JUDGMENT OF THE COURT (First Chamber)

3 September 2009 *

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In Case C-534/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 26 November 2007,

William Prym GmbH & Co. KG,

Prym Consumer GmbH & Co. KG,

established in Stolberg (Germany), represented by H.-J. Niemeyer, C. Herrmann and M. Röhrig, Rechtsanwälte,

appellants,

the other party to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre and K. Mojzesowicz, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet and J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 5 March 2009,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2009,

gives the following

Judgment

1 By their appeal, William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG seek to have set aside, in so far as it affects them, the judgment of the Court of First Instance of the European Communities of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission* ('the judgment under appeal') by which the Court of First Instance annulled, in part, Commission Decision C(2004) 4221 final of 26 October 2004 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-1/38.338 — PO/Needles) ('the decision at issue').

I — Legal context

2 Article 23(2) and (3) 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) states:

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe [Articles] 81 or … 82 of the Treaty; …

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

3 Article 31 of Regulation No 1/2003 provides:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

4 Section 1A of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') is worded as follows:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

— *minor infringements:*

These might be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market.

Likely fines: [EUR] 1 000 to [EUR] 1 million.

— *serious infringements:*

These will more often than not be horizontal or vertical restrictions of the same type as above, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market. …

Likely fines: [EUR] 1 million to [EUR] 20 million.

— *very serious infringements*:

These will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly …

Likely fines: above [EUR] 20 million.

…

It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

…'

II — The facts of the dispute and the decision at issue

5 The background to the dispute, as set out in the judgment under appeal, may be summarised as follows.

6 The appellants are German companies which claim to be among the leading European brands of hard haberdashery and sewing products.

7 On 7 and 8 November 2001, the Commission carried out investigations pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) at the premises of several Community haberdashery producers and distributors, including the appellants and two British undertakings together with their respective subsidiaries, namely (i) Coats Holdings Ltd and J & P Coats Ltd (together: 'Coats') and (ii) Entaco Group Ltd and Entaco Ltd (together: 'Entaco').

8 On 15 March 2004, the Commission sent a statement of objections to the appellants, Entaco and Coats.

9 On 26 October 2004, the Commission adopted the decision at issue.

10 In Article 1 of the decision at issue, the Commission found that the appellants, Coats and Entaco had participated in concerted practices and had entered into a series of written, formally bilateral, agreements between 10 September 1994 and 31 December 1999, amounting in practice to a tripartite agreement under which those undertakings shared or contributed to sharing product markets by segmenting the European market for hard haberdashery products, and geographic markets by segmenting the European market for needles.

11 In Article 2 of the decision at issue, the Commission imposed a fine of EUR 30 million on the appellants.

12 The Commission stated in the decision at issue that it had set the fine on the basis of the gravity and duration of the infringement. Thus, in respect of the gravity of the infringement, the Commission took account of the nature of the infringement, its actual impact on the market and the size of the relevant geographic market. On the basis of those factors, it concluded that the undertakings which participated in the cartel at issue had committed a 'very serious' infringement, and accordingly set the starting amount of the fine at EUR 20 million for the appellants.

13 As regards the duration of the infringement, the Commission found that it had extended over a period of five years and three months. Therefore, it increased the starting amount of the fine by 50% and accordingly set the basic amount of the fine at EUR 30 million for the appellants.

14 Furthermore, the Commission denied the appellants the benefit of attenuating circumstances, noting in particular that the early termination of the infringing agreement was not due to an intervention by the Commission and that it had already taken that early termination into account in its determination of the duration of the infringement.

III — The judgment under appeal

15 On 28 January 2005, the appellants brought an action before the Court of First Instance, principally, for annulment of the decision at issue in so far as it relates to them, or, in the alternative, for annulment or reduction of the fine imposed on them.

16 By the judgment under appeal, the Court granted the application in part in so far as it sought a reduction in the fine on the ground that the appellants had wrongly been refused the benefit of the provisions of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4). Exercising its unlimited jurisdiction under Article 229 EC, the Court reduced the amount of the fine imposed on the appellants to EUR 27 million. It dismissed the remainder of the application.

IV — Forms of order sought by the parties before the Court of Justice

17 The appellants claim that the Court should:

— set aside the judgment under appeal in so far as it affects them;

— annul the decision at issue in so far as it relates to them;

— in the alternative, annul or reduce the fine imposed on them by Article 2 of that decision;

— in the further alternative, refer the case back to the Court of First Instance for judgment; and

— order the Commission to pay the costs of the whole proceedings.

18 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellants to pay the costs of the appeal.

V — The appeal

19 The appellants put forward five grounds of appeal in support of their appeal, each of which will be considered in turn.

A — *First ground of appeal, alleging infringement of the rights of the defence and of the obligation to state reasons in respect of the division of the administrative procedure*

1. The judgment under appeal

20 In response to the appellants' arguments that the division of what was initially a single proceeding opened in the 'Haberdashery' case into two separate proceedings — the 'Haberdashery: Needles' case ('the needles case') and the 'Haberdashery: Fasteners' case ('the fasteners case') — had constituted an infringement of the rights of the defence, the Court of First Instance held, at paragraph 61 of the judgment under appeal:

'… it must be held that the statement of objections which was sent to the [appellants] on 15 March 2004 is unambiguously entitled "Statement of Objections relating to a proceeding — PO/Hard Haberdashery: Needles". The appellants therefore knew, by that date at the latest, that the Commission had opened a separate proceeding relating to the needles market. They were thus in a position to raise a defence against the separation of the proceedings in their reply to the statement of objections.'

2. Arguments of the parties

21 The appellants submit that the Court of First Instance erred in law in holding, at paragraph 61 of the judgment under appeal, that they knew, at least with effect from the statement of objections, that the Commission was embarking on two separate proceedings, and that they were therefore in a position to raise a defence in relation to that division of the administrative procedure. According to the appellants, the statement of objections merely showed that the Commission considered that their conduct in the needles industry amounted to a separate infringement as against their conduct in the fasteners industry. However, only a sufficiently detailed presentation of

the facts underlying the Commission's decision to split the proceeding would have enabled them to assess the legality of that step and, therefore, to defend their interests effectively.

22 The appellants further submit that, by failing to specify the reasons for dividing the proceeding, the Commission committed a breach of its obligation to state the reasons for its decision.

23 The Commission contends that the appellants confined themselves before the Court of First Instance to maintaining that they had been denied the opportunity to point out to the Commission that the fines which could be imposed on them in the two cases could not — on account of the connection between them — exceed the cap laid down in Article 23(2) of Regulation No 1/2003 of 10% of their total turnover in the European Union.

24 Consequently, according to the Commission, which denies that there was a failure to state reasons in that regard, the first ground of appeal must be regarded as being new and, accordingly, must be dismissed as inadmissible or, in the alternative, as unfounded in so far as it alleges an infringement of the obligation to state reasons.

3. Findings of the Court

25 There is no need to consider the admissibility of the first ground of appeal, since it must be held that it cannot succeed.

26 It is true that observance of the rights of the defence in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Court ensures (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, paragraphs 167 to 171; Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 92; and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 35).

27 As regards proceedings under Article 81 EC, it is nevertheless appropriate to draw a distinction between the two phases of the administrative procedure, namely the investigation phase preceding the statement of objections and the phase corresponding to the remainder of the administrative procedure. Each of these successive stages has its own internal logic; the first stage must enable the Commission to adopt a position on the course which the procedure is to follow, and the second must enable the Commission to reach a final decision on the infringement concerned (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 181 to 183, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 38).

28 The assessments made in the statement of objections provided for under Community rules are intended to define the scope of the administrative procedure vis-à-vis the undertakings in respect of which it was initiated (see, in particular, Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 70). To that end, the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. It has consistently been held that that may be done summarily, since the statement of objections is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, in particular, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 14, and 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, paragraph 67).

29 In this instance, the Court of First Instance found at paragraph 61 of the judgment under appeal that the statement of objections sent to the appellants was entitled 'Statement of Objections relating to a proceeding — PO/Hard Haberdashery: Needles'. The appellants themselves admitted in their appeal that that statement showed that the

Commission considered that their conduct in the needles industry amounted to a separate infringement as against their conduct in the fasteners industry.

30 The appellants do not deny, therefore, that the statement of objections in the present case was worded sufficiently clearly to enable them properly to identify the conduct complained of by the Commission and the course which it intended the procedure to take.

31 The appellants' only argument in support of their assertion that they were unable to exercise effectively their rights of defence at that stage is based on the Commission's alleged failure to give reasons in the statement of objections for its decision to divide the proceeding.

32 That argument cannot be accepted.

33 It amounts, effectively, to a demand that the Commission should detail not only the basic matters of fact and of law which it finds, at that stage of the administrative procedure, amount to an infringement of Community competition law, but also that it should — at least summarily — state why, within that same procedure, it does not propose to act on the basis of certain matters which it had initially investigated or intended to investigate. The Commission's obligation to state reasons at the stage of sending the statement of objections would thus be extended to cover matters which, by definition, are not essential to the conduct of the procedure which it proposes to pursue. Such an obligation to state reasons would exceed the requirements established in the case-law referred to at paragraph 28 of this judgment.

34 It follows from this that the first ground of appeal must be dismissed as, in any event, unfounded.

B — *Second ground of appeal, relating to the prohibition of the denial of justice*

1. The judgment under appeal

35 At paragraph 64 of the judgment under appeal, the Court of First Instance observed that the Commission is entitled to separate and to join proceedings for objective reasons. In response to the appellants' assertions that such reasons did not exist in the present case, the Court of First Instance observed at paragraph 65 of its judgment that the situation was not entirely comparable to a case in which it had allowed such a separation because of the separate infringements in that case. However, as regards the appellants' claims that the conduct of which they were accused constituted, in reality, a single infringement, the Court took the view, at paragraph 66 of its judgment, that these could not be verified until after the adoption of the decision in the fasteners case.

2. Arguments of the parties

36 The appellants claim that the Court of First Instance erred in law in refusing to consider the legality of the division of the proceeding since it recognised that the Commission can introduce such a separation only in the case of separate infringements and, moreover, it had evidence at its disposal, in the form of the statement of objections of 16 September 2004 in the needles case, and that of 8 March 2006 in the fasteners case, from which it may be inferred that the Commission arbitrarily split a single infringement. The Court was wrong to find, at paragraph 66 of the judgment under appeal, that, in the absence of a decision by the Commission in the fasteners case when

the Court began its deliberations in the needles case, assumptions as to the outcome of the fasteners case were of a speculative nature.

37 The Commission proposes that this ground of appeal be dismissed. In its view, the Court was entitled to hold that the appellants' claims could not be examined before the adoption of a decision in the fasteners case.

3. Findings of the Court

38 At paragraphs 64 to 66 of the judgment under appeal, the Court of First Instance observed that, according to its own case-law, proceedings relating to an infringement of Community competition law may be split and may lead to the adoption of several decisions imposing separate fines provided that there are separate infringements.

39 The appellants do not take issue with that analysis, but claim that the Court did not ascertain whether or not, in this case, the offending conduct in the decision at issue relating to the needles case, and that identified in the statement of objections of 8 March 2006 relating to the fasteners case, amounted to separate infringements.

40 As has been observed at paragraph 28 of this judgment, the statement of objections is merely a preparatory document containing assessments of fact and of law which are purely provisional in nature. The subsequent decision does not necessarily need to be a copy of the statement of objections, since the Commission must take into account the factors emerging from the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains (see, in particular, *Musique Diffusion française and Others* v *Commission*, paragraph 14, and *Aalborg Portland and Others* v *Commission*, paragraph 67).

41 Accordingly, the Court did not err in law in holding, at paragraph 66 of the judgment under appeal, that, until a decision had been adopted in the fasteners case, all assumptions as to whether or not there were separate infringements were of a speculative nature.

42 The appellants cannot claim that justice has been denied since, as the Court's reasoning shows, it remains open to them, once the decision in the fasteners case has been adopted, to argue in the context of the review of the legality of that decision that there was a single infringement. Moreover, as the appellants indicated at the hearing, they have brought an action before the Court of First Instance pursuant to Article 230 EC for annulment of the Commission's decision in the fasteners case.

43 The second ground of appeal must therefore be dismissed as unfounded.

C — *Third ground of appeal, alleging failure by the Court of First Instance to take adequate account of the finding that the Commission infringed the obligation to state reasons in determining the gravity of the infringement*

44 This is in two parts, alleging that the Court of First Instance failed to take adequate account of the finding of an infringement by the Commission of the obligation to state reasons with respect to (i) the size of the relevant market and (ii) the actual impact of the infringement on the market.

1. First part of the third ground of appeal, alleging that the Court of First Instance failed to take adequate account of the finding that the Commission had infringed the obligation to state reasons with respect to the size of the relevant market

(a) The judgment under appeal

45 The Court of First Instance pointed out at paragraph 87 of the judgment under appeal that, in view of the anti-competitive object of the agreements, the Commission was under no obligation in this case to define the market for the purposes of applying Article 81(1) EC. However, at paragraph 88 of that judgment, the Court stated that, since the operative part of the decision at issue imposed a fine under Regulation No 1/2003, the findings of fact relating to the market concerned were relevant, even though their inadequacy was not such as to give rise to the total annulment of that decision.

46 In that regard, the Court of First Instance held, at paragraph 89 of the judgment under appeal:

'According to the Guidelines, in assessing the gravity of the infringement "account must be taken" not only of its nature, but also of "its actual impact on the market, where this can be measured" (first paragraph of Section 1A). In order to assess the actual impact of the infringement on the market, it is necessary to define that market. The Guidelines also provide that it is "necessary", in order to determine the gravity of an infringement, to "take account of the effective economic capacity of offenders to cause significant damage to other operators" (fourth paragraph of Section 1A), which entails the need to determine the size of the markets and the market shares of the undertakings concerned.'

47 Having taken the view, at paragraph 95 of the judgment under appeal, that there was no failure to state reasons with respect to the definition of the relevant product markets, the Court of First Instance examined the Commission's findings relating to the size of the market in the decision at issue.

48 At paragraph 98 of the judgment under appeal, the Court of First Instance held that the Commission's findings on the dimensions of the three product markets which it had identified remained incomplete and did not make it possible to ascertain the size of all the relevant markets. It concluded from this, at paragraph 99 of the judgment, that the decision at issue was 'vitiated by an inadequate statement of reasons, which could result in its partial annulment unless the Commission's findings with regard to the effective economic capacity of the undertakings concerned to cause significant damage are based on grounds other than the [decision at issue]'.

49 At paragraphs 100 and 101 of the judgment under appeal, the Court of First Instance noted that the appellants have never disputed the Commission's findings in the decision at issue which support the conclusion that they did have such capacity, namely, inter alia, their position as European market leaders in the manufacture of needles, a market in which competition was very limited.

(b) Arguments of the parties

50 According to the appellants, the Court of First Instance infringed Article 253 EC by failing to annul the decision at issue even though it found that there was an infringement of the obligation to state reasons with respect to the size of the relevant market. It therefore failed to have regard to the fact that that defect in the decision had an impact on the determination of the gravity of the infringement, as the latter must be determined by cumulative reference to a number of criteria, and the Commission itself stated in the decision at issue that it took account of the size of the relevant market and of the economic capacity of the offenders to cause significant damage.

51 The Court of First Instance also erred in law in finding that the Commission had adequately described the actual impact of the infringement on the market, inasmuch as it referred to the leading position of the appellants. The Court thus failed to take into account the difference between determination of the effective economic capacity of an undertaking to cause significant damage and determination of the actual impact on the market.

52 The appellants consider that there is, therefore, a contradiction in reasoning as between paragraph 89 of the judgment under appeal, on the one hand, and paragraphs 99 and 100, on the other.

53 The Commission's response is that, on a correct reading of the judgment under appeal, the Court of First Instance endorsed the obligation to determine the size of the relevant market only in the context of the capacity of the undertakings to cause significant damage. However, if, as is the case here, that capacity can be established by other means, the Commission is relieved of the obligation to determine the size of the market. Furthermore, it is clear from the case-law of the Court of First Instance that the method for setting fines described in the Guidelines does not in any way require account to be taken of the size of the relevant market for the purposes of determining the starting amount of the fine.

(c) Findings of the Court

54 It has consistently been held that the gravity of infringements of Community competition law must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (see, in particular, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 465; 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 241; and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 129).

55 In consequence, contrary to the appellants' assertion, the size of the relevant market is not as a rule a factor which must be taken into account, but just one among a number of other factors to be taken into account in evaluating the gravity of the infringement and setting the amount of the fine (see, to that effect, *Dalmine* v *Commission*, paragraph 132).

56 At paragraph 89 of the judgment under appeal, the Court of First Instance nevertheless pointed out that, according to the fourth paragraph of Section 1A of the Guidelines, it is necessary, in assessing the gravity of the infringement, to take account of the effective economic capacity of undertakings to cause significant damage to other operators. It added that this entails the need to determine the size of the markets.

57 The appellants do not take issue with the Court's analysis, but submit that the Court went on to contradict itself by admitting, at paragraph 101 of the judgment under appeal, that the reference to the appellants' leading position in the relevant market may constitute an adequate description of the actual impact of the infringement on that market.

58 It must be held in that regard that the appellants' reading of paragraph 101 of the judgment under appeal is incorrect. It is clear from that paragraph that the reference to the appellants' leading position in the market is considered a relevant criterion for assessing their effective economic capacity to cause significant damage to other operators and not, as the appellants submit, for assessing the actual impact of the infringement on the market.

59 Nevertheless, the Court of First Instance contradicted itself by maintaining, at paragraph 89 of the judgment under appeal, that an assessment of an undertaking's economic capacity to cause significant damage necessarily requires the size of the market to be determined while, on the other hand, concluding at paragraphs 99 to 101 of that judgment that the inadequacy of the reasoning which it identified in that regard could be made good by other findings such as, in this case, the appellants' position as market leaders.

60 However, that contradiction cannot lead to the finding, as sought by the appellants, that the Court of First Instance failed to take adequate account of the infringement by the Commission of its obligation to state reasons with respect to the size of the relevant market.

61 In fact, contrary to the Court's finding at paragraph 89 of the judgment under appeal, the account to be taken, in accordance with the fourth paragraph of Section 1A of the Guidelines, of the effective economic capacity of offenders to cause significant damage to other operators does not entail the need to determine the size of the market.

62 Admittedly, the Court of Justice has held that, for the purposes of setting the amount of the fine, the market shares held by an undertaking are relevant in order to determine what influence it may exert on the market (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139).

63 However, for the reasons set out by the Advocate General at points 98 to 101 of his Opinion, it cannot be inferred from the case-law mentioned in the previous paragraph that, in order to assess the influence of an undertaking on the market or, to follow the wording used in the Guidelines, its effective economic capacity to cause significant damage to other operators, that capacity must be measured by requiring the Commission first to define the market and to assess its size, taking into account the volume of that undertaking's turnover.

64 Furthermore, in the case of an infringement such as that at issue in this case, which consists of market sharing, an interpretation of *Baustahlgewebe* v *Commission* as formalistic as that contended for by the appellants would result in an obligation being imposed on the Commission in respect of the method of calculating fines, and it has consistently been held that the Commission is not subject to such an obligation for the purposes of applying Article 81 EC where the infringement in question has an anti-competitive object (see, in particular, *Aalborg Portland and Others* v *Commission*, paragraph 261, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 125).

65 The Court of First Instance was therefore entitled to accept, at paragraphs 99 to 101 of the judgment under appeal, that the appellants' economic capacity to cause significant

damage to other operators could be established by means of findings such as their leading position in the relevant market.

66 It follows from this that, despite the contradictory grounds in the Court's reasoning, correctly identified by the appellants, the first part of the third ground of appeal must be dismissed as inoperative.

2. Second part of the third ground of appeal, alleging that the Court of First Instance failed to take adequate account of the finding that the Commission infringed the obligation to state reasons with respect to the actual impact of the infringement on the market

(a) The judgment under appeal

67 At paragraphs 109 to 112 of the judgment under appeal, the Court held as follows:

'109 … the requirement to take account of the actual impact on the market arises only "where this can be measured". However, at no time during the procedure did the Commission submit that that impact could not be measured in the present case, and it confined itself in its defence on that issue to observing that the sharing of product and geographic markets referred to in the agreements concluded between the appellants and Entaco was implemented and "therefore necessarily had a real effect on the conditions of competition on Community markets".

110 That conclusion is not convincing, however. …

111 In recitals 318 to 320 to the [decision at issue], the Commission … relied exclusively on a cause-and-effect relationship between the implementation of the cartel and its actual impact on the market, which is not, however, sufficient for setting the fine.

112 Consequently, the Commission has not adequately fulfilled its obligation to state reasons in that regard. The legal consequences to be drawn from this will be examined at paragraph 190 et seq. below.'

68 As regards the possible legal consequences of the failure to have regard to the obligation to state reasons referred to at paragraph 112 of the judgment under appeal, the Court of First Instance held at paragraphs 188 and 189 of its judgment that, in the present case, the infringement, the object of which was a sharing of product and geographic markets, was a patent infringement of competition law and was, by its nature, particularly serious. Therefore, according to the Court, having regard to the definition provided in the Guidelines, the classification of the infringement in the decision at issue as 'very serious' was warranted.

69 At paragraph 190 of the judgment under appeal, the Court added:

'As regards the assessment of the actual impact of the infringement on the market, it has already been held that, in the [decision at issue], the Commission failed to fulfil its obligation to state reasons … This failure to state reasons cannot, however, in this case, lead to the cancellation or reduction of the amount of the fine imposed, given that the classification of the infringement as "very serious" was well founded and that the Commission chose the minimum starting amount provided for by the Guidelines for such an infringement (or, more specifically, the maximum amount for a "serious" infringement), namely EUR 20 million. The Commission rightly points out that the fact that the minimum amount was chosen is sufficient, in this case, to take account of the reduced impact of the infringement during the period of the infringement.'

(b) Arguments of the parties

70 According to the appellants, the Court of First Instance infringed Article 253 EC by refusing to annul the decision at issue even though it had found an infringement of the obligation to state reasons with respect to the actual impact of the infringement on the market. By ruling, at paragraph 190 of the judgment under appeal, that that failure to state reasons should not, in this case, lead to the cancellation or reduction of the amount of the fine, given that the classification of the infringement as 'very serious' was well founded, the Court confused issues relating to the substantive lawfulness of that decision with issues relating to the legal consequences of a breach of the formal obligation to state reasons.

71 The Commission rejects the appellants' line of argument. It considers, however, that the Court of First Instance erred in law at paragraphs 109 to 112 of the judgment under appeal. First, the Court required the Commission to demonstrate that there was no measurable actual impact of the infringement on the market, but did not itself find that that impact could be measured. Second, the Court contradicted settled case-law to the effect that the implementation of an agreement having an anti-competitive object is sufficient to preclude the possibility that the agreement had no effect on the market. The Commission therefore requests the Court of Justice to amend the grounds of the judgment under appeal by setting aside the findings at paragraphs 109 to 112 in relation to the evidence and to the measurability of the impact of the infringement on the market.

(c) Findings of the Court

(i) The Commission's request for new grounds to be substituted

72 According to settled case-law, if the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to

be well founded on other legal grounds, the appeal must be dismissed (see, in particular, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 187).

73 Even on the assumption that a request for new grounds to be substituted can be granted in the circumstances outlined by the Commission, that request must be refused in this instance.

74 As regards, in the first place, the question whether or not the Commission is obliged, for the purposes of setting the fine, to establish that there has been an actual impact of the infringement on the market, it must be borne in mind that, while such impact is a factor to be taken into account in assessing the gravity of the infringement, it is one of a number of criteria, such as the nature of the infringement and the size of the geographic market. Likewise, it is apparent from the first paragraph of Section 1A of the Guidelines that that impact is to be taken into account only where this can be measured (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraph 125).

75 As regards horizontal price or market sharing agreements, it is also apparent from the Guidelines that the Commission may classify these agreements as very serious infringements solely on account of their nature, without being required to demonstrate an actual impact of the infringement on the market. In that case, the actual impact of the infringement is only one among a number of factors which, if it can be measured, may allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million.

76 In the present case, the object of the cartel in question was market sharing; the Commission could therefore classify it as a very serious infringement without being required to demonstrate the actual impact of that cartel on the market.

77 Nevertheless, the Court of First Instance found, at paragraph 111 of the judgment under appeal, that, in the part of the decision at issue relating to the calculation of the fine, the Commission devoted three paragraphs to consideration of that criterion, under the heading 'Actual impact of the infringement'.

78 Accordingly, the Court of First Instance — which noted at paragraph 109 of the judgment under appeal that the Commission had at no time during the procedure submitted that the actual impact of the infringement could not be measured — was entitled, without erring in law, to take the view, first, that the Commission considered that the impact described in the decision at issue could be measured and, second, that it intended to take account of that criterion for the purposes of calculating the amount of the fine.

79 As regards, in the second place, the evidence which the Commission must adduce in such circumstances in order to establish an actual impact of the infringement on the market, the Commission's contention that it is sufficient for it to refer to the implementation of the cartel must be rejected.

80 Such a reference, without any additional evidence, amounts in effect to a presumption that the implementation of the cartel has created an effect on the market.

81 However, while it is not necessary for the infringement to have an actual impact in order for it to be classified as very serious where an agreement has an anti-competitive object, the additional consideration of that factor allows the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million fixed by the Guidelines, without any cap other than the maximum limit of 10% of the total turnover of the undertaking concerned in the preceding business year laid down, in respect of the total amount of the fine, in Article 23(2) of Regulation No 1/2003.

82 In the light of those consequences, where the Commission considers it appropriate for the purposes of calculating the fine to take that optional element — the actual impact of the infringement on the market — into account, it cannot just put forward a mere presumption but, as the Advocate General stated at point 140 of his Opinion, must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market.

83 Consequently, the Court of First Instance did not err in law in finding, in essence, at paragraphs 110 and 111 of the judgment under appeal, that the Commission could not, without further explanation, simply infer from the fact that the cartel had been implemented that it had had an actual effect on the market, and base its decision exclusively on a cause-and-effect relationship between the implementation of the cartel and its actual impact on the market.

84 It follows from all of the foregoing considerations that the Commission's request for new grounds to be substituted must, in any event, be refused.

(ii) The appellants' arguments

85 The Court cannot accept the appellants' arguments to the effect that the Court of First Instance erred in law in so far as, having found an infringement of the obligation to state reasons with respect to the actual impact of the infringement on the market, it declined to annul the decision at issue.

86 As regards the review carried out by the Community judicature in respect of Commission decisions on competition matters, it should be borne in mind that, more than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the Court of First Instance by Article 31 of Regulation No 1/2003 in accordance with Article 229 EC authorises that court to vary the contested measure,

even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 692).

87 In its review of legality, the Court of First Instance held, first of all, at paragraph 112 of the judgment under appeal, that there was an inadequate statement of reasons in respect of one of the criteria used by the Commission to determine the gravity of an infringement of Article 81 EC for the purposes of calculating the fine, namely the criterion of the actual impact of the infringement on the market. Given the number of criteria which, as observed at paragraph 54 of the present judgment, the Commission may use to determine the gravity of an infringement of competition rules for the purposes of setting the fine, the Court of First Instance did not err in law in holding that its finding in relation to just one of those criteria did not automatically entail the annulment — even in part — of the decision at issue.

88 Second, in the exercise of its unlimited jurisdiction, the Court of First Instance took into account, at paragraph 190 of the judgment under appeal, the defect which it had identified, and considered whether it had any effect on the amount of the fine and whether it was necessary, accordingly, to adjust the amount. In the course of that examination, the Court held that it was not appropriate to amend the starting amount of the fine set in the decision at issue.

89 Therefore, both in terms of the review of legality and the exercise of its unlimited jurisdiction, the Court of First Instance properly assessed the legal consequences to be drawn from the infringement by the Commission of its obligation to state reasons with respect to the actual impact of the infringement on the market.

90 The second part of the third ground of appeal must therefore be dismissed.

91 It follows from all of the foregoing considerations that the third ground of appeal must be dismissed in its entirety as unfounded.

D — *Fourth ground of appeal, alleging infringement of the Guidelines and an incorrect assessment of the gravity of the infringement*

92 This is also in two parts: the first alleges a failure to take into account the incorrect determination of the actual impact of the infringement on the market, and the second alleges a failure to take into account as an attenuating circumstance the fact that the appellants voluntarily terminated the infringement.

1. First part of the fourth ground of appeal, alleging a failure to take into account the incorrect determination of the actual impact of the infringement on the market

(a) The judgment under appeal

93 This part relates, in particular, to paragraphs 188 to 190 of the judgment under appeal, which are referred to at paragraphs 68 and 69 of the present judgment.

(b) Arguments of the parties

94 The appellants submit that, at paragraphs 188 to 190 of the judgment under appeal, the Court of First Instance erred in law in two respects. First, it took the view that the failure to state reasons concerning the actual impact of the infringement was legally irrelevant since, in light of the form of that infringement in the abstract, it could be classified as 'very serious'. That failure to take into account the specific circumstances of the infringement is contrary to the Guidelines, to the case-law of the Court of Justice and to the Commission's practice in previous decisions. Second, the Court of First Instance was wrong to consider that the starting amount of the fine provided for in the Guidelines for a 'very serious' infringement constitutes a minimum amount from which it is not permitted to deviate. That approach is contrary to the Commission's practice in previous decisions and constitutes an infringement of the principle of proportionality.

95 The Commission refers in part to the arguments it put forward under the third ground of appeal in relation to the actual impact of the infringement. It adds that the Court of First Instance did not regard the starting amount of the fine provided for in the Guidelines as being an insuperable threshold, but examined its proportionality at paragraphs 206 and 223 of the judgment under appeal. As regards the appellants' arguments in relation to the Commission's practice in previous decisions, the examples they cite are irrelevant, new or inaccurate.

(c) Findings of the Court

96 As regards the first error of law invoked by the appellants, alleging that the Court of First Instance classified the infringement in the abstract without regard to the erroneous determination of its actual impact on the market, it must be noted that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that

infringements of that type pose to the objectives of the European Community (see *Musique Diffusion française and Others* v *Commission*, paragraph 129, and *Dansk Rørindustri and Others* v *Commission*, paragraph 242). It follows from this that the effect of an anti-competitive practice is not, in itself, a conclusive criterion for assessing the proper amount of a fine. In particular, factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as market sharing, a factor which is present in this case (see Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 118).

97 With regard to the second error of law, whereby the Court of First Instance wrongly took the view that the starting amount of the fine provided for in the Guidelines for a 'very serious' infringement constitutes a minimum threshold from which it is not permitted to deviate, it must be noted that, at paragraph 190 of the judgment under appeal, the Court of First Instance merely considered whether the defect which it had identified in respect of the assessment of the actual impact of the infringement had had an effect on the calculation of the amount of the fine. In the course of that examination, it found, first of all, that the Commission had not increased the starting amount of the fine on account of the impact on the market. Second, in the exercise of its unlimited jurisdiction, it took the view that the starting amount set in the decision at issue could be justified by the classification of the infringement as 'very serious'. The fact that the Court of First Instance did not judge it appropriate, in the circumstances of the case, to adjust the starting amount set by the Commission does not mean that it regarded the amount of EUR 20 million as a minimum threshold below which it is not possible to descend.

98 As regards the appellants' argument concerning the Commission's practice in previous decisions, suffice it to note that this does not serve as a legal framework for setting fines in competition matters, since the Commission enjoys a wide discretion in that area and, when exercising that discretion, is not bound by its past assessments (see, in particular, *Dansk Rørindustri and Others* v *Commission*, paragraphs 209 to 213, and *Archer Daniels Midland* v *Commission*, paragraph 82).

99 It follows from this that the first part of the fourth ground of appeal must be dismissed.

2. Second part of the fourth ground of appeal, alleging a failure to take into account as an attenuating circumstance the fact that the appellants voluntarily terminated the infringement

(a) The judgment under appeal

100 At paragraph 211 of the judgment under appeal, the Court of First Instance, referring to settled case-law, held that, in the context of the calculation of a fine imposed for an infringement of the competition rules, an attenuating circumstance may be taken into account only where the undertakings at issue were prompted by the Commission's interventions to terminate their anti-competitive conduct.

101 Having found, at paragraph 212 of the judgment under appeal, that it is clear from the decision at issue that the early termination of the infringing agreement was due neither to an intervention by the Commission nor to a decision by the appellants to end the infringement, but to a decision based on economic strategy, the Court of First Instance held, at paragraph 213 of the judgment, that the early termination of the agreement had already been taken into account when assessing the duration of the infringement and could not therefore constitute an attenuating circumstance.

(b) Arguments of the parties

102 According to the appellants, the Court of First Instance erred in law at paragraphs 211 and 213 of the judgment under appeal in so far as its analysis does not take into account the voluntary nature of the termination of the infringement. Abandonment of the offending conduct, on one's own initiative, should constitute an attenuating circumstance which has not been taken into account in the assessment of the duration of the infringement.

103 The Commission contends that the analysis of the Court of First Instance is compatible with settled case-law on the point, which should not be challenged.

(c) Findings of the Court

104 Attenuating circumstances which may result in a reduction of the basic amount of the fine include, at the third indent of Section 3 of the Guidelines, termination of the infringement as soon as the Commission intervenes, in particular, when it carries out checks.

105 At paragraph 158 of the judgment in *Dalmine* v *Commission*, the Court of Justice confirmed the Court of First Instance's assessment that the benefit of an attenuating circumstance cannot be granted under the third indent of Section 3 of the Guidelines where the infringement has already come to an end before the date on which the Commission first intervenes or where the undertakings concerned have already taken a firm decision to put an end to it before that date.

106 Consequently, the Court of First Instance did not err in law in upholding the Commission's refusal in the decision at issue to grant the appellants the benefit of attenuating circumstances by virtue of their decision to put an end to the agreements constituting the infringement, since, as the appellants themselves state, that decision had been taken before and independently of any intervention by the Commission.

107 Accordingly, the second part of the fourth ground of appeal and, in consequence, the fourth ground in its entirety, must be dismissed.

E — *Fifth ground of appeal, alleging infringement of the principle of proportionality in the determination of the amount of the fine*

1. The judgment under appeal

108 At paragraphs 228 to 232 of the judgment under appeal, the Court of First Instance considered the proportionality of the amount of the fine imposed by the decision at issue in the light of a succession of factors: the volume of the relevant markets, the size and economic strength of the appellants, their financial situation and the likelihood of a fine being imposed on them in the fasteners case. It concluded, at paragraph 233 of the judgment, that the appellants' argument in relation to infringement of the principle of proportionality had to be dismissed in its entirety.

2. Arguments of the parties

109 The appellants submit that, when determining the gravity of the infringement for the purposes of setting the amount of the fines, the Court of First Instance infringed the principle of proportionality in two respects. First, the Court applied the Guidelines in a formalistic manner, without taking into account the specific circumstances of the infringement. Second, it verified the proportionality of the fine only in relation to individual criteria, without taking an overall view of the facts of the case.

110 The Commission contends that this ground of appeal is inadmissible since it invites the Court to re-examine the level of the fine. In the alternative, it contends that the Court of First Instance carried out a detailed examination of the proportionality of the fine and that the appellants' arguments are unfounded.

3. Findings of the Court

111 With regard to the appellants' first argument, it must be held that it essentially reiterates the matters set out in relation to the second part of the fourth ground of appeal and must therefore be rejected on the same grounds as those which resulted in that plea being dismissed.

112 With regard to the second argument, it essentially asks the Court of Justice to re-examine the amount of the fine set by the Court of First Instance. However, it has been consistently held that it is not for the Court of Justice, when ruling in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of a fine imposed on an undertaking for its infringement of Community law (see, in particular, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 614, and *Dansk Rørindustri and Others* v *Commission*, paragraph 245).

113 The fifth ground of appeal must therefore be dismissed as inadmissible.

114 It follows from all of the foregoing considerations that the appeal must be dismissed in its entirety.

VI — Costs

115 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the

costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the appellants and the appellants have been unsuccessful, they must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG to pay the costs.**

[Signatures]