JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
9 July 2003 *

In Case T-223/00,

Kyowa Hakko Kogyo Co. Ltd, established in Tokyo (Japan),

Kyowa Hakko Europe GmbH, established in Düsseldorf (Germany),

represented by C. Canenbley, and K. Diedrich, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by W. Wils and R. Lyal, acting as Agents, assisted by J. Flynn, barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for partial annulment of Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24) or a reduction in the fine imposed on the applicants,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: M. Vilaras, President, V. Tiili and P. Mengozzi, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2002,

gives the following

Judgment

Facts

1 The applicants, Kyowa Hakko Kogyo Co. Ltd and its European subsidiary Kyowa Hakko Europe GmbH (hereinafter together referred to as 'Kyowa'),

operate in the sector of pharmaceutical products, foods and chemical and agricultural products. Kyowa introduced a lysine fermentation process in 1958.

2 Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs, such as cereals, which contain insufficient natural lysine; this enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals. Feedstuffs to which synthetic lysine is added may also substitute for feedstuffs which do contain a sufficient quantity of lysine in the natural state, such as soybean.

3 In 1995, following a secret investigation by the Federal Bureau of Investigation, searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 Archer Daniels Midland Company ('ADM Company'), Kyowa Hakko Kogyo Co. Ltd ('Kyowa Hakko Kogyo'), Sewon Corp., Cheil Jedang Corp. ('Cheil') and Ajinomoto Co. Inc. were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the American Department of Justice, the companies were fined by the judge in charge of the case. Kyowa Hakko Kogyo and Ajinomoto Co. Inc. were each fined USD 10 million, ADM Company was fined USD 70 million and Cheil USD 1.25 million. The fine imposed on Sewon Corp. was, it says, USD 328 000. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

4 In July 1996, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice'), Ajinomoto Co. Inc. offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area ('EEA').

5 On 11 and 12 June 1997 the Commission carried out investigations at the European premises of ADM Company and Kyowa pursuant to Article 14(3) of 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). Following those investigations, Kyowa informed the Commission of its wish to cooperate and gave it certain information concerning, in particular, a chronology of the meetings which had taken place between lysine producers.

6 On 28 July 1997 the Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to ADM Company and its European subsidiary Archer Daniels Midland Ingredients Ltd ('ADM Ingredients'), to Sewon Corp. and its European subsidiary Sewon Europe GmbH (hereinafter together referred to as 'Sewon') and to Cheil concerning their conduct in the amino acids market and certain cartel meetings specified in the requests for information.

7 On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to the applicants and the other companies concerned, namely ADM Company and ADM Ingredients (hereinafter together referred to as 'ADM'), Ajinomoto Co. Inc. and its European subsidiary Eurolysine SA (hereinafter together referred to as 'Ajinomoto'), Daesang Corp. (formerly Sewon Corp.) and its European subsidiary Sewon Europe GmbH, and Cheil, for infringement of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area ('the EEA Agreement'). In its statement of objections the Commission charged the companies in question with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes from September 1990 (in the case of Ajinomoto, Kyowa and Sewon), March 1991 (Cheil) and June 1992 (ADM) to June 1995.

8 On 17 August 1999, after a hearing of the companies held on 1 March 1999, the Commission sent them a supplementary statement of objections concerning the duration of the cartel.

9 On completion of this administrative procedure, the Commission adopted Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24, 'the Decision'). The Decision was served on the applicants by letter of 20 June 2000.

10 The Decision includes the following provisions:

'*Article 1*

[ADM Company] and its European subsidiary [ADM Ingredients], Ajinomoto Company, Incorporated and its European subsidiary Eurolysine SA, Kyowa Hakko Kogyo Company Limited and its European subsidiary Kyowa Hakko Kogyo Europe GmbH, Daesang Corporation and its European subsidiary Sewon Europe GmbH, as well as [Cheil] have infringed Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement by participating in agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA.

The duration of the infringement was as follows:

(a) in the case of [ADM Company] and [ADM Ingredients] from 23 June 1992 to 27 June 1995;

(b) in the case of Ajinomoto Company, Incorporated and Eurolysine SA from at least July 1990 to 27 June 1995;

(c) in the case of Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH from at least July 1990 to 27 June 1995;

(d) in the case of Daesang Corporation and Sewon Europe GmbH from at least July 1990 to 27 June 1995;

(e) in the case of [Cheil] from 27 August 1992 to 27 June 1995.

Article 2

The following fines are hereby imposed on the undertakings referred to in Article 1 in respect of the infringements found therein:

(a) [ADM Company] and
[ADM Ingredients],
jointly and severally liable, a fine of EUR 47 300 000

(b) Ajinomoto Company, Incorporated and
Eurolysine SA,
jointly and severally liable, a fine of EUR 28 300 000

(c) Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH, jointly and severally liable, a fine of EUR 13 200 000

(d) Daesang Corporation and Sewon Europe GmbH, jointly and severally liable, a fine of EUR 8 900 000

(e) [Cheil], a fine of EUR 12 200 000

...'

11 In calculating the amount of the fines, the Commission applied the method set out in 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') and the Leniency Notice.

12 First, the basic amount of the fine, determined by reference to the gravity and duration of the infringement, was fixed at EUR 21 million for Kyowa, EUR 42 million for Ajinomoto, EUR 39 for ADM, EUR 19.5 million for Cheil and EUR 21 million for Sewon (paragraph 314 of the Decision).

13 In fixing the starting amount of the fines, determined by reference to the gravity of the infringement, the Commission began by finding that the undertakings

concerned had committed a very serious infringement, having regard to its nature, its actual impact on the lysine market in the EEA and the extent of the relevant geographical market. Then, observing that the total turnover figures achieved by each undertaking in the last year of the infringement revealed considerable disparity of size between the undertakings which had committed the infringement, the Commission went on to apply differential treatment. Consequently, the starting amounts of the fines were set at EUR 30 million for ADM and Ajinomoto and EUR 15 million for Kyowa, Cheil and Sewon (paragraph 305 of the Decision).

14 In order to reflect the duration of each undertaking's involvement in the infringement and determine the basic amount of their respective fines, the starting amounts were then increased by 10% per annum, giving an increase of 30% in the case of ADM and Cheil and 40% in the case of Ajinomoto, Kyowa and Sewon (paragraph 313 of the Decision).

15 Secondly, on account of aggravating circumstances, the basic amount of the fines imposed on ADM and Ajinomoto was increased by 50%, that is to say EUR 19.5 million for ADM and EUR 21 million for Ajinomoto, on the ground that each had played a leading role in the infringement (paragraph 356 of the Decision).

16 Thirdly, on account of mitigating circumstances, the Commission reduced by 20% the increase in Sewon's fine on account of the duration of its infringement, on the ground that Sewon had played a passive role in the cartel from the beginning of 1995 (paragraph 365 of the Decision). The Commission also reduced by 10% the basic amount of the fine imposed on each of the undertakings concerned, on the ground that they had all put an end to the infringement as soon as a public authority intervened (paragraph 384 of the Decision).

17 Fourthly, the Commission allowed a 'significant reduction' in the fines, pursuant to Section D of the Leniency Notice. On that basis, the fines on Ajinomoto and Sewon were reduced by 50% of the amount they would have had to pay if they had not cooperated with the Commission, the fines on Kyowa and Cheil were reduced by 30% and, lastly, the fine on ADM by 10% (paragraphs 431, 432 and 435 of the Decision).

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 25 August 2000 the applicants brought the present action.

19 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the Commission to give written replies to a number of questions. The Commission complied with that request within the time allowed.

20 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 24 April 2002.

21 The applicants claim that the Court should:

— annul the provision of the Decision imposing a fine on them or reduce the fine;

— order the Commission to pay the costs;

22 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to bear the entire costs jointly and severally.

Law

23 The action falls into three principal heads of complaint. First, the applicants complain that the Commission calculated the fine on the basis of the criteria laid down by the Guidelines. Secondly, the applicants complain that the Commission failed to take account of the relevant turnover figure on assessing the gravity of the infringement. Thirdly, the applicants claim that the Commission failed to take account in the Decision of the fines already imposed in the United States.

Applicability of the Guidelines

Arguments of the parties

24 The applicants complain that the Commission calculated the fines on the basis of the method laid down in the Guidelines even though they were not published

until 1998, after they had cooperated with the Commission in June 1997. In support of this complaint, the applicants put forward two pleas, alleging first infringement of the principle of the protection of legitimate expectations and, secondly, infringement of the principle of legal certainty.

— Infringement of the principle of the protection of legitimate expectations

25 The applicants allege that the Commission breached the principle of the protection of legitimate expectations in that, during the administrative procedure, its conduct caused them to entertain a legitimate expectation regarding the method which would be used to calculate the fine. Contrary to the Commission's claim in paragraph 328 of the Decision, it is possible for a legitimate expectation regarding the method of calculation to arise from statements made by the institutions or from their approach and not solely from the Leniency Notice.

26 In this connection, the applicants argue that they had anticipated that the Commission would use the traditional method based on the turnover achieved by the undertaking in question in the relevant market. Given that Kyowa's turnover in the EEA lysine market in 1995 was EUR 16 million, the maximum fine, according to that method, would have been EUR 1.6 million, leaving aside any deductions attributable to mitigating circumstances and cooperation during the administrative procedure.

27 Staff of the Commission, whose acts and declarations may, according to case-law, be taken for acts of the institution itself (Joined Cases 303/81 and 312/81 *Klöckner-Werke* v *Commission* [1983] ECR 1507, paragraph 28 et seq., and Case T-48/96 *Acme* v *Council* [1999] ECR II-3089, paragraph 48), in fact gave the applicants precise assurances in the course of the administrative procedure regarding the use of the traditional method for calculating fines.

28 As is confirmed by the Decision (paragraphs 319 to 328), those assurances were given in statements made by Commission staff in charge of the file who expressly confirmed that the institution's usual practice was to assess the fine on the basis of turnover achieved from the sale of the product concerned in the EEA and that there was no reason to depart from that practice. The applicants refer to their letter of 7 August 1997 summarising their meetings with the Commission on 31 July and 1 August 1997 and to the Commission's letter of 25 August 1997 in response to that summary. In its letter the Commission stated that the applicants could base no legitimate expectation on statements made by Commission staff concerning a reduction in their fine on account of their cooperation. On the other hand, it expressed no reserve as to the method for calculating the fine, in particular in response to the applicants' assertion that fines were usually calculated on the basis of turnover achieved in the EEA from the sale of the product concerned by its investigation. By so doing, the Commission acknowledged that the discussions of 31 July and 1 August 1997 could provide a basis for legitimate expectations on the part of the applicants.

29 There is, according to the applicants, no foundation for the argument given in the Decision that staff in charge of the case had exceeded their powers and could not, through their statements, bind the Commission with regard to the amount of the fine.

30 In the present case, the statements in question related not to the amount of the fine but to the method of calculating it. Furthermore, the argument that staff in charge of a case have no authority to give assurances to undertakings is belied by the Leniency Notice. Indeed, according to Section E.1 of the Leniency Notice, any undertaking that 'wishes to take advantage of the favourable treatment set out in [the Leniency Notice]... should contact the Commission's Directorate-General for Competition'. Lastly, there have been cases where officials of the Directorate-General for Competition have given precise assurances to undertakings regarding the assessment to be made in a Decision concerning them. The applicants cite several cases in which the Commission agreed to take account of the cooperation offered by undertakings, even before publication of the Leniency Notice (see, for

example, Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding pursuant to Article [81] of the EC Treaty (Case IV/C/33.833 — *Cartonboard*) (OJ 1994 L 243, p. 1).

31 In conclusion, the applicants state that, when taking the decision to cooperate with the Commission, they relied on the assurances which they were given regarding the method of calculating the fine.

32 The Commission replies that traders cannot have a legitimate expectation that a legal situation which is capable of being altered by the Community institutions will be maintained. That applies in particular to its policy concerning the calculation of fines. Moreover, in the present case, the Guidelines were adopted before the statement of objections was sent to the applicants.

33 The Commission adds that it gave no assurance in its letter of 25 August 1997 that a calculation method based on turnover achieved from lysine sales in the EEA would be used.

— Infringement of the principle of legal certainty

34 The applicants contend that the principle of legal certainty and the related concept of estoppel prevent an institution which has induced an undertaking to act on the basis of misleading statements from acting contrary to those statements (see, *inter alia*, the Opinion of Advocate General Warner in Joined Cases 63/79 and 64/79 *Boizard* v *Commission* [1980] ECR 2975, at p. 3002).

35 In the present case, as the Commission's statements concerning the application to Kyowa of the traditional method of calculating fines were misleading, it should be estopped from applying the new method laid down in the Guidelines. In view of the length of time taken by the Commission to draw up new notices in the field of competition law, Commission staff must have been aware, at the time of the meetings of 31 July and 1 August 1997, that the Guidelines would be published shortly afterwards, that is on 14 January 1998. Furthermore, in view of the letters of 7 and 25 August 1997, the Commission knew that the applicants' cooperation was given on the basis of its statements.

36 In those circumstances, the Commission should be required to honour its commitments and the fine imposed on the applicants should be reduced in accordance with the calculation method used before the Guidelines were published.

37 The Commission denies any breach of the principle of legal certainty, for the same reasons as it gave in connection with the plea of breach of the principle of the protection of legitimate expectations.

Findings of the Court

38 First of all, the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain legitimate expectations (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26). However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration

(Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59, and the case-law cited).

39 Secondly, according to settled case-law (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33, and Case C-1/98 P *British Steel* v *Commission* [2000] ECR I-10349, paragraph 52), traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained.

40 In the field of Community competition rules, it is clear from the case-law (see, *inter alia*, the judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109) that effective application of those rules requires that the Commission may at any time adjust the level of fines to match the needs of Community competition policy. Consequently, the fact that, in the past, the Commission imposed fines at a certain level for certain types of infringements does not preclude it from raising that level, subject to the limits indicated in Regulation No 17.

41 Moreover, according to that same case-law, the Commission is not bound to mention, in the statement of objections, the possibility of a change in its policy as regards the general level of fines, because that possibility is dependent on general considerations of competition policy having no direct relationship with the particular circumstances of the case at hand (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 22).

42 Given that the adoption of the Guidelines, in which the Commission laid down its new general method for calculating fines, was prior to the statement of objections

addressed to each of the members of the cartel and independent of the particular circumstances of the present case, the applicants cannot, *a fortiori*, reproach the Commission for applying those Guidelines in determining the amount of the fine, unless they can show that the authorities caused them to entertain a legitimate expectation to the contrary.

43 In this connection, the applicants first of all argue that, contrary to the Commission's claim in paragraph 328 of the Decision, it is possible for a legitimate expectation as to the method of calculation to arise from statements made by the institutions or their approach, not merely from the Leniency Notice. However, there are no grounds for the applicants' submission that the Leniency Notice implied that the method for calculating fines usually employed by the Commission at the time when they decided to cooperate would be applied in their case.

44 Admittedly, it should be pointed out that, in Section E.3 of the Leniency Notice, the Commission states that it 'is aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission'.

45 However, given that the purpose of the Leniency Notice is, as stated in Section A.3 thereof, to '[set] out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them', the only 'legitimate expectation' which the applicants were entitled to entertain was one relating to the conditions under which a reduction would be allowed in recognition of their cooperation, not to the amount of the fine 'which would otherwise have been imposed upon [them]' or to the calculation method that might be used to fix the fine.

46 Next, the applicants maintain that they received precise assurances from Commission staff of such a kind as to cause them to believe that the method for calculating fines allegedly used before publication of the Guidelines would be maintained.

47 The applicants refer to a letter of 7 August 1997 (annex 4 to the application) which was sent to the Commission staff in charge of the file in order to record, in summary form, what was said at their meetings with the Commission in anticipation of their cooperation. They also refer to the Commission's reply of 25 August 1997 (annex 5 to the application).

48 In the letter of 7 August 1997, the main purpose of which was to obtain some assurance concerning the applicability of the Leniency Notice and the possibility of a reduction under it, Kyowa stated incidentally that 'with respect to the potential fine', Commission staff had 'confirmed that the Commission's traditional approach is to base the fine on the firm's turnover for the product concerned in the EEA for the last year of the illegal conduct'. Referring expressly to that statement, the Commission wrote in its letter of 25 August 1997 that 'it is evident that there are a number of different elements which determine the importance of a possible fine, such as the duration and gravity of the infringement and the benefit for the parties generated by the infringement'.

49 Leaving aside the fact that the letter of 7 August 1997 does not even refer to the statement allegedly made by a Commission official concerning the continued use of the calculation method employed before publication of the Guidelines, it must be held that the evidence which the applicants put forward fails to prove that there has been any breach of the principle of the protection of legitimate expectations in this case.

50 First, even if it were proved that, during the meetings of 31 July and 1 August 1997, Commission officials confirmed that the institution's traditional approach

to calculating fines was based on a particular turnover figure, that would not, of itself, imply any assurance that such a method would continue to be used in the future. The same applies, *a fortiori*, in light of the case-law cited, according to which no decision-making practice in the field must automatically be continued.

51 Secondly, whilst the Commission's reply does not expressly contradict the assertions made in Kyowa's letter of 7 August 1997, neither does it confirm them. Instead it emphasises, essentially, that the basic amount of a fine is calculated by reference to a number of factors (the gravity and duration of the infringement and the benefit derived from it). Now, Kyowa could have had a legitimate expectation only if the Commission had first given it 'assurances', which presupposes some positive act on its part, not the mere absence of express opposition, as in this case (see, to that effect, Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez and Others* v *Parliament* [2001] ECR II-3397, paragraph 184, and, by analogy, Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 27). Next, even if the Commission had given assurances concerning the calculation method that would be used, it would still be necessary for them to have been 'precise' assurances. The opposite is true, in fact, because the Commission emphasised in its reply that calculation of the fine is based on a number of factors, without even mentioning the turnover achieved by the undertaking concerned.

52 At the hearing the applicants referred to another sentence in the Commission's letter of 25 August 1997 as providing support for their view, namely the last sentence, which reads: 'I believe that these comments, which do not reflect upon the accuracy or otherwise of your summary of the discussion, will encourage your clients' co-operation.' Suffice it to observe that that rather evasive statement is equally incapable of providing grounds for the allegation that Kyowa was given precise assurances.

53 As regards, lastly, the plea of infringement of the principle of legal certainty and the associated principle of estoppel, suffice it to point out that that plea rests upon

the existence of misleading statements by the Commission concerning the application, in Kyowa's case, of the supposedly traditional method of calculating fines, a point which the applicants have failed to prove.

54 In light of the whole of the foregoing considerations, the Court must reject the pleas of infringement of the principles of the protection of legitimate expectations and of legal certainty.

The turnover figure taken into account in assessing the gravity of the infringement

Arguments of the parties

55 The applicants submit that, in its appraisal of the gravity of the infringement, the Commission made a manifest error of assessment and breached the principle of proportionality in that it relied on Kyowa's worldwide turnover, rather than its turnover from the sale of lysine in the EEA, which represents only a small proportion of its worldwide turnover.

56 As regards the appraisal of the gravity of the infringement, the applicants point out that, according to the first paragraph of Section 1.A of the Guidelines, 'account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographical market'. Given that the

Commission observed in paragraph 298 of the Decision that the infringement had had an impact on the lysine market in the EEA, it ought to have set the starting amount of the fine, reflecting the gravity of the infringement, by reference to the undertaking's turnover from lysine sales in the EEA, rather than its worldwide turnover. In so doing, the Commission failed to analyse the real impact of the infringement and disregarded case-law (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraphs 94 and 95).

57 In the present case, that manifest error of assessment is particularly prejudicial to the applicants as Kyowa's turnover from lysine sales in the EEA was only EUR 16 million. The fine imposed thus represents 82.5% of that turnover.

58 The impact of Kyowa's infringement is all the more limited in that, by contrast with the other undertakings, its only presence in the EEA was as a distributor acting through sales agents. It did not produce lysine for consumption in the EEA. The Commission must, in accordance with case-law, take account of individual circumstances when calculating a fine (see Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, and Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369).

59 Lastly, the Commission ought to have taken account of the fact that the effect of the infringement on the EEA lysine market was attenuated as a result of the common agricultural policy. Because cereal prices remained high during the period in question thanks to subsidies paid under the common agricultural policy, the demand for lysine remained weak, and thus the cartel's impact was reduced.

In so far as it relied on Kyowa's worldwide turnover, the Commission thus failed to have regard to this attenuation of the infringement's impact in the EEA.

60 The Commission replies that its appraisal was consistent with the Guidelines and that the basic amount of the fine, set by reference to the gravity of the infringement, was not disproportional. Moreover, the Commission is not legally required to have regard to turnover in the EEA when setting fines. Article 15 of Regulation No 17 refers only to total turnover, and then only as a factor in determining the upper limit for fines.

Findings of the Court

61 It is settled case-law that under Regulation No 17 the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). The proper application of those rules requires that the Commission may at any time adjust the level of fines to the needs of Community competition policy, raising them if necessary (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 109).

62 In setting the amount of the fine which it imposed on the applicants in the Decision the Commission used the calculation method which it imposed on itself in the Guidelines. According to settled case-law, the Commission may not depart

from rules which it has imposed on itself (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, confirmed on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, and the case-law cited). In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion, there arises a self-imposed limitation of that discretion inasmuch as it must then follow those guidelines (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89).

63 According to the Guidelines, the Commission is to take as the starting point in calculating the amount of the fines an amount determined by reference to the gravity of the infringement ('the general starting point'). The gravity of an infringement is established by reference to a number of factors, some of which the Commission must now imperatively take into account.

64 The Guidelines provide that, apart from the specific nature of the infringement, its actual effect on the market and its geographical extent, it is necessary also to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and the fine must be set at a level which ensures that it has a sufficiently deterrent effect (fourth paragraph of Section 1.A).

65 Moreover, account may also be taken of the fact that large undertakings are usually better able to recognise that their conduct constitutes an infringement and more aware of the consequences stemming from it (fifth paragraph of Section 1.A).

66 In cases involving several undertakings, such as cartels, it may be necessary to apply weightings to the general starting point in order to take account of the specific weight and, therefore, the real impact on competition of the offending conduct of each undertaking, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. Consequently, it may be necessary to adapt the general starting point according to the specific nature of each undertaking ('the specific starting point') (sixth paragraph of Section 1.A).

67 It is appropriate to observe that the Guidelines do not provide that fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover in the relevant market. However, nor do they preclude the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances demand it. In particular, turnover may be relevant when considering the various factors mentioned in paragraphs 64 to 66 of the present judgment (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 283 and 284).

68 Furthermore, it should be borne in mind that, according to settled case-law, the criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and that the fixing of the fine cannot be the result of a simple calculation based on total turnover (*Musique diffusion française and Others* v *Commission*, cited above, paragraphs 120 and 121, *Parker Pen* v *Commission*, cited above,

paragraph 94, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176).

69 In the present case, it is clear from the Decision that, in order to determine the starting point for the fine, the Commission first considered the specific nature of the infringement, its actual effect on the market and its geographic extent. The Commission then stated that it was important, given the need to treat each firm individually, to take account of the 'effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA', the dissuasive effect of the fine and the relative size of each undertaking (paragraph 304 of the Decision). In order to assess these factors the Commission chose to refer to the total turnover of each of the undertakings concerned in the last year of the infringement, on the view that that figure would enable it 'to assess the real resources and importance of the undertakings concerned in the markets affected by their illegal behaviour' (paragraph 304 of the Decision).

70 The Commission's reliance on total turnover rather than turnover from the sale of the products in issue in the EEA is precisely what the applicants complain of.

71 It is important to emphasise at this stage that a certain degree of ambiguity arises when the Decision is read alongside the Commission's pleadings in the present case and that the Commission, on being questioned on the point by the Court at the hearing, stated that it took account of not only the total turnover of the undertakings concerned, that is to say turnover from all their activities, but also their worldwide turnover in the lysine market. The two sets of figures are given in a table appearing in paragraph 304 of the Decision. In addition, it should be noted that, according to paragraph 318 of the Decision, 'the Commission has taken due account of the economic importance of the particular activity concerned by the infringement in its conclusions of gravity'.

72 Nevertheless, it is established that the Commission did not take account of the turnover of each undertaking from sales in the market concerned by the infringement, namely the lysine market in the EEA.

73 Now, for the purposes of assessing the 'effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA', which implies an assessment of the real importance of the undertakings in the market affected by their unlawful conduct, that is to say their influence on that market, total turnover is an imprecise guide. It is of course possible for a powerful undertaking with a multitude of different business activities to have only a very limited presence in certain specific markets, such as the lysine market. Similarly, an undertaking with a strong position in a geographical market outside the Community may have only a weak position in the Community or EEA market. In such cases, the mere fact that the undertaking in question has a high total turnover does not necessarily mean that it has a decisive influence on the market affected by the infringement. That is why the Court emphasised in paragraph 139 of its judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 that although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market. In the present case, however, the Commission took no account of the undertakings' market shares in terms of volume in the market affected by the cartel (the EEA lysine market) or even of their turnover in that market, although, given the absence of any other producers, that would have enabled it to establish the relative importance of each of the undertakings in the market in that the Commission would have obtained an indirect indication, in value terms, of their respective market shares (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 99).

74 Moreover, it is clear from the Decision that the Commission made no explicit reference to taking account of the 'specific weight and, therefore, the real impact on competition of the offending conduct of each undertaking', which, under the

Guidelines, it must now do where it considers, as it did in the present case, that the starting amounts of the fines must be weighted because the infringement is one that involves several undertakings (a cartel) among which there is considerable disparity in size (see the sixth paragraph of Section 1.A of the Guidelines).

75 The Commission's reference in the last sentence of paragraph 304 of the Decision to 'the real... importance of the undertakings' does not remedy that omission.

76 An assessment of the specific weight, that is to say of the real impact of the infringement committed by each of the undertakings, in fact involves establishing the scale of the infringement committed by each of them, rather than the importance of the undertaking in question in terms of its size or economic power. Now, as is clear from settled case-law (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 121 and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 369), the proportion of turnover derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the scale of the infringement on the relevant market. In particular, as the Court of First Instance has emphasised, the turnover in products which have been the subject of a restrictive practice constitutes an objective criterion which gives a proper measure of the harm which that practice causes to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

77 It follows from the foregoing that, by relying on the applicants' worldwide turnover, without taking into consideration their turnover in the market affected by the infringement, the EEA lysine market, the Commission disregarded the fourth and sixth paragraphs of Section 1.A of the Guidelines, but not, as the

applicants claim, the first paragraph of that section, which concerns the taking into account of the actual impact of the infringement on the market affected. The effects to be taken into account under that head are those resulting from the whole of the infringement in which the undertakings participated (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 150 to 152). An appraisal of the individual conduct of each undertaking or of factors relating specifically to each of them individually is thus irrelevant in that context.

78 That being so, it is incumbent on the Court to consider whether the Commission's failure to take account of turnover in the relevant market and its consequential disregard of the Guidelines have led it in this case to breach the principle of proportionality in setting the fine. It must be remembered in this connection that assessing the proportionality of a fine with regard to the gravity and duration of an infringement, which are the criteria referred to in Article 15(2) of Regulation No 17, falls within the unlimited jurisdiction conferred on the Court of First Instance by Article 17 of that regulation.

79 In the present case, the applicants argue, essentially, that the specific starting point of the fine, set at EUR 15 million, is disproportionate in that it is almost identical to its turnover in the EEA lysine market in the last year of the infringement, which was EUR 16 million.

80 First of all, it is appropriate to state that the fact that the specific starting point is almost the same as the turnover achieved in the relevant market is not, of itself, conclusive. Indeed, that figure of EUR 15 million is merely an intermediate figure which, in accordance with the method laid down in the Guidelines, is then adapted to reflect the duration of the infringement and any aggravating and mitigating circumstances.

81 Secondly, an intermediate figure such as that may be justified by the very nature of the infringement, its actual effect, the geographical extent of the market affected, the fact that the fine must have a deterrent effect and the size of the undertakings in question, all of which were taken into account by the Commission in this case. The Commission was right to classify the infringement as 'very serious' in that the applicants participated in a horizontal agreement the object of which was to set price objectives and sales quotas and to establish a system for exchanging information on sales volumes. Moreover, that agreement had a real effect on the lysine market in the EEA, causing an artificial price increase and a restriction of sales volumes. As regards the size of the undertakings and the deterrent effect of the fines, the Commission was entitled to have regard to the total turnover of the undertakings concerned. According to case-law, total turnover is in fact the figure which gives an indication of the size of the undertaking (see, to that effect, *Musique diffusion française and Others* v *Commission*, cited above, paragraph 121) and of its economic power, which must be known in order to assess whether a fine will deter it.

82 Thirdly, it is important to emphasise that the figure of EUR 15 million adopted in respect of the applicants is significantly lower than the minimum threshold of EUR 20 million laid down in the Guidelines as standard for 'very serious' infringements (see the third indent of the second paragraph of Section 1.A of the Guidelines).

83 In support of their submission the applicants also refer explicitly to the judgment in *Parker Pen* v *Commission*, cited above, in which the Court of First Instance upheld a plea of infringement of the principle of proportionality on the ground that the Commission had failed to take into consideration the fact that the turnover accounted for by the product to which the infringement related was relatively low in comparison with the turnover resulting from the undertaking's business as a whole and that this justified a reduction in the fine (paragraphs 94 and 95). The applicants' precise point is that only a small proportion of their total turnover is derived from sales of lysine in the EEA.

84 It should be observed, first of all, that the approach adopted by the Court in *Parker Pen* v *Commission* related to the final amount of the fine rather than the starting amount in light of the gravity of the infringement, which is in issue in the present case.

85 Next, even if the authority of that case were applicable to the present case, it must be pointed out at this stage that the Court has power to assess, in the context of its unlimited jurisdiction, whether or not the amount of a fine is reasonable. That assessment may justify the production and taking into account of additional information (see, to that effect, case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 53 to 55) such as, in this case, the applicants' turnover in the EEA lysine market, which was not taken into account in the Decision.

86 In this connection, it is important to point out that a comparison of the various turnover figures of the applicants for 1995 reveals two things. First, turnover from sales of lysine in the EEA, at EUR 16 million, can indeed be regarded as small in comparison with total turnover, at EUR 2.8 billion. Secondly, it appears, by contrast, that its turnover from lysine sales in the EEA represents a relatively large proportion — close to 22% in fact — of sales in the worldwide lysine market (EUR 73 million).

87 Since the sales of lysine in the EEA therefore represent not a small fraction but a significant proportion of worldwide turnover from lysine sales, it cannot validly be argued that the principle of proportionality has been infringed, *a fortiori* because the starting amount of the fine was not set on the mere basis of a simple calculation based on total turnover, but also by reference to sectoral turnover and other relevant factors such as the nature of the infringement, its actual effect on the market, the extent of the market affected, the necessary deterrent effect of the sanction and the size and power of the undertakings.

88 That conclusion cannot be altered by a mere allegation concerning the effect of the common agricultural policy on cereal prices in Europe during the period of the infringement or the supposedly limited impact of the infringement in the EEA or by the fact that the lysine which Kyowa distributes in the European market is produced outside Europe, a fact which is true of all the producers in question except Eurolysine (paragraph 35 of the Decision).

89 In light of those reasons, the Court, in the exercise of its unlimited jurisdiction, finds that the starting amount of the fine, determined by reference to the gravity of the infringement committed by Kyowa, is appropriate and that, since the Commission's failure to adhere to the Guidelines has not, in the present case, led it to breach the principle of proportionality, the applicants' complaint in this regard must be rejected.

The relevance of the fine imposed in the United States

Arguments of the parties

90 The applicants maintain that the Commission has infringed the principle of the prohibition of concurrent sanctions, which is enshrined in case-law (Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 11, Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, paragraph 3 to 5, and Case T-149/89 *Sotralentz* v *Commission* [1995] ECR II-1127, paragraph 29), in that, when calculating the starting amount of the fine, it failed to take account of the fine already imposed on Kyowa by the American authorities.

91 According to the applicants, natural justice requires that account be taken of penalties which have already been imposed on an undertaking for the same reasons. That principle must be observed even if, owing to its differing geographical effect, the conduct in the territory of the EEA constitutes a separate offence from that which attracted a fine in the United States.

92 In the present case, because Kyowa was fined for the impact in the United States of its participation in the worldwide lysine cartel, that is to say on the same grounds as those alleged by the Commission, the Commission ought to have deducted turnover generated in the United States (USD 31 million, or EUR 24 million between October 1994 and September 1995) from the turnover figure on which it based its calculation.

93 The Commission contends that the case-law relied upon by the applicants does not relate to decisions of the authorities of non-member countries but to decisions of the national competition authorities of Member States of the Community. Because the latter are able to apply their national competition law to practices which are also governed by Community competition law, it is logical that the Commission should take account of fines already imposed by them.

94 The Commission denies that there are any grounds for the applicants' argument that the portion of Kyowa's turnover generated in the United States should be deducted. According to the Guidelines, the worldwide turnover of the undertakings concerned is not used as a basis for calculating fines. It merely serves to distinguish one undertaking from another according to size.

95 Finally, it would be paradoxical for an undertaking which has taken part in a worldwide cartel to be able to expect more indulgent treatment than one which

has taken part in a cartel in Europe. On the contrary, the Commission should, when exercising its power to impose fines, remember the need for punishment and deterrence.

Findings of the Court

96 It is clear from case-law that the principle of *non bis in idem*, enshrined also in Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950, is a general principle of Community law upheld by the Community judicature (Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 149, 172, *Boehringer* v *Commission*, cited above, paragraph 3, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 96, confirmed on this point by the judgment of the Court of Justice in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59).

97 In the field of Community competition law, the principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is not amenable to appeal.

98 In addition, the Court of Justice has held that the possibility of concurrent sanctions, one a Community sanction, the other a national one, resulting from two sets of parallel proceedings, each pursuing distinct ends, is acceptable because of the special system of sharing jurisdiction between the Community and

the Member States with regard to cartels. However, a general requirement of natural justice demands that, in determining the amount of a fine, the Commission must take account of any penalties that have already been borne by the undertaking in question in respect of the same conduct where these were imposed for infringement of the law relating to cartels of a Member State and where, consequently, the infringement was committed within the Community (*Wilhelm and Others*, cited above, paragraph 11, *Boehringer* v *Commission*, cited above, paragraph 3, Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 191, and *Sotralentz* v *Commission*, cited above, paragraph 29).

99 The Court cannot therefore uphold the applicants' argument that, by imposing a fine on them for their involvement in a cartel already sanctioned by the American authorities, the Commission infringed the principle of *non bis in idem*, according to which a second penalty may not be imposed on the same person in respect of the same infringement.

100 In this connection, suffice it to recall that the Community judicature has held that an undertaking may be made the defendant to two parallel sets of proceedings concerning the same infringement and, thus, incur concurrent sanctions, one imposed by the competent authority of the Member State in question, the other a Community sanction. That possibility is justified because the two sets of proceedings pursue different ends (*Wilhelm and Others*, cited above, paragraph 11, *Tréfileurope* v *Commission*, cited above, paragraph 191, and *Sotralentz* v *Commission*, cited above, paragraph 29).

101 That being so, the principle *non bis in idem* cannot, *a fortiori*, apply in the present case because the procedures conducted and penalties imposed by the Commission on the one hand and the American authorities on the other clearly pursued different ends. The aim of the first was to preserve undistorted competition within the European Union and the EEA, whereas the aim of the second was to protect the American market.

102 That conclusion is supported by the scope of the principle that a second penalty may not be imposed for the same offence, as laid down in Article 4 of Protocol 7 to the ECHR and applied by the European Court of Human Rights. It is clear from the wording of Article 4 that the effect of the principle is solely to prevent the courts of any given State from trying or punishing an offence for which the person concerned has already been acquitted or convicted in that same State. On the other hand, the *non bis in idem* principle does not preclude a person from being tried or punished more than once in two or more different States for the same conduct (see Eur. Court HR *Krombach* v *France* judgment of 29 February 2000, unpublished).

103 It is also important to emphasise that, at present, there is no principle of public international law that prevents the authorities or courts of different States from trying and convicting the same person on the basis of the same facts. Such a rule could arise today only through very close international cooperation leading to the adoption of common rules such as those contained in the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelex Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed in Schengen (Luxembourg) on 19 June 1990. The applicants have not pointed to any binding agreement between the Community and third countries such as the United States that lays down such a prohibition.

104 Admittedly, Article 50 of the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) proclaimed in Nice on 7 December 2000 provides that no one may be tried or punished again in criminal proceedings for an offence of which he has already been finally acquitted or convicted within the Union in accordance with the law. However, independently of the question whether that provision has binding legal force, it is clearly intended to apply only within the territory of the Union and the scope of the right laid down in the provision is expressly limited to cases where the first acquittal or conviction is handed down within the Union.

105 It follows that the Court must reject the applicants' allegation of infringement of the *non bis in idem* principle on the ground that the cartel in question was also penalised outside the Community.

106 In so far as the applicants allege that, by failing to take into account, when calculating the starting amount of the fine, the fine already imposed on Kyowa Hakko Kogyo in the United States, the Commission has disregarded pertinent case-law and the principle of natural justice defined in it, that argument cannot be upheld by the Court either.

107 It should be remembered that, in paragraph 3 of its judgment in *Boehringer* v *Commission*, the Court held that

'[i]t is only necessary to decide the question whether the Commission may also be under a duty to set a penalty imposed by the authorities of a third State against another penalty if in the case in question the actions of the applicant complained of by the Commission, on the one hand, and by the American authorities, on the other, are identical'.

108 The applicants state that they have been punished by the American authorities for the effects in the United States of their involvement in the worldwide lysine cartel, that is to say for 'the same act on which the Commission's punishment is based

here'. That situation, according to the applicants, implies an obligation for the Commission to take account in this case of the fine imposed on Kyowa Hakko Kogyo by the American authorities by deducting turnover achieved in the United States from the turnover figure taken into account.

109 First of all, it should be observed that it is clear from the wording of paragraph 3 of the judgment in *Boehringer* v *Commission* that the Court did not decide the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member country where the facts with which the Commission charges an undertaking are the same as those alleged by the first authorities. The passage makes clear that the Court merely regarded the identity of the facts alleged by the Commission and by the authorities of the non-member country as being a precondition of the said question.

110 Secondly, it was in view of the particular situation which arises from the close interdependence between the national markets of the Member States and the common market and from the special system for the sharing of jurisdiction between the Community and the Member States with regard to cartels on the same territory, namely the common market, that the Court, having acknowledged the possibility of dual sets of proceedings and having regard to the possibility of double sanctions flowing from them, held it to be necessary, in accordance with a requirement of natural justice, for account to be taken of the first decision imposing a penalty (*Wilhelm and Others*, cited above, paragraph 11, and the Opinion of Advocate General Mayras in Case 7/72 *Boehringer* v *Commission*, cited above, ECR 1293, 1301 to 1303).

111 The circumstances of the present case, however, are obviously different and given that the applicants point to no express provision of a convention requiring the Commission, when determining the amount of a fine, to take into account penalties already imposed on the same undertaking in respect of the same conduct by the authorities or courts of a third country, such as the United States, they cannot validly complain that, in the present case, the Commission failed to satisfy any such alleged obligation.

112 In any event, even if it could be inferred *a contrario* from the judgment in *Boehringer* v *Commission* that the Commission is in fact required to set off any penalty imposed by the authorities of a non-member country where the facts alleged against the undertaking in question by the Commission are the same as those alleged by the first authorities, it remains for the applicants to prove that the facts are indeed the same (*Boehringer* v *Commission*, paragraph 5), which, in the present case, they have failed to do.

113 Indeed, it must be observed that the applicants have put forward no argument capable of supporting their submission, nor, above all, have they provided any documentary evidence, such as the judgment delivered against Kyowa Hakko Kogyo in the United States.

114 That being so, the Court must reject the applicants' complaint that the Commission failed to fulfil an alleged obligation to take into account the fine imposed earlier by the authorities of a non-member country.

115 It follows that the application must be dismissed in its entirety.

Costs

116 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay their own costs and, jointly and severally, those of the Commission, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Kyowa Hakko Kogyo Co. Ltd and Kyowa Hakko Europe GmbH to bear their own costs and, jointly and severally, to pay those incurred by the Commission.**

Vilaras Tiili Mengozzi

Delivered in open court in Luxembourg on 9 July 2003.

H. Jung M. Vilaras

Registrar President

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