetings, involving more senior executives, and that those meetings — as stated by Cerestar — were generally chaired by representatives of Hoffmann-La Roche and Jungbunzlauer, and yet the latter was not regarded by the Commission as one of the ringleaders of the cartel. It is apparent from the remainder of Cerestar's written statement that ADM's former representative, in chairing the 'Sherpa' meetings, would regularly give an outline of the agreements reached at the 'Masters' meetings'. [102] Moreover, the Commission itself pointed out in recital 273 of the contested decision that 'other members of the cartel also carried out activities usually associated with a leadership role, such as the chairing of meetings, or the centralisation of data collection and distribution'.

157. It seems to me therefore that ADM's ringleader status in the citric acid cartel cannot be regarded as adequately proved.

158. I therefore suggest that, on that basis also, the Court of Justice cancel the 35% increase applied by the Commission, in the contested decision, to the basic amount of the fine imposed on ADM.

H — *The sixth plea on appeal, relating to the failure to accept as an attenuating circumstance the cessation of ADM's participation in the cartel as soon as the US antitrust authorities first took action*

1. Appraisal by the Court of First Instance

159. Before the Court of First Instance, ADM complained that the Commission had not given it the benefit of the attenuating circumstance referred to in the third indent of Section 3 of the Guidelines, that is to say, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)'. Emphasising that it had brought its participation in the citric acid cartel to an end immediately after the raid carried out by the FBI at its premises in the United States in June 1995, [103] ADM had maintained that the Commission's failure to accept that attenuating circumstance was contrary to the principle of proportionality

102 — Annex 15 to the appeal, p. 3.

103 — In fact, there is uncertainty as to whether ADM's participation in the citric acid cartel ceased *following* the raid on its premises by the FBI in June 1995. The contested decision established that ADM's participation in the cartel lasted until May 1995 (see recital 247 and Article 1, second paragraph) and ADM, in its reply to the statement of objections (paragraph 5.2), indicated that it had ceased participating of its own accord in May 1995 'when the cartel ceased to function and prior to intervention by the authorities'. However, the contested decision indicates more than once that ADM's participation in the cartel ended in June 1995 with the FBI's raid (see recitals 128 and 193).

and, since the Commission had taken a decision to the opposite effect in an earlier case characterised by similar circumstances, to the principle of equal treatment.

160. By detailed reasoning, set out in paragraphs 331 to 346 of the judgment under appeal, the Court of First Instance rejected both those complaints.

161. First, the Court of First Instance held that 'the third indent of Section 3 of the Guidelines must be interpreted restrictively so as not to undermine the effectiveness of Article 81(1) EC'. An interpretation of that provision based on a purely literal analysis might 'give the impression that the mere fact that an offender terminates an infringement as soon as the Commission intervenes constitutes, generally and without reserve, an attenuating circumstance' and 'would reduce the effectiveness of the provisions for maintaining effective competition, as it would weaken both the penalty which could be imposed for an infringement of Article 81 EC and the deterrent effect of such a penalty'. According to the Court of First Instance, 'termination of an infringement only after the Commission has intervened should not be rewarded in the same way as an independent initiative of the offending party and merely constitutes an appropriate and normal reaction to that intervention', merely 'mark[ing] a return by the offending party to lawful conduct'. 'Consequently, that provision [of the Guidelines] must be interpreted as meaning that solely the particular circumstances of the specific case in which an infringement is actually terminated as soon as the Commission intervenes can warrant that termination being taken into account as an attenuating circumstance.' [104]

162. Secondly, the Court of First Instance took the view that, 'in the specific context of this case', 'the fact that ADM [had] terminated the infringement as soon as the competition authority intervened [was] not capable of constituting an attenuating circumstance'; since there was 'a secret cartel whose object [was] price fixing and market sharing', 'there [could] be no doubt that the infringement was committed intentionally'. [105]

163. Finally, the Court of First Instance observed that 'the mere fact that the Commission assessed conduct in a certain manner in its previous decisions does not mean that it is obliged to do so also when adopting a subsequent decision' and, in any event, that in so far as the precedent relied on by ADM represented only an assessment by the Commission, it was not capable of affecting the analysis already carried out by the Court. [106]

104 — Judgment under appeal, paragraphs 335 to 338.
105 — Judgment under appeal, paragraphs 339 to 342.
106 — Judgment under appeal, paragraph 345.

2. Arguments of the parties

164. By the present plea on appeal, ADM alleges that, by the reasoning set out above, the Court of First Instance infringed the principle whereby the Commission is required to observe the rules which it imposes on itself or else to give its reasons for departing from them. ADM puts forward various arguments, in which, in essence:

— it criticises the interpretation given by the Court of First Instance to the third indent of Section 3 of the Guidelines, by which a genuine obligation is mistaken for a mere power on the part of the Commission to grant a reduction in the amount of the fine where the infringement ceased as soon as the Commission first took action;

— in any event it criticises the Court of First Instance for not holding that the Commission had failed in its obligation to indicate its reasons for declining in that case to exercise its power of assessing whether a reduction of the fine was justified in view of the fact that participation in the cartel was terminated as soon as the US authorities first took action.

165. The Commission, for its part, states that the Court of First Instance examined ADM's complaints in detail, correctly interpreted the relevant provision of the Guidelines and correctly assessed the circumstances of the case in concluding, rightly, that ADM's cessation of participation in the cartel as soon as the FBI carried out a raid on its premises did not constitute an attenuating circumstance.

3. Assessment

166. Let me say straightaway that I share the view put forward by the Court of First Instance that an undertaking's termination of participation in a secret and manifestly unlawful cartel does not constitute a circumstance which significantly mitigates the gravity of the infringement and which on that account deserves to be rewarded by a decrease in the fine. [107]

167. However, I do not [108] endorse the reasoning by which the Court of First Instance rejected ADM's complaint alleging breach of

107 — To that effect, see also the Opinion of Advocate General Trstenjak of 15 May 2008 in Case C-510/06 P *Archer Daniels Midland* v *Commission* [2008] ECR I-0000, point 232, relating to the sodium gluconate cartel.

108 — Unlike Advocate General Trstenjak in the Opinion cited in the preceding footnote.

the principle of proportionality through the refusal to recognise the attenuating circumstance in question. In particular, I am of the opinion that ADM is correct to criticise the Court for misinterpreting the third indent of Section 3 of the Guidelines.

168. As was recognised in paragraph 335 of the judgment under appeal, if that provision is taken literally, it means that the mere fact that the offender ceases the infringement as soon as the Commission intervenes constitutes an attenuating circumstance. There is nothing in the provision to allow a distinction to be drawn, or for the benefit in question to be applied 'only [in] particular circumstances'. Also, it was not until the new 2006 guidelines [109] that the Commission supplemented the wording of the third indent of Section 3 of the Guidelines, indicating that the attenuating circumstance represented by termination of unlawful activities immediately after the Commission first intervened 'will not apply to secret agreements or practices (in particular cartels)'.

169. It was therefore in disregard of the rule *in claris non fit interpretatio* that the Court of First Instance considered itself obliged to adopt a narrow interpretation of the third indent of Section 3 of the Guidelines, which rendered it applicable only in 'particular circumstances', on the basis that, 'if termination of an infringement as soon as the Commission intervenes were to be recognised as an attenuating circumstance, that would unduly impair the effectiveness of Article 81(1) EC by weakening both the penalty and its deterrent effect'.

170. That finding also seems to me to stretch the point. Apart from the fact that Article 81(1) EC as such does not provide for any penalty, but only lays down a prohibition, I do not see how recognition in principle of such an attenuating circumstance could go so far as to undermine the effectiveness of that provision — or in any event of Article 83 EC and Article 15 of Regulation No 17, which provide for the imposition of fines — since the consequent reduction of the fine can be tailored to the characteristics of the particular case, even to the point of being negligible, hence unlikely to have an impact on the deterrent effect of the fine.

171. It is worth noting that the Guidelines do not include among the aggravating circumstances referred to in paragraph 2 continuation of the infringement after the Commission has first intervened. It is thus arguable that the Guidelines sought to differentiate the treatment of undertakings participating in a prohibited cartel which react differently to the Commission's intervention — some of them ceasing the infringement and the others continuing to perpetrate it — giving a reward (reduction of the fine) in the former case, as opposed to imposing a penalty (increase of the fine) in the latter.

109 — Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2). See the first indent of paragraph 29.

172. Moreover, it does not follow from a literal interpretation of the third indent of Section 3 of the Guidelines, as advocated by ADM, that the Commission must be regarded as having undertaken to consider *in every case* that mere cessation of the infringement as soon as it intervenes constitutes an attenuating circumstance. Indeed, ADM is right to point out that, according to the case-law, the Commission may depart from the Guidelines provided that it sets out the reasons prompting it to do so and on condition that those reasons are compatible with the principle of equal treatment. [110]

173. I therefore consider that the third indent of Section 3 of the Guidelines may be interpreted to the effect that cessation of the infringement as soon as the Commission intervenes is in principle — and therefore not only in particular circumstances, as indicated in the judgment under appeal — to be rewarded by a reduction in the basic amount of the fine.

174. That interpretation does not mean, however, that the Court of First Instance should necessarily grant ADM the benefit of the attenuating circumstance referred to in that provision and therefore reduce the basic amount of its fine.

175. The Court of First Instance, enjoying under Article 229 EC and Article 17 of Regulation No 17 unlimited jurisdiction as regards fines imposed under that regulation, is 'empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's' and consequently cancel, reduce or even increase the fine imposed by the Commission when the issue of the amount of that fine is submitted for its assessment. [111] Consequently, as has already been pointed out by Advocate General Jacobs in his Opinion in *JCB Service* v *Commission*, [112] the Court of First Instance is not bound by the Guidelines.

176. The Court of First Instance could therefore have rejected ADM's claim on the basis of the arguments set out in paragraphs 336, 340 and 341 of the judgment under appeal — which I consider to be perfectly tenable [113] and which are essentially based on the idea that bringing to an end an infringement which is manifestly unlawful is an 'appropriate and normal' reaction to the Commission's intervention — albeit in the context of an assessment of appropriateness, which, in other words, reflects choices made by virtue of the discretion left to the Court by the Community legislature.

110 — See *Dansk Rørindustri and Others* v *Commission*, cited in footnote 15 above, paragraph 209.

111 — Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 61 and 62. See also the Opinion of Advocate General Kokott of 8 December 2005 in Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, point 132, and the Opinion of Advocate General Poiares Maduro of 16 November 2006 in *Groupe Danone* v *Commission*, points 45 and 48.

112 — Opinion of 15 December 2005 in the case cited in footnote 100 above, point 141.

113 — Except, as pointed out above, the last two lines of paragraph 336, which refer to weakening of the penalty and its deterrent effect.

177. The present plea on appeal should therefore, in my opinion, be upheld in so far as it imputes to the Court of First Instance an error of law in interpreting the Guidelines. The judgment under appeal should be set aside on this point. Given that the state of the proceedings so permits, the complaint made by ADM at first instance can be re-examined, and should in my opinion be rejected, by the Court of Justice in the exercise of the unlimited jurisdiction which it, too, enjoys when giving final judgment in the matter in accordance with the first paragraph of Article 61 of its Statute. [114]

I — *The ninth plea on appeal, regarding the actual impact of the cartel on the market*

1. Appraisal by the Court of First Instance

178. Before the Court of First Instance, ADM maintained by various complaints that the Commission had not satisfactorily demonstrated that, as stated in the contested decision in implementation of the first paragraph of Section 1A of the Guidelines, [115] the cartel found to exist had an actual impact on the market. In its appeal, ADM criticises in that regard only the assessments by which the Court of First Instance, in paragraphs 198 to 203 of the judgment under appeal, rejected its argument that the cartel's impact could not be regarded as established in so far as the Commission had not proceeded in advance to identify the relevant product market. ADM had submitted that that market had to be identified for the purposes of an analysis intended to establish the effects of the cartel in order to assess the gravity of the infringement, alleging that in the contested decision there was no conclusion to the effect that the citric acid market constituted the relevant product market. [116]

179. The Court of First Instance rejected that argument, essentially on the basis of the following considerations:

'198 It should be noted first of all that, in the Decision, the Commission did not analyse whether the relevant product market should be limited to citric acid or whether it should be understood, as ADM asserts, more broadly, as encompassing citric acid substitutes. Under the headings "The Product" … and "The Market for Citric Acid" …, the Commission merely described the various applications for citric acid and its market volume.

199 However, in the expert report submitted by ADM to the Commission during the administrative proce-

114 — See Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 218.

115 — According to that provision,'[i]n assessing the gravity of the infringement, account must be taken', inter alia of 'its actual impact on the market, where this can be measured'.

116 — See the application at first instance, paragraph 7.2.3.

dure, the relevant product market is analysed and defined as being wider, encompassing substitutes, notably phosphates and mineral acids. Nevertheless, in the Decision, the Commission did not consider ADM's arguments concerning the need to use a wider definition of the relevant product market.

200 ADM's argument can therefore succeed only if it shows that, had the Commission defined the relevant product market in line with ADM's claims, it would have had to find that the infringement did not have an impact on the market defined as that consisting of citric acid and its substitutes. …

201 With regard to the Commission's analysis of the price developments and sales quotas at recital 213 et seq. of the Decision, ADM has failed to demonstrate or even put forward any elements which, together, would constitute a body of consistent evidence showing with reasonable probability that the impact of the citric acid cartel on the wider market encompassing citric acid substitutes was non-existent or at least negligible. Even the expert report, which advocates that the market should be defined more widely, confines its analysis as regards the purported lack of influence of the cartel on price developments to the citric acid market alone.'

2. Arguments of the parties

180. In its appeal, ADM submits that, it having been correctly established in paragraph 198 of the judgment under appeal that the Commission had not defined the relevant product market, the Court of First Instance was not entitled to conclude that the Commission had demonstrated that the cartel had had effects on the market. ADM maintains that it is essential to define the relevant market in order to establish the effects of a cartel, emphasising in particular that an agreement on product prices cannot have any impact if consumers are able to direct their demand towards substitute products, and that a generalised increase in the prices or demand for those products may trigger — quite independently of the activities of the cartel itself — an increase in the price of the product covered by the cartel. In considering it incumbent on ADM to demonstrate that, if the market had been defined as ADM desired, the Commission would have had to find that the infringement had not had any impact on that market, the Court of First Instance wrongly placed on ADM the burden of proving the effects of a cartel, a burden which in fact lies with the Commission. The Court of First Instance thus infringed the principle whereby the Commission must observe the rules which it imposes on itself, such as those set out in the Guidelines. Since the effects of the cartel on the market were not established, the amount of the fine should be reduced accordingly.

181. Contending that the Court of First Instance did not declare that the contested decision did not contain a market definition, the Commission maintains that the Court did not commit any error regarding the burden of proof and that, by the present plea on appeal, ADM is in reality seeking to persuade the Court of Justice to examine a question of fact regarding which it did not produce the necessary evidence in the proceedings at first instance. At the hearing, the Commission's agent added that, in any event, an analysis of the relevant product market was not necessary in the present case.

3. Assessment

182. It is appropriate to point out, at the outset, that in using the term 'definition of the relevant product market' ADM is referring to the well-known operation of identifying the totality of the products or services which, by reason of their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products, [117] an operation that the Commission undertakes when applying Articles 81 EC and 82 EC and monitoring concentrations with a Community dimension. It is an operation which, together with identification of the relevant geographic market, makes it possible to determine the competitive pressures to which the undertakings concerned by particular conduct on the market or by a concentration are exposed and thus to assess their market power.

183. As the Commission itself points out in its notice on the definition of the relevant market for the purposes of Community competition law, [118] 'the concept of "relevant market" is different from other definitions of market often used in other contexts. For instance, companies often use the term "market" to refer to the area where they sell their products or to refer broadly to the industry or sector where they belong'. A general reference may also be made to the market for a product (for example, citric acid) as the context in which the supply of and demand for that product are to be found, regardless of whether products interchangeable with it may exist, for which the supply and demand may interact with the supply and demand for the first-mentioned product. It is to the concept of relevant product market described in the preceding point, as opposed to more general concepts of product market, that I shall refer below when speaking of the relevant product market.

184. In the context of its complaint, ADM called on the Court of First Instance to rule on the question whether an assessment of the effects of a cartel prohibited under Article 81 EC, for the purposes of determining the gravity of an infringement, necessarily requires a definition of the relevant product market or whether such an assessment can be conducted with reference only to the product covered by the cartel, in other words, without taking account of the existence of other products which might be interchangeable with that product from the consumers' point of view.

117 — See, as being representative of all such cases, *Michelin* v *Commission*, cited in footnote 10 above, paragraph 37.

118 — OJ 1997 C 372, p. 5, paragraph 3.

185. The present plea on appeal is based on the idea that the Court of First Instance found that the contested decision lacked a definition of the relevant product market and that the Court, in essence, wrongly concluded that such a definition was unnecessary in the case before it for the purposes of assessing the impact of the cartel on the market.

186. Although the considerations set out by the Court of First Instance are not totally clear on this point and the Commission stresses that the Court did not reproach it for failing to define a market, I consider that it emerges sufficiently clearly from paragraphs 198 and 199 of the judgment under appeal that the Commission confined itself to taking account of citric acid without troubling to verify whether it was interchangeable with other products. The fact that the Court of First Instance observed that the contested decision referred to the 'citric acid market' cannot be taken as meaning that the Court recognised that the Commission had in fact defined the relevant product market.

187. The Commission itself — even though it stated in its rejoinder at first instance that the contested decision 'indicated clearly that the product market to be taken into consideration was the citric acid market' [119] — declared in its reply to the written questions from the Court of First Instance that in making that statement it did not intend to assert that it had carried out 'an *extensive and detailed* analysis of the relevant product market' [120] within the meaning of the notice referred to in point 183 above, since it was not necessary for the purposes of the present case to examine all possible substitutes for citric acid. Moreover, in that reply, the Commission added that, in the contested decision, all it did was 'to describe *the products affected by the cartel* and the supply and demand of these products', [121] and by that assertion clearly revealed that it had not made *any* analysis of the relevant product market.

188. I consider, therefore, that ADM was not wrong to state, as it did, that the Court of First Instance established that the Commission had omitted to define the relevant product market and had merely considered the *product* citric acid and the market for it in a general sense.

189. If ADM is regarded as being correct in its submission that it is always necessary to establish a definition of the relevant product market in order to ascertain the actual impact of a cartel for the purposes of assessing the gravity of the infringement, it would also be right to argue — as it did in its appeal — that the reasoning followed by the Court of First Instance in paragraphs 200 and 201 of the judgment under appeal unduly reversed the burden of proof, placing it on ADM when in fact it lay with the Commission. If the Commission had to define the relevant product market and failed to do so, concerning itself only with the product citric acid without taking account of the substitut-

119 — Rejoinder, paragraph 25.

120 — See the reply to question No 1, p. 2 (emphasis added).

121 — Ibid., p. 3 (emphasis added).

ability of other products, it was incumbent on the Court of First Instance to establish that omission on the part of the Commission, and it should not have called on ADM to show that in the relevant market, defined as the latter had suggested, the cartel had had no impact.

190. The present plea on appeal therefore raises a question of law and does not call in question the assessment of the facts made by the Court of First Instance. It is therefore admissible.

191. As regards the merits, I consider that the assessments made by the Court of First Instance are essentially sound.

192. No practical consequence seems to me to follow from the fact that the Court of First Instance examined ADM's complaint as being intended to establish an *erroneous* definition of the relevant product market, [122] when in fact it alleged the *absence* of a definition of that market. The Court of First Instance started from the premiss that the lack of any analysis by the Commission of the interchangeability of citric acid with other products meant in practice that it took into consideration a relevant market limited to citric acid, whereas ADM considered it to be wider. The complaint that ADM made before the Court of First Instance, on the other hand, was based on the view that the Commission had considered citric acid as the product market only in a general sense. In essence, however, this diversity of views has no practical importance, since what ADM criticises is essentially the fact that, as a result of the lack of a definition of the relevant product market, the Commission did not verify the effects of the cartel on what, in ADM's opinion, was the relevant product market, that is to say, a market covering not only citric acid but also other products.

193. Like the Commission, I regard as unfounded ADM's view that, in order to ascertain the actual impact of a cartel for the purposes of assessing the gravity of an infringement, it is always necessary to define the relevant product market.

194. It must first of all be borne in mind that not all assessments that the Commission is called on to make when applying EC Treaty competition rules first require the relevant market to be defined.

122 — See the judgment under appeal, paragraphs 194 and 203, where reference is made, respectively, to 'errors in its definition of the relevant market' and 'the relevant product market was defined incorrectly'.

195. A definition of the relevant market is of course essential, for example, in order to establish the existence of a dominant position within the meaning and for the purposes of Article 82 EC. [123]

196. As regards Article 81 EC, the Court of Justice has stated that 'the sole purpose of defining the relevant market, in order to apply Article 85(1) of the Treaty (now Article 81(1) EC), is to determine whether the agreement in question may harm trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market'. [124] Moreover, as is clear from the case-law of the Court of First Instance, the obligation to include a definition of the relevant market in a decision adopted under Article 81 EC is not absolute, but is incumbent upon the Commission '*only where it is impossible, without such a definition*, to determine whether the [cartel in question] is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market'. [125]

197. A definition of the relevant market also appears necessary in order to ascertain whether in a particular case the condition laid down in Article 81(3)(b) EC is satisfied, for the purposes of a declaration that Article 81(1) is not applicable, [126] whereas it is not needed in order to establish whether the other three conditions in Article 81(3) EC are satisfied. [127]

198. Also, for the purposes of determining the gravity of an infringement, in order to apply Article 15 of Regulation No 17, it is necessary to assess the need for a prior definition of the relevant market in relation to the specific assessment to be carried out.

199. Where the actual impact of a cartel is being assessed, it does not seem to me that, in order to verify whether the cartel has had such an impact, it is necessary in every case for the Commission to delimit the relevant market in advance.

200. In the present case, the Commission ascertained that the cartel had had effects on citric acid prices. ADM's complaints against that finding before the Court of First Instance were rejected by the latter, for the reasons set

123 — See, amongst many, Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 5; *Michelin* v *Commission*, cited in footnote 10 above, paragraph 37; and Case C-250/06 *United Pan-Europe Communications and Others* [2007] ECR I-11135, paragraph 21.

124 — Order of 16 February 2006 in Case C-111/04 P *Adriatica di Navigazione* v *Commission*, paragraph 31.

125 — Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 206 (emphasis added). See also Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230, and Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 132.

126 — To that effect, see the Commission notice on the definition of relevant market for the purposes of Community competition law, cited in footnote 118 above, paragraph 11, and *CMA CGM and Others* v *Commission*, cited in the preceding footnote, paragraph 226.

127 — *CMA CGM and Others* v *Commission*, cited in footnote 125 above, paragraph 226.

out in paragraphs 152 to 168 and 180 to 193 of the judgment under appeal, which have not been contested in the present appeal. Those effects must therefore be regarded as definitively established.

J — *The pleas on appeal (seventh and eighth) alleging breach of the principle of the protection of legitimate expectations as regards the assessment of ADM's cooperation in the course of the administrative procedure*

201. Even if it is accepted that the relevant product market in this case covered products other than citric acid, the fact remains that the cartel had had an impact on at least one segment of that putative wider market, namely the segment represented specifically by citric acid. Those effects having been established, the Commission in my opinion discharged its burden of proving that the cartel had had an actual impact on the market. It was incumbent at that stage on ADM to show that such effects were not decisive by alleging and proving, for example, that they were offset by contrary effects triggered by the cartel in other segments of that wider market. However, as was rightly observed by the Court of First Instance in paragraph 201 of the judgment under appeal, ADM put forward no evidence to suggest that, if the Commission had also considered substitutes for citric acid, it would have had to conclude that the impact of the cartel on the wider market was non-existent or negligible.

202. The present plea on appeal therefore does not in my opinion deserve to be upheld.

203. Before the Court of First Instance, ADM criticised the contested decision for refusing it the benefit of Section B of the Leniency Notice concerning 'non-imposition of a fine or a very substantial reduction in its amount'. That refusal, in so far as it was based on the fact that ADM did not satisfy the condition laid down in Section B(b), was — it was alleged — contrary to the principle of the protection of legitimate expectations, for two reasons. First, ADM submitted that, contrary to what was stated in the contested decision, it and not Cerestar was the first undertaking to provide decisive evidence of the cartel's existence, within the meaning of Section B(b). The evidence provided by Cerestar at the meeting with Commission staff on 29 October 1998 did not in fact, according to ADM, enable the existence of the cartel to be established, in contrast to the information provided by ADM to the Commission at the meeting of 11 December 1998. Secondly, ADM claimed that, in any event, during various meetings with Commission staff and in correspondence exchanged with them during the administrative procedure, it had received confirmation that it had been the first to cooperate with the Commission within the meaning of Section B of that notice.

204. The Court of First Instance rejected both those objections. The first was regarded as irrelevant, since ADM was found not to meet

the conditions under Section B(e) of the Leniency Notice, it having been established that it had played a leadership role in the cartel, and since the conditions laid down in Section B(a) to (e) must be cumulatively satisfied if the benefit in question is to be granted. [128] The second complaint was regarded as unfounded, in that the Court of First Instance, following an examination of the statements relied upon by ADM, formed the view that the Commission had not given any precise assurance, in the course of the administrative proceeding, to the effect that it would grant ADM that benefit and moreover that the Commission could not have given any such assurance since it is only on the basis of an assessment of all the information submitted to it by the undertakings in the course of the administrative proceeding that the Commission can decide whether one of them may enjoy that benefit. [129]

1. The plea on appeal relating to statements made by Commission staff during the administrative proceeding

205. By this plea on appeal, ADM maintains that, it having been established in paragraphs 391 and 392 of the judgment under appeal that 'the Commission, alluding to Section B of the Leniency Notice, did indeed seek to encourage the parties concerned to cooperate with it fully by making that exercise as attractive as possible' and that it had 'indicated to ADM that it was in principle "eligible" for a very substantial reduction of the fine under Section B of the Leniency Notice', the Court should have concluded that precise assurances were given to ADM such as to engender the legitimate expectation that it would be granted the benefit in question.

206. Moreover, according to ADM, the Court of First Instance was wrong to consider that there could be no such assurances since the Commission does not assess the undertakings' cooperation until the end of the administrative procedure. The Leniency Notice states that a legitimate expectation arises at the very moment the evidence is provided.

207. The Commission contends that the Court's observations are untainted by any error of law. It emphasises in particular that, whilst it is true that the Leniency Notice gives rise to legitimate expectations, an undertaking may not, at the time it provides the Commission with evidence, entertain any legitimate expectation that the Commission will grant it a reduction of the fine under Section B of that notice. The Commission is in a position to assess whether that undertaking meets the cumulative conditions laid down in that section only after it has acquired and assessed all the evidence.

208. For my part, I would observe in the first place that the question whether, by the statements made by Commission staff in the course of the administrative procedure,

128 — Judgment under appeal, paragraphs 375 to 379.
129 — Judgment under appeal, paragraphs 384 to 395.

precise assurances were given to ADM regarding the application to it of Section B of the Leniency Notice falls within the sphere of assessment of the facts undertaken by the Court of First Instance, which cannot be criticised on appeal unless distortion of the facts or of the evidence thereof is alleged. However, ADM does not make any allegation to that effect in its appeal.

209. However, I consider that the conclusions reached by the Court of First Instance do not at all conflict with its findings in paragraphs 391 and 392 of the judgment under appeal (see point 205 above), from which it cannot be inferred that ADM was given precise assurances that it would be granted the benefit of Section B of the Leniency Notice. All that is apparent from those findings is that the grant of that benefit was mentioned to ADM by Commission staff as a possibility, 'in implementation' of that section, which meant that the conditions laid down in that section had first to be satisfied.

210. Moreover, the Court of First Instance was entirely right to consider, essentially, that, at the time when ADM cooperated in the Commission investigation, it could not have had any legitimate expectation that such a benefit would be granted. ADM must have been aware, even then, that, as specifically stated in Section E(2) of the Leniency Notice, [130] the Commission assesses satisfaction of the Section B conditions only when adopting the final decision.

211. The present plea on appeal must therefore be rejected.

2. The plea on appeal relating to the alleged breach of the conditions laid down in Section B of the Leniency Notice

212. By this plea on appeal, ADM submits in essence that the rejection as irrelevant of its claim at first instance alleging infringement of Section B(b) of the Leniency Notice and therefore of the principle of the protection of legitimate expectations is vitiated by an incorrect finding that it failed to meet the conditions laid down in Section B(e). That incorrect finding, ADM maintains, is the consequence of errors of law committed by the Court of First Instance in its examination of the grounds on which ADM contested the Commission's view that it had played a leadership role in the cartel.

130 — According to which,'[o]nly on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met, and thus whether or not to grant any reduction in the fine or even waive its imposition altogether'.

213. The Commission observes that by this plea on appeal ADM is simply repeating the complaints made by it in the context of other pleas in law raised on appeal against the assessments by which the Court of First Instance confirmed the attribution of leadership status to ADM in the contested decision. The Commission contends therefore that the present plea on appeal should be rejected since, as argued by the Commission in response thereto, those complaints are unfounded.

214. Because, having examined the grounds relating to ADM's alleged leadership role in the citric acid cartel, I am of the opinion that it cannot, for both procedural and substantive reasons, be concluded that ADM actually played such a role, I can only suggest that the present plea on appeal also be upheld. In other words, since it cannot be concluded that ADM was a leader of the cartel and accordingly that it did not meet the conditions laid down in Section B(e) of the Leniency Notice, the Court of First Instance should have examined the merits of the complaint alleging misapplication by the Commission of Section B(b).

215. The judgment under appeal should therefore be set aside in so far as it rejected that complaint, which I shall now examine on the basis that the state of the proceedings is such that the Court of Justice may properly give final judgment on that point as well, pursuant to the first paragraph of Article 61 of its Statute.

K — *The action against the contested decision: whether ADM should be regarded, under Section B(b) of the Leniency Notice, as the first undertaking to have provided the Commission with decisive evidence of the cartel's existence*

216. ADM claimed before the Court of First Instance that it had been the first undertaking to provide the Commission with decisive evidence of the citric acid cartel's existence. That evidence, it is alleged, was provided, during the meeting held between ADM's representatives and Commission staff on 11 December 1998, by direct testimony, documentary evidence dating back to the time of the cartel and documents describing the context and implementation of the cartel. In contrast, the evidence provided by Cerestar at the meeting held between its representatives and Commission staff on 29 October 1998 could not, contrary to what is stated in the contested decision, be regarded as decisive for the purposes of establishing the cartel's existence.

217. In that connection, ADM had put forward the following arguments: [131]

— Cerestar did not provide information on the cartel for the period before its involvement in it;

131 — See the application at first instance, paragraph 9.2.1.

— the information provided by Cerestar regarding the dates of the cartel meetings and their participants was not precise or conclusive and was in part subsequently retracted by Cerestar itself, after a more detailed check;

— Cerestar provided vague and rather inconclusive information regarding the subject-matter of the meetings and gave no precise information regarding the prices and quotas agreed;

— it does not appear that Cerestar provided the Commission with first-hand witness evidence;

— Cerestar itself considered it necessary to expand upon and clarify the oral statements made at the 29 October 1998 meeting by sending additional information, in any event after the meeting between ADM and Commission staff on 11 December 1998;

— the Commission sent Cerestar a request for detailed information dated 3 March 1999, which was based on statements made by ADM.

218. The Commission objected that incompleteness of information provided by an undertaking does not, under Section B(b) of the Leniency Notice, preclude a finding that such information is decisive evidence of the existence of a cartel. Section B(b) of the Leniency Notice does not require evidence of the exact duration of the cartel or of the constant participation of all its members.

219. As a preliminary point, I would observe that ADM has not called in question the fact that decisive evidence, within the meaning of Section B(b) of the Leniency Notice, may also be provided orally and did not complain of uncertainty surrounding the content of the oral statements made by Cerestar representatives at the 29 October 1998 meeting. The content of those statements is apparent from a 'file note' of 6 November 1998 drawn up by one of the Commission staff present at that meeting, which was produced before the Court of First Instance in response to a specific request from that Court. Moreover, ADM has not contested — or at least has not done so in a sufficiently clear and detailed manner — the statement at the beginning of recital 306 of the contested decision to the effect that the information provided by Cerestar at that meeting matches that contained in Cerestar's written statement.

220. In examining this complaint, raised in the application at first instance, it is therefore necessary only to verify, in the light of the arguments put forward by ADM, whether that information, as apparent from the above-mentioned 'file note' and from Cerestar's written statement, constitutes decisive evidence of the existence of the citric acid cartel.

221. In that connection, it must first of all be pointed out that — as the case-law of the Court of First Instance has made clear — the concept of 'decisive evidence of the cartel's existence' within the meaning of Section B(b) of the Leniency Notice does not refer to evidence that is in itself sufficient to demonstrate the existence of the cartel. [132] The evidence provided must not, however, be a simple indication as to the direction which the Commission's investigation should take, but must be capable of being used directly as evidence of the infringement. [133]

222. Section B(b) of the Leniency Notice does not in fact require evidence to be supplied regarding all the facts recorded in the Commission decision. [134] The evidence provided does not therefore necessarily have to cover the entire lifetime of the cartel. Nor does that provision require that the evidence necessarily be provided in the form of direct testimony from the perpetrators of the unlawful activities. The first and fourth arguments set out in point 217 above are therefore unfounded and should be rejected.

223. The mere fact that, after the meeting of 29 October 1998, Cerestar intended providing further information or that the Commission sent it a request for information is not relevant for the purposes of establishing whether the evidence provided at that meeting was decisive evidence of the cartel's existence. The fifth and sixth arguments reproduced in point 217 above should therefore be rejected also.

224. As regards the lack of precision of the information provided by Cerestar on 29 October 1998 as to the dates of cartel meetings and those who attended them, I would point out that the circumstances relied on by ADM — that the information identified eight meetings only as 'possible' cartel meetings, that the identity of the persons present at the meetings was indicated only in relation to three cartel meetings actually found to have been held and that six of the meetings mentioned were found, as a result of Commission inquiries, not to have been held — are not such as to rule out the possibility that, by supplying such information, Cerestar nevertheless provided the Commission with deci-

132 — See *Tokai Carbon and Others* v *Commission*, cited in footnote 30 above, paragraph 362; *BASF* v *Commission*, cited in footnote 30 above, paragraph 492; and Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 156. Attention was drawn in all those judgments to the fact that the adjective 'sufficient' as used in Section B (a) of the Leniency Notice does not, in contrast, appear in Section B(b) of that notice. See also Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 692.

133 — See *BASF* v *Commission*, cited in footnote 30 above, paragraph 493, and *Daiichi Pharmaceutical* v *Commission*, cited in the preceding footnote, paragraph 157.

134 — See, to that effect, *Daiichi Pharmaceutical* v *Commission*, cited in footnote 132 above, paragraph 162.

sive evidence. The fact remains, as is apparent from ADM's own observations, that on the basis of that same information — subject, where necessary, to appropriate and understandable reservations, given the time that had elapsed and the alleged lack of documentation — Cerestar was in a position to identify a number of cartel meetings established in the contested decision and the persons who took part. [135]

225. Finally, regarding the allegedly vague and somewhat inconclusive nature of the information provided by Cerestar on 29 October 1998 concerning the subject-matter of the cartel meetings, and the lack of precise data concerning the prices and quotas agreed upon, I do not consider that those circumstances provide a sound basis for ruling out the possibility that, on that date, Cerestar had provided decisive evidence of the cartel's existence.

226. It is true that that information is not so complete as to indicate — for every confirmed meeting of the cartel to which it relates — the date, place, participants, subject-matter and course of the discussions. However, for each of those meetings, the information includes specific details which make it directly usable as evidence of facts that amount to an infringement and are proved by a combination of that information and the evidence which the Commission later gathered from other sources.

227. Thus, for example, whilst it is true that, for the cartel meeting of 19 May 1992 in Jerusalem, the information provided by Cerestar did not indicate the subject-matter of the discussions but only the approximate date, the place and the participants, the Commission was able to establish, thanks to information provided by other undertakings, that at that meeting a compensation system was examined for offsetting sales between cartel members in cases where the agreed individual market shares were exceeded. [136] Also, that information from other undertakings was in turn corroborated by information provided by Cerestar on 29 October 1998, in which, albeit without references to specific cartel meetings, that compensation system was described in general terms and quantitative details were given of individual transactions carried out by Cerestar for offsetting purposes.

228. In relation to the Brussels meeting of 2 November 1994, [137] the information provided by Cerestar also included references to the subject-matter of the discussions and,

135 — The meetings in question are, in particular, the meeting of 19 May 1992 in Jerusalem (see recital 103 of the contested decision and page 5 of Cerestar's written statement, where the following day is indicated as the probable date of the meeting, thus involving a minimal discrepancy as to timing); the meeting of 1 June 1993 in Ireland (see recital 113 of the contested decision and page 6 of Cerestar's written statement); and the meeting of 27 October 1993 in Bruges (see recital 118 of the contested decision and page 6 of Cerestar's written statement).

136 — See recital 103 of the contested decision.

137 — See recital 122 of the contested decision and pages 7 and 8 of Cerestar's written statement.

in particular, the plan, agreed upon at that meeting, to approach rival Chinese producers through representatives, and put to them the possibility of an anti-dumping complaint against them.

229. The fact that, in order to demonstrate facts amounting to an infringement, such as the various confirmed meetings of the cartel, the Commission had to supplement the evidence provided by Cerestar on 29 October 1998 with information subsequently given by other cartel members or by Cerestar itself does not negate the 'decisive' value of that first evidence, which was indeed capable of being directly used as evidence and not merely as guidance for the direction the Commission's investigations should take.

230. It is also true that the information provided by Cerestar on 29 October 1998 did not include precise data on the prices agreed and, with regard to the quotas, made reference only to the quota allocated to Cerestar itself of 5% of the cartel members' aggregate world sales.

231. Nevertheless, that information identifies the members of the cartel, enables the period 1991 to 1995 to be identified as the approximate duration of the infringement, identifies a number of cartel meetings and their locations and participants, gives a detailed report of the circumstances surrounding Cerestar's joining the cartel, contains a general — but not thereby vague — description of the operating mechanics of the cartel, with reference to the types of meetings ('Masters" and 'Sherpa') as well as to the various subject areas covered by the agreements (in particular, prices, market share allocation and exchange of sales volume data). There is no doubt, in my opinion, that by giving such information, even though it was not accompanied by numerical data on agreed prices and quotas, Cerestar provided decisive evidence of the existence of the cartel, [138] which was capable of substantially facilitating the Commission's task of reconstructing and proving the facts constituting the infringement. Whether, in the light of the limited degree of detail provided, that contribution merited such a generous reduction of the fine as that granted to Cerestar by the Commission (90%) is an entirely different question which obviously should not be considered here.

232. ADM's arguments do not therefore seem to me to be capable of demonstrating that the Commission made errors of assessment in considering that the information provided by Cerestar at the meeting of 29 October 1998 constituted decisive evidence of the existence of the citric acid cartel.

138 — See, for similar conclusions in comparable circumstances, *BASF* v *Commission*, cited in footnote 30 above, paragraph 568; Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 238 to 244 and, in particular, paragraph 242; and Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraphs 320 to 324 and, in particular, paragraph 323.

233. ADM's complaint in that regard in its action at first instance should therefore, in my opinion, be rejected.

L — *Redetermination of the amount of the fine imposed on ADM*

234. Drawing the appropriate inferences from the foregoing considerations and conclusions, I consider that the Court of Justice, giving final judgment in the matter in accordance with the first paragraph of Article 61 of its Statute, should redetermine the amount of the fine imposed on ADM in the contested decision as follows: it should cancel the 35% increase applied by the Commission to the basic amount of the fine on account of the aggravating circumstance of leadership status within the cartel; it should then apply to the latter amount, namely EUR 58.8 million, the 50% reduction granted by the Commission under Section D of the Leniency Notice.

235. The fine imposed on ADM would thus be reduced to EUR 29.4 million.

M — *Costs*

236. Pursuant to the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of those Rules of Procedure, applicable by virtue of Article 118 thereof to appeal proceedings, the unsuccessful party is to be ordered to pay the costs if the successful party has applied for them. However, pursuant to Article 69(3), where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties are to bear their own costs.

237. In the present case, in view of the fact that both parties have failed to some extent, I consider it appropriate that each party should be directed to bear its own costs in the present appeal proceedings.

238. Also, in view of the partial setting aside of the judgment under appeal and the partial success of ADM's claims against the contested decision, I consider it fair, granting in part the relief sought on this point in the appeal, to amend the award of costs made in the judgment under appeal. I propose in that connection that the Commission should be ordered to pay one quarter, and not just one tenth, of the costs incurred by ADM in the proceedings before the Court of First Instance, and that ADM should bear the remaining costs of those proceedings.

III — Conclusion

239. In the light of the foregoing, I suggest that the Court of Justice:

(1) set aside the judgment of the Court of First Instance of the European Communities of 27 September 2006 in Case T-59/02 *Archer Daniels Midland* v *Commission* in so far as it rejects ADM's complaint of breach of the rights of the defence through failure to indicate, in the statement of objections, factual circumstances on the basis of which the Commission considered it to be one of the leaders of the cartel in Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) or, failing which, set aside that judgment in so far as it rejects ADM's complaints of breach of procedural safeguards as regards the Commission's use of the FBI Report as evidence of ADM's alleged leadership status within the cartel;

(2) set aside that judgment in so far as it rejects ADM's complaint of breach of the principle of proportionality through the refusal to recognise the existence of an attenuating circumstance of the kind referred to in the third indent of Section 3 of the Commission guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty amounted to breach of the principle of proportionality;

(3) set aside that judgment in so far as it rejects as irrelevant ADM's complaint of misapplication by the Commission of Section B(b) of its 1996 notice on the non-imposition or reduction of fines in cartel cases;

(4) set the amount of the fine imposed on ADM at EUR 29.4 million;

(5) for the rest, dismiss the appeal;

(6) order the Commission to pay one quarter of the costs incurred by ADM in the proceedings before the Court of First Instance and to bear its own costs in the present appeal proceedings;

(7) order ADM to pay three quarters of its own costs in the proceedings before the Court of First Instance and to pay the costs incurred by the Commission in those proceedings in their entirety, and to bear its own costs in the present appeal proceedings.