Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

14 February 2012 *

(Competition — Cartel, in the territory of a Member State, which commenced before the accession of that State to the European Union — Cartel of international scope having effects in the territory of the Union and the European Economic Area — Article 81 EC and Article 53 of the EEA Agreement — Prosecution and sanction of the infringement for the period prior to the date of accession and the period following that date — Fines — Delimitation of the powers of the Commission and those of the national competition authorities — Imposition of fines by the Commission and by the national competition authority — Ne bis in idem principle — Regulation (EC) No 1/2003 — Articles 3(1) and 11(6) — Consequences of the accession of a new Member State to the Union)

In Case C-17/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Krajský soud v Brně (Czech Republic), made by decision of 11 December 2009, received at the Court on 11 January 2010, in the proceedings

Toshiba Corporation,

T&D Holding, formerly Areva T&D Holding SA,

Alstom Grid SAS, formerly Areva T&D SAS,

Alstom Grid AG, formerly Areva T&D AG,

Mitsubishi Electric Corp.,

Alstom,

Fuji Electric Holdings Co. Ltd,

Fuji Electric Systems Co. Ltd,

Siemens Transmission & Distribution SA,

Siemens AG Österreich,

VA Tech Transmission & Distribution GmbH & Co. KEG,

Siemens AG,

Hitachi Ltd,

* Language of the case: Czech.

Hitachi Europe Ltd,

Japan AE Power Systems Corp.,

Nuova Magrini Galileo SpA,

v

Úřad pro ochranu hospodářské soutěže,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský and U. Lõhmus, Presidents of Chambers, A. Rosas (Rapporteur), A. Borg Barthet, M. Ilešič, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2011,

after considering the observations submitted on behalf of:

— Toshiba Corporation, by I. Janda, advokát, and J. MacLennan, Solicitor,

— Mitsubishi Electric Corp., by A. César and M. Abraham, advokáti,

— Alstom, by M. Dubovský and M. Nulíček, advokáti, J. Derenne, avocat, K. Wilson, Solicitor, and G. Dolara, advocate,

— Fuji Electric Holdings Co. Ltd and Fuji Electric Systems Co. Ltd, by V. Glatzová, advokát,

— Siemens Transmission & Distribution SA, Siemens AG Österreich and VA Tech Transmission & Distribution GmbH & Co. KEG, by M. Nedelka, advokát,

— Siemens AG, by M. Nedelka, advokát,

— Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp., by M. Touška and I. Halamová Dobíšková, advokáti, M. Reynolds and P.J. Mansfield, Solicitors, W. Devroe, advocaat, N. Green QC, and S. Singla, Barrister,

— Nuova Magrini Galileo SpA, by M. Nedelka, advokát,

— the Úřad pro ochranu hospodářské soutěže, by M. Vráb, acting as Agent,

— the Czech Government, by M. Smolek, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent, assisted by S. Kingston, Barrister,

— the Spanish Government, by S. Centeno Huerta and J.M. Rodríguez Cárcamo, acting as Agents,

— the Polish Government, by M. Szpunar and K. Zawisza, acting as Agents,

— the Slovak Government, by B. Ricziová, acting as Agent,

— the European Commission, by F. Castillo de la Torre, N. Khan, K. Walkerová and P. Němečková, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis and O. Einarsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 81 EC, of 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), particularly Articles 3(1) and 11(6) thereof, and of point 51 of the Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43; 'the Commission Notice').

2 The reference has been made in the context of a dispute between various undertakings and the Úřad pro ochranu hospodářské soutěže (Czech competition authority) concerning the decision of that authority to fine them for infringement of Czech competition law.

Legal context

EU law

3 Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; 'the Act of Accession') provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions ... before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

4 Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement'), prohibits cartels in the same terms as those of Article 81 EC and its scope extends to the whole of the European Economic Area ('the EEA').

5 Recital 8 of Regulation No 1/2003 provides:

'In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 [EC] and 82 [EC] where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) [EC] the relationship between national laws and Community competition law. ...'

6 Recital 9 of Regulation No 1/2003 provides:

‘Articles 81 [EC] and 82 [EC] have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. ...’

7 According to recital 17 of Regulation No 1/2003:

‘If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. ...’

8 Recital 18 of the same regulation provides:

‘To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. ...’

9 Recital 37 of Regulation No 1/2003, which deals with the protection of fundamental rights, provides:

‘This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (“the Charter”). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.’

10 Article 3 of Regulation No 1/2003 governs as follows the ‘Relationship between [Article 81 EC] ... and national competition laws’:

‘1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) [EC] which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 [EC] to such agreements, decisions or concerted practices. ...

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) [EC], or which fulfil the conditions of Article 81(3) [EC] which are covered by a Regulation for the application of Article 81(3) [EC]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 [EC] and 82 [EC].’

11 Under the heading 'Cooperation between the Commission and the competition authorities of the Member States' Article 11 of Regulation No 1/2003 further states, in the first sentence of paragraph 6, the following rule:

'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 [EC] and 82 [EC].'

12 Article 13 of Regulation No 1/2003, headed 'Suspension or termination of proceedings', provides:

'1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 [EC] or Article 82 [EC] against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.'

13 Article 16 of Regulation No 1/2003, headed 'Uniform application of Community competition law' provides in paragraph 2:

'When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 [EC] or Article 82 [EC] which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.'

14 Pursuant to Article 45(2) thereof, Regulation No 1/2003 was made applicable as from 1 May 2004.

15 Under the heading '3.2. The initiation of proceedings by the Commission under Article 11(6) of the Council Regulation', the Commission Notice provides inter alia the following explanations:

'...

51. Article 11(6) of [Regulation No 1/2003] states that the initiation by the Commission of proceedings for the adoption of a decision under [Regulation No 1/2003] shall relieve all [competition authorities of Member States] of their competence to apply Articles 81 [EC] and 82 [EC]. This means that once the Commission has opened proceedings, [national competition authorities] cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

...

53. Two situations can arise. First, where the Commission is the first competition authority to initiate proceedings in a case for the adoption of a decision under [Regulation No 1/2003], national competition authorities may no longer deal with the case. Article 11(6) of [Regulation No 1/2003] provides that once the Commission has initiated proceedings, [national competition authorities] can no longer start their own procedure with a view to applying Articles 81 [EC] and 82 [EC] to the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

...'

National law

16 The relevant provision of Czech law is Article 3 of the Law on the Protection of Competition. That provision applied until 30 June 2001 in the version of Law No 63/1991 Sb. (Zákon č. 63/1991 Sb., o ochraně hospodářské soutěže), as amended, and, as from 1 July 2001, in the version of Law No 143/2001 Sb. (Zákon č. 143/2001 Sb., o ochraně hospodářské soutěže).

17 According to Article 3(1) of the Law on the Protection of Competition, in the version in force until 30 June 2001:

'1. All agreements between competitors, all decisions of associations of undertakings and all concerted practices of competitors ... which have the effect or may have the effect of distorting competition on the product market are prohibited and void, save for contrary provision by this Law or by a special law or in the event of exemption granted by the ministry of Competition ...'.

18 The prohibition of agreements and practices restricting competition, set out in Article 3(1) of Law No 143/2001 Sb., which replaced Law No 63/1991 Sb. on 1 July 2001, remained essentially unchanged.

Facts, administrative procedure and the dispute in the main proceedings

19 This case concerns an international cartel on the market for gas insulated switchgear ('GIS') in which a number of European and Japanese undertakings in the electrical engineering sector participated for different periods between 1988 and 2004. Both the Commission and the Úřad pro ochranu hospodářské soutěže dealt with certain aspects of this case in 2006 and 2007 and each imposed fines on the undertakings concerned.

The administrative procedure at EU level

20 According to the information contained in the order for reference, on 30 September 2004 the Commission sent the Úřad pro ochranu hospodářské soutěže a letter informing it that it intended to initiate a proceeding concerning a cartel on the GIS market. The Commission indicated in that letter that the anti-competitive conduct under examination had taken place, in large part, before 1 May 2004 and that, taking account of the difficulty posed by the imposition of a fine as regards only the final days of that conduct (from 1 May to 11 May 2004), the procedure before it would concern only the activities of that cartel carried out in the territory of the European Union before the enlargement of the latter on 1 May 2004. According to the Commission, it was thus unlikely that it would initiate a proceeding concerning the Czech Republic.

21 On 20 April 2006, the Commission initiated proceedings for the imposition of fines on the basis of Article 81 EC and Article 53 of the EEA Agreement in conjunction with Regulation No 1/2003. Those proceedings, which had been preceded by a leniency application and investigations carried out at the premises of several members of the cartel in 2004, were directed against a total of 20 legal persons, including the Toshiba Corporation and the other applicants in the main proceedings.

22 In points 2 and 3 of the grounds of the Commission Decision of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas Insulated Switchgear) ('the Commission Decision'), which terminated the proceedings, the Commission states that, from 15 April 1988 until 11 May 2004, the aforementioned cartel committed a single and continuous infringement of Article 81 EC and, as from 1 January 1994, also of Article 53 of the EEA Agreement, covering the territory of the EEA and in which the individual members of the cartel participated for differing periods of time. In section 6.6.2 of that decision, the

Commission identified the termination date of that cartel as 11 May 2004, by reference to the date on which the last working meeting of which it was aware had taken place, which ended when the representatives of Siemens AG informed the other members of the said cartel that the Commission had carried out unannounced inspections on that day.

23 According to the findings in points 2, 3, 218 and 248 of the grounds of the Commission's decision, this was a complex cartel operated worldwide (except in the USA and Canada), including in the European Union and the European Economic Area, under which the participating undertakings, inter alia, exchanged sensitive market information, shared markets, fixed prices and terminated collaboration with non-cartel members.

24 Apart from one undertaking, ABB Ltd, which benefited from the Commission's leniency programme, all the parties to the proceedings, including all the applicants in the main proceedings, were ordered to pay fines of a total amount of more that EUR 750 million. The highest individual fine, amounting to more than EUR 396 million, was imposed on Siemens AG.

The administrative procedure at national level

25 On 2 August 2006, the Úřad pro ochranu hospodářské soutěže initiated a proceeding for infringement of the Law on the Protection of Competition, concerning the members of the cartel at issue in the main proceedings. On 9 February 2007, it adopted a first decision against which the applicants in the main proceedings formed an internal administrative action. Following that action, by decision of 26 April 2007, the President of the Úřad pro ochranu hospodářské soutěže amended that first decision.

26 In that decision of 26 April 2007, the said authority held that ABB Management Services Ltd (holder of the rights of ABB Power Technologies Management Ltd), ABB Switzerland Ltd, ABB Ltd, Alstom, Areva T&D SA, Fuji Electric Holdings Co. Ltd, Fuji Electric Systems Co. Ltd, Hitachi Ltd, Hitachi Europe Ltd, Mitsubishi Electric Corp., Toshiba Corporation, Schneider Electric SA, Siemens AG, Siemens AG Österreich (holder of the rights of VA Technologie AG and VA Tech T & D GmbH), VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission and Distribution Ltd (formerly VA Tech Transmission & Distribution Ltd) and Nuova Magrini Galileo SpA had participated in a cartel in the territory of the Czech Republic. By so doing, those competitor undertakings had, during the period up to 30 June 2001, infringed the prohibition set out in Article 3(1) of the Law on the Protection of Competition, in the version thereof arising from Law No 63/1991 Sb., as amended, and, during the period from 1 July 2001 to 3 March 2004, infringed the prohibition appearing in Article 3(1) of that law, in the version thereof arising from Law No 143/2001 Sb. Those undertakings thus infringed the Law on the Protection of Competition during the period up to 3 March 2004.

27 To determine the date on which the infringement ceased, the Úřad pro ochranu hospodářské soutěže used the last date on which proof of the existence of the infringement could be brought, namely 3 March 2004, on which date the last email communication demonstrating the existence of links between the participants in the cartel at issue in the main proceedings had been registered. According to the information given at the hearing by the agent of the Czech Republic and by the representative of the Úřad pro ochranu hospodářské soutěže, for the purposes of determining the end of a cartel, Czech competition law uses assessment criteria different from those used by the Commission.

28 Apart from one undertaking, which benefited from leniency measures laid down by national law, all the undertakings concerned by the proceeding brought at national level had fines imposed upon them.

The procedure before the Czech courts

29 The applicants in the main proceedings brought an action against the decision of the Úřad pro ochranu hospodářské soutěže before the Krajský soud v Brně (Regional Court, Brno). They argued inter alia that that authority had determined the duration of the cartel at issue in the main proceedings in an erroneous manner, and that it had knowingly placed the cessation of the latter at a date prior to the accession of the Czech Republic to the Union, in order to justify the application of the Law on the Protection of Competition. According to those applicants, it follows from Article 11(6) of Regulation No 1/2003 that the said authority no longer had the power to implement a proceeding at national level, since the Commission had already initiated a proceeding at European level in the same case. They concluded that the proceeding brought at national level infringed the ne bis in idem principle, prohibiting the cumulation of penalties.

30 By judgment of 25 June 2008, the Krajský soud v Brně annulled the decision of the Úřad pro ochranu hospodářské soutěže of 26 April 2007, and the initial decision, adopted on 9 February 2007.

31 The Krajský soud v Brně took the view that the conduct of the applicants in the main proceedings constituted a single and continuous infringement and based its reasoning on the Commission's decision to conclude that the Úřad pro ochranu hospodářské soutěže had wrongly concluded that the infringement had ended on 3 March 2004. The latter continued until 11 May 2004, that is to say after the accession of the Czech Republic to the Union and after the entry into force of Regulation No 1/2003. It should therefore be regarded as having been committed under the 'new law', namely Article 81 EC and Regulation No 1/2003. The Commission having already initiated a proceeding under Article 81 EC against the cartel of 'worldwide scope' at issue in the main proceedings and imposed penalties, the new proceeding opened in the same case infringed the ne bis in idem principle. The Krajský soud v Brně considered, moreover, that the Úřad pro ochranu hospodářské soutěže no longer had the power, under the first sentence of Article 11(6) of Regulation No 1/2003, to deal with the case at issue on the basis of Article 81 EC.

32 The Úřad pro ochranu hospodářské soutěže appealed on a point of law against the judgment of the Krajský soud v Brně before the Nejvyšší správní soud (Supreme Administrative Court). It considers that it still has the power to prosecute the applicants in the main proceedings by reason of their conduct prior to the date of accession of the Czech Republic to the Union, since, until that date, the Commission was not able to prosecute any of the infringements concerning that State. According to that authority, the fact of penalising a cartel of worldwide scope in the context of different competences does not constitute an infringement of the ne bis in idem principle. The said authority argues that the Commission and itself have examined territorially different consequences of that cartel. Moreover, the case-law of the Court of Justice, arising from the judgment in Case 14/68 *Wilhelm and Others* [1969] ECR 1, authorises the parallel application of Union and national competition law.

33 By judgment of 10 April 2009, the Nejvyšší správní soud set aside the judgment of the Krajský soud v Brně.

34 The Nejvyšší správní soud took the view that the Krajský soud v Brně had wrongly held that participation of the undertakings concerned in the cartel constituted a continuous infringement. According to the former court, the existence of two distinct infringements should be recognised, the date of the accession of the Czech Republic to the Union having constituted a pivotal date in that regard by reason of the modification of competences which followed. In particular, until that accession, the cartel practised on Czech territory fell exclusively within national jurisdiction and could be prosecuted only under national law. The Nejvyšší správní soud thus referred the case back to the Krajský soud v Brně for a new ruling.

35 The Krajský soud v Brně observes that, even if, under Article 110(3) of Law 150/2002 Sb., establishing the code of administrative procedure (Zákon č. 150/2002 Sb., soudní řád správní), it is required to follow the legal analysis adopted by the Nejvyšší správní soud, it nevertheless appears to it to be necessary to clarify certain points of Union law concerning, first, the accession of the Czech Republic to the Union on 1 May 2004 and, secondly, the entry into force of Regulation No 1/2003.

36 In those circumstances, the Krajský soud v Brně decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 81 EC (now Article 101 TFEU) and [Regulation No 1/2003] be interpreted to mean that that legislation must be applied (in proceedings brought after 1 May 2004) to the whole period of operation of a cartel, which commenced in the Czech Republic before that state's entry to the European Union (that is, before 1 May 2004) and continued and ended after the Czech Republic's entry to the European Union?

(2) Must Article 11(6) of Regulation No 1/2003 in conjunction with Article 3(1) thereof and recital 17 in the preamble thereto, point 51 of the Commission Notice ..., the principle ne bis in idem under [the Charter], and the general principles of European law be interpreted as meaning that if the Commission brings proceedings after 1 May 2004 for infringement of Article 81 EC and makes a decision in that case:

(a) the competition authorities of the Member States are automatically relieved of their competence to deal with that conduct from that time onwards?

(b) the competition authorities of the Member States are relieved of their competence to apply to that conduct the provisions of domestic law containing parallel legislation to Article 81 EC ...?'

The questions referred for a preliminary ruling

Preliminary observations

37 The wording of the questions submitted by the referring court calls for the following observations. In the first question, which seeks to determine the law applicable to the effects on Czech territory of the cartel at issue in the main proceedings, reference is made to a proceeding brought after the accession of the Czech Republic to the Union, on 1 May 2004, in relation to a cartel which, in the territory of that State, commenced before that date, continued and did not cease until after that date. The second question concerns the impact of the adoption, by the Commission, of a decision penalising anti-competitive conduct on the possibility of a national competition authority initiating or pursuing a proceeding concerning that same conduct ('those same facts').

38 That formulation of the questions referred is explained by the fact that the referring court considers it necessary to regard the cartel on the market for GIS at issue in the main proceedings as a single and continuous line of conduct which did not cease until after the accession of the Czech Republic to the Union, and to assess that anti-competitive conduct, as a whole, having regard to the legislation in force on the day it ended, namely Article 81 EC and Regulation No 1/2003.

39 In that context, the referring court, like the applicants in the main proceedings, bases its argument on the Commission's decision and considers that the latter penalised the conduct of the companies concerned in relation likewise to the Czech Republic, so that the Úřad pro ochranu hospodářské soutěže no longer had the power, after the accession of the Czech Republic to the Union and the entry into force of Regulation No 1/2003, to prosecute and penalise the effects of the cartel on that territory, even in relation to a period prior to that accession.

40 However, it is indicated in the order for reference that, on 30 September 2004, the Commission informed the Úřad pro ochranu hospodářské soutěže that it envisaged initiating a proceeding concerning the cartel on the GIS market at issue in the main proceedings, stating that the anti-competitive conduct examined had taken place, to a great extent, before 1 May 2004 and that the procedure brought by it would concern only the activities of the cartel carried out in the territory of the Union, as it existed before the enlargement of the latter on 1 May 2004.

41 In addition, in its written observations, the Commission has stated that the interpretation of the scope of its decision, which appears in point 29 of the order for reference, is inaccurate and that its decision does not penalise the effects of the collusive conduct which materialised in Czech territory before 1 May 2004.

42 Finally, it is apparent from the information provided by the referring court itself that the decision of the Úřad pro ochranu hospodářské soutěže at issue in the main proceedings takes into account only the anti-competitive effects produced, in Czech territory, by the cartel between the undertakings concerned, before 1 May 2004. That decision thus concerns only the period before the accession of the Czech Republic to the Union.

43 It is therefore in the light of those preliminary considerations that the questions referred are to be examined.

The first question

44 By its first question, the referring court asks, in essence, whether the provisions of Article 81 EC and Article 3(1) of Regulation No 1/2003 must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they can be applied to a cartel which produced effects in the territory of a Member State which acceded to the Union on 1 May 2004 during periods prior to that date.

45 In that regard, it should be remembered that account must be taken, as to the interpretation and application of Article 81 EC and Regulation No 1/2003, of the particular situation of a State, such as the Czech Republic, which became a member of the Union with effect from 1 May 2004 (see, in relation to Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition, 1969(II), p. 412), Case C-366/05 *Optimus - Telecomunicações* [2007] ECR I-4985, paragraph 25, and Case C-441/08 *Elektrownia Pątnów II* [2009] ECR I-10799, paragraph 30).

46 Pursuant to Article 2 of the Act of Accession, as from the date of accession, that is to say from 1 May 2004, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession are binding on the new Member States and apply in those States under the conditions laid down in those Treaties and in the Act of Accession.

47 According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9; Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22; Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, paragraph 31; and Case C-450/06 *Varec* [2008] ECR I-581, paragraph 27).

48 Regulation No 1/2003 contains procedural and substantive rules.

49 As the Advocate General has pointed out in point 43 of her Opinion, the said regulation, like Article 81 EC, contains substantive provisions which govern the assessment by the competition authorities of agreements between undertakings and therefore constitute substantive rules of EU law.

50 Such substantive rules cannot in principle be applied retroactively, irrespective of whether such application might produce favourable or unfavourable effects for the persons concerned. The principle of legal certainty requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained (see, to that effect, Case C-120/08 *Bavaria* [2010] ECR I-13393, paragraphs 40 and 41).

51 According to settled case-law, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them (see Case C-369/09 P *ISD Polska and Others* v *Commission* [2011] ECR I-2011, paragraph 98 and case-law cited).

52 However, in the present case, neither the wording, nor the purpose, nor the general system of Article 81 EC, Article 3 of Regulation No 1/2003 and the Act of Accession contain any clear indications that those two provisions should be applied retroactively.

53 Those findings have not been called into question by the arguments submitted by the applicants in the main proceedings.

54 First, some of the applicants in the main proceedings seek to draw an argument from paragraphs 62 and 63 of the judgment in Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165), in order to maintain that, in the present case, the applicability of Article 3(1) of Regulation No 1/2003 cannot be limited to infringements which were committed after the accession of the Czech Republic to the Union and that the Commission had the power to penalise anti-competitive conduct committed in the territory of that State before that accession.

55 It should be recalled in that respect that, in paragraph 62 of the judgment in *Dow Chemical Ibérica and Others* v *Commission*, the Court of Justice held that, as from the accession of the Kingdom of Spain on 1 January 1986, Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition, 1959-1962, p. 87), was applicable in that new Member State, so that undertakings established in Spain could be the subject of investigations with effect from 1 January 1986. It is clear from paragraph 63 of the same judgment that the Commission's powers of investigation, after that date, with undertakings established in Spain could not be limited solely to conduct subsequent to accession and could therefore concern conduct prior to that date.

56 However, the case of *Dow Chemical Ibérica and Others* v *Commission* did not concern the application of substantive rules but only the application of procedural rules, in that case the application of provisions concerning Commission searches on the premises of undertakings.

57 By contrast, the judgment in *Dow Chemical Ibérica and Others* v *Commission* does not contain any indication as to whether substantive rules of EU competition law are applicable to the anti-competitive effects produced by a cartel in the territory of a new Member State during the period prior to the accession of that State to the Union.

58 Secondly, some applicants in the main proceedings rely on the case-law according to which a new rule applies immediately to the future effects of a situation which arose under the old rules, in order to maintain that, after the accession of a State to the Union, EU law must apply immediately for the purposes of assessing facts which arose before that accession. In paragraph 14 of its judgment in Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, to which those companies referred, the Court held

that, where the act governing the accession of a State, in that case the Republic of Austria, contains no specific conditions with regard to the application of a provision of the EC Treaty, the latter provision must be regarded as being immediately applicable and binding on that Member State from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession.

59 Such an argument cannot be used in favour of a retroactive application of Article 81 EC and Regulation No 1/2003 to conduct prior to the accession of a Member State to the Union.

60 The provisions of Article 81 EC and Article 3(1) of Regulation No 1/2003 are applicable to the possible anti-competitive effects of the cartel at issue in the main proceedings on Czech territory only in so far as it is necessary to impose penalties for those effects inasmuch as they were produced during the period which began on 1 May 2004. As has been found in paragraph 42 of this judgment, according to the order for reference, the case in the main proceedings concerns an infringement of the legislation of the Czech Republic on competition which ended before the accession of that State to the Union. The Úřad pro ochranu hospodářské soutěže merely applied national competition law to the effects prior to accession of the anti-competitive practices which were implemented in Czech territory before that date. It does not prosecute the future effects of conduct prior to the said accession.

61 Thirdly, some applicants in the main proceedings have argued that Article 3(1) of the Law on the Protection of Competition, applicable in the Czech Republic before 1 May 2004, formulated, in substance, the same prohibition on agreements and collusive practices as that laid down in Article 81 EC and that, before the accession of the Czech Republic to the Union, Czech competition law was essentially aligned with EU law on that matter. The Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part (OJ 1994 L 360, p. 2), signed in Luxembourg on 4 October 1993 and which entered into force on 1 February 1995, already contained in Article 64 a provision analogous to Article 81 EC. According to those applicants in the main proceedings, accession of the Czech Republic to the Union did not therefore have the effect of creating in that State, with regard to companies, new rules prohibiting practices which had hitherto been legal. Application of Article 81 EC to the cartel at issue in the main proceedings in its entirety, including to the part thereof implemented before that accession, did not undermine the principle of legal certainty as regards the undertakings concerned.

62 In that regard, it should be noted that, before 1 May 2004, as regards the treatment of the anti-competitive effects produced in Czech territory, the national bodies were the only ones with the power to apply and implement both national law and the said Europe Agreement. Moreover, before that date, Regulation No 1/2003, Article 3(1) of which for the first time imposes an obligation on the various national competition authorities to proceed, under the conditions laid down therein, to the application, in parallel, of Article 81 EC and national competition law, was not applicable in either the existing or the new Member States. Pursuant to Article 45, second paragraph, thereof, Regulation No 1/2003 has applied only since 1 May 2004.

63 Some applicants in the main proceedings have also argued that the principle of the retroactive application of the more lenient penalty justifies the anti-competitive effects of the cartel at issue in the main proceedings produced in Czech territory before 1 May 2004 being assessed in relation to Article 81 EC and Regulation No 1/2003. According to those companies, that principle, recognised by the Court of Justice in criminal matters, should also apply in competition law in proceedings for administrative infringements.

64 In that respect, it should be noted that the principle of the retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States and of the general principles of law, the observance of which the Court ensures (Joined Cases C-387/02,

C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 and 68; Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59; Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraph 61), also appears in the third sentence of Article 49(1) of the Charter.

65 It should however be observed that, by invoking such a principle, the applicants in the main proceedings do not advocate the application of a more lenient penalty for the period before 1 May 2004, but are in reality seeking to obtain a situation in which the Úřad pro ochranu hospodářské soutěže takes no final decision as regards the effects of the cartel in question on Czech territory. Those companies want the principle of the retroactive application of the more lenient penalty to be ultimately interpreted as meaning that that authority does not have the power to penalise that cartel for the period before 1 May 2004 and that the anti-competitive effects produced by the latter during that period are considered as covered by the Commission's decision.

66 Such arguments amount, as the Advocate General has pointed out in point 61 of her Opinion, to challenging the power as such of the Úřad pro ochranu hospodářské soutěže to impose fines. Such a question is linked to the interpretation of Article 11(6) of Regulation No 1/2003 and to the principle of ne bis in idem, which will be examined in the context of the second question, and not to the principle of retroactive application of the more lenient penalty.

67 The answer to the first question is therefore that the provisions of Article 81 EC and Article 3(1) of Regulation No 1/2003 must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they do not apply to a cartel which produced effects, in the territory of a Member State with acceded to the Union on 1 May 2004, during periods prior to that date.

The second question

68 By its second question, which is divided into two parts, the referring court asks in essence whether proceedings for the imposition of a fine which are initiated by the European Commission after 1 May 2004 permanently prevent the national competition authority of a Member State which acceded to the Union on that date from prosecuting under domestic competition law a cartel the effects of which were produced in the territory of that State before the accession of the latter to the Union. The referring court's primary purpose in raising this question is to seek information on the interpretation of Article 11(6) in conjunction with Article 3(1) of Regulation No 1/2003 and on the delimitation of the powers of the national competition authority and the Commission to initiate such a proceeding. Secondly, the referring court inquires of the Court of Justice as to the margin of manoeuvre which that authority has in applying national competition law, in connection with the ne bis in idem principle.

The delimitation of the competition powers of the national authorities and the Union in cartel proceedings

69 The referring court and the applicants in the main proceedings consider that, by virtue of the combined provisions of Articles 11(6) and 3(1) of Regulation No 1/2003, the Úřad pro ochranu hospodářské soutěže definitively lost its power to prosecute the cartel at issue in the main proceedings at the time when the Commission initiated its proceeding for the imposition of a fine. The EFTA Surveillance Authority considers that Article 11(6) of Regulation No 1/2003 should be interpreted as meaning that the national competition authorities lose their power to apply national competition law when the Commission has initiated a proceeding concerning the same facts as those referred to by the proceeding initiated by the said authorities.

70 It is true that Article 11(6) of Regulation No 1/2003, by which the competition authorities of the Member States lose their power to apply Articles 81 EC and 82 EC once the Commission opens a proceeding for the adoption of a decision in application of Chapter III of the said regulation, lays down a procedural rule and is, consequently, applicable from 1 May 2004 onwards in all the Member States, including to cartel proceedings which concern situations arising before that date.

71 It should be recalled at the outset that, in this case, the decision of the Úřad pro ochranu hospodářské soutěže at issue in the main proceedings exclusively concerns the anti-competitive effects produced by the cartel at issue in the main proceedings before 1 May 2004 and thus concerns the period prior to the accession of the Czech Republic to the Union, during which Article 81 EC was not applicable in that State. The provisions of Article 11(6) of Regulation No 1/2003 cannot a priori, for that period, preclude the application of national legal provisions on competition such as those in Article 3 of the Law on the Protection of Competition.

72 It is however necessary to examine the extent of the national competition authorities' loss of jurisdiction provided for in Article 11(6) of Regulation No 1/2003, inasmuch as, according to the applicants in the main proceedings and the EFTA Surveillance Authority, those authorities, from the entry into force of the said regulation on 1 May 2004, not only lose their power to apply Articles 81 and 82 EC but also definitively lose their power to apply national competition law to conduct capable of affecting trade between Member States which is already the subject-matter of a Commission decision.

73 In interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 49).

74 As has been pointed out by the Advocate General in point 77 of her Opinion and by most of the interested parties who have submitted observations to the Court, Article 11(6) of Regulation No 1/2003 is closely connected in terms of its content with Article 3(1) of the same regulation.

75 An examination of those two provisions taken together shows that the national competition authorities can no longer apply not only EU competition law but also part of their domestic competition law once the Commission initiates proceedings for the adoption of a decision under Chapter III of Regulation No 1/2003.

76 The parts of national competition law which remain applicable are mentioned in Article 3(2) and (3) of Regulation No 1/2003, and described in recitals 8 and 9 of that regulation. The final sentence of Article 3(2) and Article 3(3) state that the national competition authorities may implement stricter national laws which prohibit or sanction 'unilateral conduct engaged in by undertakings' and are in any event free to apply national merger control laws and provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 EC and 82 EC.

77 The first sentence of Article 3(1) of Regulation No 1/2003 establishes a close link between the prohibition of cartels set out by Article 81 EC and the corresponding provisions of national competition law. Where the national competition authority applies provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 81 EC, the said first sentence of Article 3(1) requires that Article 81 EC also be applied to it in parallel.

78 In so far as the national competition authority is not authorised, under the first sentence of Article 11(6) of Regulation No 1/2003, to apply Article 81 EC, where the Commission has opened a proceeding for the adoption of a decision in application of Chapter III of that regulation, the said national authority also loses the possibility of applying provisions of national law prohibiting cartels.

79 Regulation No 1/2003 does not, however, indicate that the opening of a proceeding by the Commission permanently and definitively removes the national competition authorities' power to apply national legislation on competition matters.

80 As the Commission argues in its written observations, the power of the national competition authorities is restored once the proceeding initiated by the Commission is concluded.

81 In accordance with settled case-law, EU law and national law on competition apply in parallel (*Wilhelm and Others*, paragraph 3; Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraph 61; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 38). Competition rules at European and at national level view restrictions on competition from different angles (*Wilhelm*, paragraph 3; *Manfredi and Others*, paragraph 38; Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECR I-8301, paragraph 103) and their areas of application do not coincide (Case C-505/07 *Compañía Española de Comercialización de Aceite* [2009] ECR I-8963, paragraph 52).

82 That situation has not been changed by the enactment of Regulation No 1/2003.

83 Such an interpretation is corroborated by the fact that, according to the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, submitted by the Commission (COM(2000) 582 final) (OJ 2000 C 365 E, p. 284), Article 3 of Regulation No 1/2003 should have been drafted in such a way that, where a cartel for the purposes of Article 81 EC or the abuse of a dominant position for the purposes of Article 82 EC is capable of affecting trade between Member States, EU competition law alone is applicable, to the exclusion of national competition laws. Contrary to what the Commission initially proposed, Regulation No 1/2003 permits both the rules of EU law on competition (Articles 81 EC and 82 EC) and national legislation on the matter to continue to be applied to one and the same case.

84 Moreover, by virtue of Article 16(2) of Regulation No 1/2003, where the competition authorities of the Member States rule on agreements, decisions or practices falling within Article 81 EC or 82 EC which already form the subject-matter of a Commission decision, they cannot take decisions which would contradict the decision adopted by the Commission.

85 It is apparent from that provision that the competition authorities of the Member States retain their power to act even if the Commission has itself already taken a decision. The said provision establishes that the national authorities may intervene after the Commission, but prohibits them from contradicting a previous decision of the Commission.

86 By its wording, Article 16(2) of Regulation No 1/2003 appears to envisage only the application of EU competition law by the national competition authorities. However, the same rules must apply a fortiori where the national competition authorities intend to apply national competition law. Since those authorities remain authorised to apply EU law after the Commission has taken a decision, they must a fortiori be permitted to apply their national law, provided they comply with the requirements of EU law, in application of Article 3 of Regulation No 1/2003.

87 The application of Article 16(2) of Regulation No 1/2003 cannot be limited to the case of a previous finding by the Commission as to the non-applicability of Article 81 EC or Article 82 EC in accordance with Article 10 of Regulation No 1/2003. Contrary to the view taken by the referring court and some of the applicants in the main proceedings, the general wording of Article 16(2) of Regulation No 1/2003 and its schematic position within the chapter on '[c]ooperation' indicate that it covers all conceivable decisions that the Commission may have adopted on the basis of Regulation No 1/2003 and is by no means limited to only one particular type of decision.

88 Some of the applicants in the main proceedings also seek to derive an argument from recital 18 of Regulation No 1/2003, according to which, to ensure that cases are dealt with by the most appropriate authorities within the network, a competition authority should be permitted to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. One of the applicants in the main proceedings relies on that recital to argue that the said regulation is based on the principle that each case must be examined by a single authority, namely that which is the best placed for that purpose.

89 However, recital 18 of Regulation No 1/2003 cannot be interpreted as meaning that the EU legislature intended to deprive the national authorities of their power to apply national competition law once the Commission has itself adopted a decision.

90 That recital bears no relation to the national authorities' loss of jurisdiction provided for in Article 11(6) of Regulation No 1/2003. It must be read in combination with Article 13 of that regulation, according to which each national competition authority within the network of competition authorities has the possibility — but is not under any obligation — to suspend the proceeding which it has opened or to reject a complaint which it has received, where another national authority within that network is already dealing with the same case. Article 13 and recital 18 of Regulation No 1/2003 reflect the broad discretion which the national authorities joined together in that network have in order to ensure an optimal attribution of cases within the latter.

91 It follows from the considerations set out in paragraphs 74 to 90 of this judgment that a national competition authority does not, pursuant to Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) of the same regulation, permanently and definitively lose its power to apply national competition law where the Commission opens a proceeding for the adoption of a decision under Chapter III of Regulation No 1/2003. A fortiori, in a situation such as that at issue in the main proceedings, in which the competition authority of a Member State penalises, by the application of national competition law, the anti-competitive effects produced by a cartel in the territory of the said Member State during periods prior to the accession of the latter to the Union, the combined provisions of Articles 11(6) and 3(1) of Regulation No 1/2003 cannot, in respect of those periods, prevent the application of national provisions of competition law.

92 Consequently, the answer to the first part of the second question is that the opening by the Commission of a proceeding against a cartel under Chapter III of Regulation No 1/2003 does not, pursuant to Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) of the same regulation, cause the competition authority of the Member State concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the Union.

The ne bis in idem principle

93 The second part of the second question concerns the issue whether, in a situation such as that at issue in the main proceedings, the ne bis in idem principle precludes the application of national competition law by the national competition authority.

94 The ne bis in idem principle must be observed in proceedings for the imposition of fines under competition law (see, to that effect, 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, paragraph 59; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 338 to 340; Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 50). That principle thus precludes an undertaking being found liable or proceedings being

brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged (*Limburgse Vinyl Maatschappij* v *Commission*, paragraph 59).

95 It is of little importance that the decision whereby the said authority imposed fines relates to a period prior to the accession of the Czech Republic to the Union. The temporal applicability of the ne bis in idem principle in the context of EU law depends not on the date on which the facts being prosecuted were committed, but, in a situation such as that at issue in the main proceedings, falling under competition law, on that on which the proceeding for the imposition of a penalty was opened. On 2 August 2006, when the Úřad pro ochranu hospodářské soutěže opened the proceeding at issue in the main proceedings, the Czech Republic was already a Member State of the Union, with the result that that authority was required to comply with that principle.

96 It must be held that, in a situation such as that at issue in the main proceedings, the ne bis in idem principle does not preclude the application of national competition law by the national competition authority.

97 The Court has held, in competition law cases, that the application of this principle is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same (*Aalborg Portland and Others* v *Commission*, paragraph 338).

98 In the case at issue in the main proceedings, it must be noted that, in any event, one of the conditions thus laid down, namely identity of the facts, is lacking.

99 Whether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must be examined with reference to the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect.

100 In this case, the referring court and the applicants in the main proceedings consider that the territory of the Czech Republic is covered by the Commission's decision in relation to both the period before and the period after 1 May 2004. They cite as evidence for this the fact that the Commission speaks of a worldwide cartel and did not expressly exclude the Czech Republic from the scope of its decision.

101 In that regard, it should be noted, first, that the Commission's decision refers specifically, in many of its passages, to the consequences of the cartel at issue in the main proceedings within the European Community and the EEA, referring expressly to the 'Member States of the time' and the States 'which were contracting parties' to the EEA Agreement. Next, as has been pointed out in paragraph 41 of this judgment, that decision does not penalise the possible anti-competitive effects produced by that cartel in the territory of the Czech Republic during the period prior to the accession of that State to the Union. Finally, it is apparent from the methods of calculation of the fines that, in its decision, the Commission did not take account of the States which acceded to the Union on 1 May 2004. According to point 478 of the grounds of the Commission's decision, the latter used as the basis for calculation of the fines the turnover figures achieved by the members of the said cartel in the EEA during 2003.

102 It must therefore be concluded that the Commission's decision does not cover any anti-competitive consequences of the said cartel in the territory of the Czech Republic in the period prior to 1 May 2004, whereas, according to the information supplied by the national court, the decision of the Úřad pro ochranu hospodářské soutěže imposed fines only in relation to that territory and that period.

103 Having regard to the above, the answer to the second part of the second question is that the ne bis in idem principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive

effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted were not designed to penalise the said effects.

Costs

104 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The provisions of Article 81 EC and Article 3(1) of 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 must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they do not apply to a cartel which produced effects, in the territory of a Member State which acceded to the Union on 1 May 2004, during periods prior to that date.**

2. **The opening by the European Commission of a proceeding against a cartel under Chapter III of Regulation No 1/2003 does not, pursuant to Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) of the same regulation, cause the competition authority of the Member State concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the European Union.**

   The ne bis in idem principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted were not designed to penalise the said effects.

[Signatures]