JUDGMENT OF THE GENERAL COURT (Second Chamber)

17 May 2011 *

In Case T-343/08,

Arkema France, established in Colombes (France), represented initially by A. Winckler, S. Sorinas and H. Kanellopoulos, and subsequently by S. Sorinas, E. Jégou and M. Sabeva, lawyers,

applicant,

v

European Commission, represented by X. Lewis, É. Gippini Fournier and R. Sauer, acting as Agents,

defendant,

APPLICATION for, principally, annulment of Commission Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the Agreement on the European Economic Area (EEA) (Case COMP/38.695 — Sodium chlorate), in so far as it concerns the applicant, and, in the alternative, annulment or reduction of the fines imposed on the applicant in that decision,

* Language of the case: French.

THE GENERAL COURT (Second Chamber),

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

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 2 June 2010,

gives the following

Judgment

Background to the dispute

1 By Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the Agreement on the European Economic Area (EEA) (Case COMP/38.695 — Sodium chlorate) ('the contested decision), the Commission of the European Communities imposed sanctions on, among other undertakings, the applicant, Arkema France (formerly Atochem SA, then Elf Atochem SA, then Atofina SA and Arkema SA) and its parent company until 2006, Elf Aquitaine SA, on account of their participation in a complex of agreements and concerted practices affecting the sodium chlorate market in the EEA for the period 11 May 1995 to 9 February 2000 so far as the applicant and Elf Aquitaine were concerned (recitals 12 to 15 to and Article 1 of the contested decision).

2 Sodium chlorate is a strong oxidising agent manufactured by the electrolysis of a sodium chloride water solution in a diaphragm-less cell. Sodium chlorate can be produced as a crystal product or as a solution product. Its largest application is for the manufacturing of chlorine dioxide, which is used in the pulp and paper industry for the bleaching of chemical pulp. Other applications include, to a lesser extent, drinking water purification, textile bleaching, herbicides and uranium refining (recital 2 to the contested decision).

3 The main competitors on the sodium chlorate market in the EEA were, in 1999, the following undertakings: EKA Chemicals AB ('EKA'), whose share capital was wholly owned by the Akzo Nobel group, and which held 49 % of the market; Finnish Chemicals Oy, whose share capital was indirectly and wholly owned by Erikem Luxembourg SA ('ELSA'), and which held 30 % of the market; the applicant, 97.55 % of whose share capital was owned by Elf Aquitaine between 1992 and 2000, and which had a 9 % market share; Aragonesas Industrias y Energia SAU ('Aragonesas'), whose share capital was wholly owned between 1992 and 2000, directly or indirectly, by Uralita SA, had, as did Solvay SA/NV, a 5 % share of the market, while other producers jointly had 2 % of the market (recitals 13, 14, 25 to 30, 42 and 46 to the contested decision).

4 On 28 March 2003 EKA lodged an application with the Commission for immunity under the Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') concerning the existence of a cartel on the sodium chlorate market ('the cartel'). EKA supported that application by documentary evidence and an oral statement (recitals 54 and 55 to the contested decision).

5 On 30 September 2003 the Commission granted EKA conditional immunity in accordance with point 15 of the 2002 Leniency Notice (recital 55 to the contested decision).

6 On 10 September 2004 the Commission sent requests for information to Finnish Chemicals, the applicant and Aragonesas, pursuant to Article 18(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) (recital 56 to the contested decision).

7 On 18 October 2004 the applicant, in its response to the Commission's request for information referred to at paragraph 6 above, submitted an application under the 2002 Leniency Notice (recital 57 to the contested decision).

8 On 29 October 2004 Finnish Chemicals lodged an application under the 2002 Leniency Notice with the Commission and provided the Commission orally with information relating to the cartel. Finnish Chemicals confirmed that application by letter of 2 November 2004 and at the same time provided documentary evidence relating to its participation in the infringement in question (recital 58 to the contested decision).

9 Between 4 November 2004 and 11 April 2008 the Commission sent requests for information pursuant to Article 18(2) of Regulation No 1/2003 to, among other undertakings, the applicant, Elf Aquitaine, Aragonesas, EKA and Finnish Chemicals. The Commission also met EKA and Finnish Chemicals (recitals 59 to 65 to the contested decision).

10 By letter of 11 July 2007 the Commission informed the applicant that it intended to reject its application under the 2002 Leniency Notice (recital 563 to the contested decision).

11 By letter of the same date the Commission also informed Finnish Chemicals that it intended to grant it, under the 2002 Leniency Notice, a reduction of 30 to 50 % of the amount of any fine imposed (recital 583 to the contested decision).

12 On 27 July 2007 the Commission adopted a statement of objections, addressed to, in addition to the applicant, EKA, Akzo Nobel NV, Finnish Chemicals, ELSA, Elf Aquitaine, Aragonesas and Uralita. The addressees responded to the statement of objections within the prescribed period (recitals 66 and 67 to the contested decision).

13 On 20 November 2007 the applicant and Elf Aquitaine, among others, exercised their right to be heard orally at a hearing before the hearing officer (recital 68 to the contested decision).

14 On 11 June 2008 the Commission adopted the contested decision, which was notified to the applicant two days later.

15 In the contested decision, the Commission observes, in substance, that the applicant, EKA, Finnish Chemicals and Aragonesas pursued a strategy of stabilising the sodium chlorate market, the ultimate aim of which was to allocate sales volumes of that product among themselves, to coordinate the pricing policy towards their customers and thus to maximise their margins. The functioning of the cartel was based on frequent contacts between competitors in the form of bi- or multilateral meetings and telephone conversations, but without following a fixed pattern. According to the

Commission, those collusive practices took place from 21 September 1994 for EKA and Finnish Chemicals, from 17 May 1995 for the applicant, from 16 December 1996 for Aragonesas and from 13 February 1997 for ELSA. The practices continued until 9 February 2000, at least so far as the applicant, EKA, Finnish Chemicals and Aragonesas are concerned (recitals 69 to 71 to the contested decision).

16 As regards, in particular, the unlawful conduct of the applicant, the Commission observes that the facts set out in the contested decision show that that undertaking participated directly in the anti-competitive practices in question. The Commission also observes that throughout the infringement period Elf Aquitaine held more than 97 % of the shares in the applicant. For that reason, the Commission maintains that there are reasonable grounds for considering that Arkema France was required to follow the policy defined by its parent company and it was therefore unable to act autonomously. The Commission therefore concludes that it may be presumed that Elf Aquitaine exercised decisive influence over the applicant, which is borne out by the additional indicia which it sets out (recitals 384 and 386 to the contested decision).

17 As regards the calculation of the amounts of the fines imposed on, in particular, the applicant and Elf Aquitaine, the Commission relied on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines') (recital 498 to the contested decision).

18 First of all, the Commission states that, in order to determine the basic amount of the fine imposed on the applicant, an amount corresponding to 19 % of the value of the sales of the products affected by the cartel should be taken into account. First, since the applicant participated in the infringement for at least four years and eight months, the Commission considers that that amount should be multiplied by five in order to take account of the duration of the infringement. Second, in order to deter the undertakings concerned, and in particular the applicant, from participating in horizontal price-fixing agreements, the Commission considers it necessary to impose an additional amount corresponding to 19 % of the value of those sales. The

Commission therefore concludes that a fine of EUR 22 700 000 should be imposed, for which the applicant and Elf Aquitaine are to be jointly and severally liable (recitals 510 and 521 to 523 to the contested decision).

19 Furthermore, as regards the adjustment of the basic amount of the fine, the Commission observes, with respect to aggravating circumstances, that on the date of adoption of the contested decision it had already imposed sanctions on the applicant in three decisions in which that undertaking had been held liable for earlier cartel activities. The Commission states that those decisions are Decision 85/74/EEC of 23 November 1984 relating to a proceeding under Article [81 EC] (IV/30.907 — Peroxygen products) (OJ 1985 L 35, p. 1; 'the Peroxygen Products decision'); Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 — Polypropylene (OJ 1986 L 230, p. 1; 'the Polypropylene decision'); and Decision 94/599/EC of 27 July 1994 relating to a proceeding under Article [81 EC] (IV/31.865 — PVC) (OJ 1994 L 239, p. 14; 'the PVC decision'). On the one hand, the Commission considers, in substance, that the applicant's conduct consisting in repeated infringement justifies an increase of 90 % of the basic amount of the fine imposed on it. On the other hand, the Commission finds no attenuating circumstance in favour of the applicant or Elf Aquitaine that would justify a reduction of the fine. In particular, the Commission considers that, when all the facts of the case are taken into account, there are 'no exceptional circumstances' that could justify granting the applicant a reduction of the fine outside the scope of the 2002 Leniency Notice (recitals 525, 526, 538 and 544 to the contested decision).

20 Next, the Commission states, in substance, that in order to ensure that fines have a sufficiently deterrent effect, and in the light of the fact that Elf Aquitaine has a particularly large turnover beyond the sales of goods to which the infringement relates and, last, that that turnover is in absolute terms much larger than the turnover of

the other undertakings involved, it is appropriate to apply to Elf Aquitaine an increase of 70 % of the basic amount of the fine (recitals 545, 548 and 559 to the contested decision).

21 In addition, the Commission finds that the fines to be imposed on the applicant and Elf Aquitaine, in particular, are below 10 % of their respective total turnovers in 2007 and that the fines that can be imposed on them before the application of the 2002 Leniency Notice come to EUR 43 130 000 for the applicant and to EUR 38 590 000 for Elf Aquitaine (recitals 551 and 552 to the contested decision).

22 Last, the Commission considers that the applicant must not benefit from any reduction of the fine under the 2002 Leniency Notice, since the information which it supplied to the Commission did not constitute significant added value within the meaning of point 21 of that notice. Conversely, the Commission considers that Finnish Chemicals provided it with evidence representing significant added value for the purposes of point 21 of that notice and therefore granted that undertaking a reduction of 50 % of the fine that would otherwise have been imposed on it (recitals 580, 588 and 591 to the contested decision).

23 Articles 1 and 2 of the operative part of the contested decision are worded as follows:

'*Article 1*

The following undertakings infringed Article 81 [EC] and Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices with a view to allocating sales volumes, fixing prices, exchanging commercially sensitive information on prices and sales volumes and monitoring the

execution of the anti-competitive arrangements for sodium chlorate in the EEA market:

(a) [EKA], from 21 September 1994 until 9 February 2000;

(b) Akzo Nobel …, from 21 September 1994 until 9 February 2000;

(c) Finnish Chemicals …, from 21 September 1994 until 9 February 2000;

(d) [ELSA], from 13 February 1997 until 9 February 2000;

(e) [the applicant], from 17 May 1995 until 9 February 2000;

(f) Elf Aquitaine …, from 17 May 1995 until 9 February 2000;

(g) Aragonesas …, from 16 December 1996 until 9 February 2000;

(h) Uralita …, from 16 December 1996 until 9 February 2000.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) EKA … and Akzo Nobel …, jointly and severally, EUR 0;

(b) Finnish Chemicals …: EUR 10 150 000, of which jointly and severally with [ELSA] (in liquidation): EUR 50 900;

(c) [the applicant] and Elf Aquitaine …, jointly and severally: EUR 22 700 000;

(d) [the applicant]: EUR 20 430 000;

(e) Elf Aquitaine …: EUR 15 890 000;

(f) Aragonesas … and Uralita …, jointly and severally: EUR 9 900 000.

…'

24 In Article 3 of the operative part of the contested decision, the Commission orders the undertakings referred to in Article 1 of that decision, first, to bring an immediate end to the infringement, in so far as they have not already done so, and, second, to refrain from repeating any act or conduct described in Article 1 and from any act or conduct having the same or similar object or effect.

25 Article 4 of the operative part of the contested decision lists the addressees of the contested decision, which are the undertakings referred to in Article 1 of that decision.

Procedure and forms of order sought

26 By application lodged at the Registry of the General Court on 19 August 2008, the applicant brought the present action.

27 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure. The Court also put certain questions to the Commission and requested it to provide certain documents. The Commission replied within the prescribed period, but refused to produce the transcript of EKA's oral application for immunity.

28 The parties presented oral argument and answered the questions put by the Court at the hearing on 2 June 2010.

29 By order of 11 June 2010 in Case T-343/08 *Arkema France* v *Commission*, not published in the ECR, the Court ordered the Commission to produce the transcript of EKA's oral application for immunity and gave leave for that document to be consulted by the applicant's lawyers at the Court Registry. The Commission produced that document within the prescribed period and the applicant's lawyers consulted it at the Court Registry. Conversely the applicant did not respond within the prescribed period to the written question from the Court asking whether that document corresponded to the document to which it had been given access during the administrative procedure before the Commission.

30 The oral procedure was closed on 27 July 2010.

31 The applicant claims that the Court should:

— principally, annul, on the basis of Article 230 EC, the contested decision, in so far as it concerns the applicant;

— in the alternative, annul or reduce, on the basis of Article 229 EC, the amount of the fines imposed on the applicant in the contested decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

A — *The principal claims, seeking annulment in part of the contested decision*

33 In support of its application for annulment of the contested decision in so far as it concerns the applicant, the applicant puts forward four pleas in law. The first plea alleges errors of law and of fact in connection with the imputation of the applicant's unlawful conduct to Elf Aquitaine. The second plea alleges errors of law in connection with the increase of the basic amount of the fine imposed on the applicant for repeated infringement. The third plea alleges that the Commission was wrong to take the view that the applicant was not entitled to a reduction of the fine under the 2002 Leniency Notice. The fourth plea alleges that the Commission made errors of law and of fact in not granting the applicant any reduction of the fine outside the scope of the 2002 Leniency Notice.

1. *Admissibility*

34 The Commission raises two objections to admissibility, alleging that, first, the applicant's first head of claim and, second, its first plea are inadmissible.

(a) First objection to admissibility, alleging that the applicant's first head of claim is inadmissible

35 The Commission claims that the applicant's first head of claim is inadmissible. It maintains that none of the pleas referred to at paragraph 33 above is capable of entailing the annulment of the contested decision in its entirety.

36 While it is true that the applicant puts forward in its written pleadings no argument contesting the Commission's first objection to admissibility, it must be emphasised that, in answer to the questions put by the Court at the hearing, the applicant stated that, by its first head of claim, it sought annulment of Article 2(c) and (d) of the contested decision, which was duly noted in the minutes of the hearing.

37 The Court finds that, by its second to fourth pleas referred to at paragraph 33 above, the applicant disputes, in substance, the amount of the fines which the Commission imposed on it in Article 2(c) and (d) of the contested decision. Those pleas therefore, in accordance with Article 44(1) of the Rules of Procedure of the General Court, support its application for annulment in part of that article.

38 It must therefore be held that the applicant's first head of claim, in so far as it seeks exclusively the annulment of Article 2(c) and (d) of the contested decision, is admissible. Accordingly, the Commission's first objection to admissibility must be rejected as unfounded.

(b) Second objection to admissibility, alleging that the applicant's first plea is inadmissible

39 The Commission claims that the first plea raised by the applicant, alleging that the Commission was wrong to impute liability for the infringement committed by the applicant to Elf Aquitaine, is inadmissible, since the imputation of such liability does not adversely affect the applicant. The Commission maintains, in particular, that the imputation of liability to Elf Aquitaine has no impact on the amount of the fines which it imposed on the applicant. In answer to the questions put by the Court at the hearing, the Commission observed, first, that if the Court should annul the imputation of liability there would be no advantage for the applicant, since it would then be solely liable to pay the fine provided for in Article 2(c) of the contested decision. Second, the applicant's argument that it is because Elf Aquitaine took over its activity on the polypropylene market after the adoption of the Polypropylene decision that the fine imposed on it was increased to take account of a repeated infringement in the contested decision is unfounded.

40 The applicant puts forward in its written submissions no argument contesting the Commission's second objection to admissibility. In answer to the questions put by the Court at the hearing, the applicant stated that it maintained that the imputation of its unlawful conduct to Elf Aquitaine had an impact on the amount of the fine imposed on it for repeated infringement in the contested decision, since Elf Aquitaine took over the applicant's activity on the polypropylene market after the adoption of the Polypropylene decision.

41 In the present case, it must be observed, first of all, that, according to consistent case-law, an action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of the measure must of itself be capable, by its result, of procuring an advantage for the party who brought it (see, to that effect, Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33;

Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 33 and the case-law cited; and Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited).

42 The Court must therefore consider whether the applicant's first plea is capable of procuring an advantage for the applicant within the meaning of the case-law cited at paragraph 41 above.

43 First, as regards the claim for annulment or reduction of the fine provided for in Article 2(c) of the contested decision, it should be observed, first of all, that that fine is in the sum of EUR 22 700 000 and that it was imposed jointly and severally on the applicant and Elf Aquitaine. Next, it follows from recitals 510 and 521 to 523 to the contested decision, the terms of which are summarised at paragraph 18 above, that the amount of that fine was determined in accordance with the provisions of the Guidelines and corresponds to 19 % of the value of the applicant's sales, multiplied by five owing to the duration of its involvement in the infringement in question and to which an additional amount of 19 % of the value of the applicant's sales was added for deterrence. Accordingly, as the Commission observes in its written pleadings, without, moreover, being contested by the applicant, that fine was determined by reference to what were solely the applicant's figures and Elf Aquitaine's figures were not taken into account by the Commission in the determination of the fine.

44 Accordingly, even if the Court were to find that the Commission was wrong to impute liability for the unlawful conduct of the undertaking concerned to Elf Aquitaine, such a finding would not have any consequences either for the actual principle of the imposition of the fine imposed on the applicant in Article 2(c) of the contested decision for its participation in the cartel or on the calculation of the amount of that fine; and, as the Commission correctly observed in answer to the questions put by the Court at the hearing, such a finding, in so far as it would lead the Court to annul the fines

imposed on Elf Aquitaine in the contested decision, would have the consequence that the applicant would be solely liable for the fine provided for in Article 2(c) of the contested decision.

45 Second, as regards the fine provided for in Article 2(d) of the contested decision, it should be observed, first of all, that it follows from recitals 525 and 526 to the contested decision, the terms of which are summarised at paragraph 19 above, that the Commission considered that, in accordance with point 28 of the Guidelines, the basic amount of the fine of EUR 22 700 000 imposed jointly and severally on the applicant and Elf Aquitaine should be increased by 90 %. In addition, it was on the basis of the Peroxygen Products decision, the Polypropylene decision and the PVC decision, of which the applicant was an addressee, that the Commission imposed on it the fine of EUR 20 430 000 provided for in Article 2(d) of the contested decision.

46 Accordingly, even if the Court were to find that the Commission was wrong to impute liability for the unlawful conduct of the undertaking concerned to Elf Aquitaine, such a finding would have no impact, first, on the actual principle of the applicant being ordered to pay a fine of EUR 20 430 000 for a repeated infringement and, second, on the calculation of the amount of that fine. That amount corresponds to 90 % of the amount of the fine of EUR 22 700 000 provided for in Article 2(c) of the contested decision, which, as stated at paragraph 43 above, was calculated solely on the basis of the applicant's own figures.

47 In that regard, the argument which the applicant raised in answer to the questions put by the Court at the hearing (see paragraph 40 above) must be rejected as ineffective. In so far as, as follows from Article 1 of the Polypropylene decision, the applicant was an addressee of that decision, on which, among other decisions, the Commission relied as a basis for its finding in the contested decision that the applicant's conduct constituted a repeat infringement, any finding by the Court that the Commission was wrong to impose a penalty on Elf Aquitaine in the contested decision would have no impact on the actual principle of the imposition on the applicant of

the fine provided for in Article 2(d) of the contested decision or on the calculation of the amount of that fine.

48 In the light of all the foregoing considerations, it must be concluded that the applicant's first plea is not capable of procuring an advantage for the applicant within the meaning of the case-law cited at paragraph 41 above.

49 Accordingly, the Commission's second objection to admissibility must be upheld and the applicant's first plea must be rejected as inadmissible.

2. *Substance*

(a) Second plea, alleging errors of law in connection with the increase of the basic amount of the fine imposed on the applicant for repeated infringement

50 The applicant claims, in substance, that the Commission was wrong to increase the basic amount of the fine imposed on it by 90 % for repeated infringement. This plea is divided into three parts.

First part, alleging breach of the rights of the defence and of the principle of proportionality, on the ground that the Peroxygen Products decision was taken into account in the contested decision for the purpose of establishing repeated infringement

— Arguments of the parties

51 In the first place, the applicant contends that the Commission breached its rights of defence, in so far as it took the Peroxygen Products decision into account for the purpose of establishing repeated infringement, in spite of the fact that it had not mentioned that decision in the statement of objections. Although the applicant does not dispute that, in accordance with Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, 'the judgment of this Court in *Groupe Danone* v *Commission*', paragraphs 56 and 57, the Commission is able to take the aggravating circumstance of repeated infringement into account in the final decision without stating in the statement of objections that it intends to do so, it maintains that, in so far as the Commission chose to identify in the statement of objections the decisions taken against the applicant on which it proposed to rely for the purpose of establishing repeated infringement, it could not rely on the Peroxygen Products decision in the contested decision. By mentioning only the Polypropylene decision and the PVC decision at footnote 361 to the statement of objections, the Commission misled the applicant as to the scope of the aggravating circumstance that it eventually took into consideration in the contested decision, thereby preventing it, at the statement of objections stage, from submitting observations on the period of 11 years that elapsed between the adoption of the Peroxygen Products decision and the beginning of the infringement penalised in the contested decision.

52 In the second place, the applicant submits that the Commission breached the principle of proportionality by taking the Peroxygen Products decision into account in the contested decision for the purpose of establishing repeated infringement. It maintains that the time which elapsed between the adoption of the Peroxygen Products decision and the beginning of the infringement penalised in of the contested decision is manifestly excessive. It follows from the Commission's practice when taking

decisions and from Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, 'the judgment of the Court of Justice in *Groupe Danone* v *Commission*', paragraph 39, that a period of more than 10 years between the finding of a first infringement and the commission of a second infringement cannot be taken to demonstrate that an undertaking has a tendency towards infringing the competition rules. The fact that the Peroxygen Products decision was taken into consideration in the contested decision is all the more disproportionate because it dealt with facts dating back more than 30 years. The applicant observes, moreover, that seven years elapsed between the end of the infringement penalised in the PVC decision and the adoption of that decision.

53 The Commission contests the applicant's arguments.

— Findings of the Court

54 In the first place, as regards the applicant's complaint that its rights of defence were breached because the Commission did not mention the Peroxygen Products decision in the statement of objections, it must be borne in mind first of all that, according to consistent case-law, where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and it also indicates the main factual and legal criteria capable of giving rise to the imposition of a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21, and the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 50).

55 Next, so far as the setting of the amounts of the fines is concerned, the rights of defence of the undertakings in question are guaranteed before the Commission by virtue of the fact that they have the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement. Moreover, undertakings have an additional guarantee, as regards the setting of the amount of the fine, in that the Court has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 31 of Regulation No 1/2003 (see, to that effect, the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 51 and the case-law cited).

56 Last, as regards, more particularly, the aggravating circumstance consisting in repeated infringement, it must be emphasised that, according to the case-law, first, the mere fact that the Commission considered, in its previous practice in taking decisions, that certain factors did not constitute an aggravating factor for the purpose of determining the amount of the fine does not imply that it must make the same assessment in a subsequent decision. Second, the opportunity afforded to an undertaking in another case to make known its views on the intention to make a finding of repeated infringement on its part does not mean that the Commission is obliged to do the same in all cases, or that, where such a possibility is not afforded, the applicant is prevented from fully exercising its right to be heard (see the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 57 and the case-law cited).

57 In the present case, it must be stated that, as the Commission observed in its written pleadings, it indicated in the statement of objections that it intended to impose fines on the undertakings concerned (see paragraph 345 of the statement of objections) and that it would take account of the gravity and duration of the infringement, making reference to the Guidelines (see paragraph 346 of the statement of objections). Furthermore, the Commission indicated that it would take into consideration any attenuating circumstances, such as those provided for at point 29 of the Guidelines, and also of any aggravating circumstances, such as those provided for at point 28 of the Guidelines, which expressly refer to repeated infringement (see paragraph 350 of the statement of objections). Last, the Commission noted that certain of the undertakings concerned 'had already been the subject of decisions relating to a similar

infringement' (see paragraph 351 of the statement of objections) which refers specifically in the applicant's case to the applicant by referring to the Polypropylene decision and the PVC decision (see footnote 361 to the statement of objections).

58 Accordingly, on the basis of the elements which the Commission set out in the statement of objections and which are reproduced at paragraph 57 above, it did not breach the applicant's rights of defence when, in accordance with the case-law set out at paragraphs 54 to 56 above, it applied the aggravating circumstance of repeated infringement in the contested decision.

59 In that regard, the applicant's argument that its rights of defence have been breached in so far as the Commission misled it as to the scope of the aggravating circumstance of repeated infringement that would be applied in the contested decision and, moreover, prevented it, at the stage of the statement of objections, from submitting its arguments on the period of 11 years that elapsed between the Peroxygen Products decision and the beginning of the applicant's participation in the infringement penalised in the contested decision must be rejected as unfounded.

60 First, in so far as the Commission expressly mentioned in the statement of objections its intention to take the aggravating circumstance of repeated infringement into consideration, notably with regard to the applicant, and in so far as it did not in any way indicate that it would confine itself to relying in that regard on the Polypropylene decision and the PVC decision, to which it referred at footnote 361 to the statement of objections, the applicant could not preclude the possibility that the Commission would apply that aggravating circumstance on the basis of any previous decision capable of establishing repeated infringement on its part, such as the Peroxygen Products decision.

61 Second, and in any event, since the Commission was not required, in accordance with the case-law set out at paragraph 56 above, to indicate in the statement of objections the decisions in which the applicant had previously been penalised for its

participation in cartels and on which the Commission proposed to rely for the purpose of establishing repeated infringement in the contested decision, the mere failure to mention the Peroxygen Products decision in the statement of objections cannot have prevented the applicant from exercising its right to be heard in full or to have misled the applicant as to the scope of the aggravating circumstance which the Commission applied in the contested decision.

62 Accordingly, it must be held that, contrary to the applicant's contention, its rights of defence have not been breached.

63 In the second place, as regards the applicant's complaint that the Commission breached the principle of proportionality in taking the Peroxygen Products decision into consideration for the purpose of establishing repeated infringement, it must be borne in mind that, according to the case-law, the principle of proportionality requires that the measures adopted by the institutions must not exceed what is appropriate and necessary for attaining the objective pursued. When it comes to the calculation of fines, the gravity of infringements has to be determined by reference to numerous factors and it is important not to confer on one or other of those factors an importance which is disproportionate in relation to other factors. In that context, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (see Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228 and the case-law cited, and Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 264).

64 In addition, the Commission has a discretion as regards the choice of factors to be taken into account for the purpose of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the deterrent effect of fines, without the need to refer to a binding or exhaustive list of the criteria

which must be taken into account (see the judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 37 and the case-law cited).

65 It must be emphasised, moreover, that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and that the Commission cannot be bound by any limitation period when making such a finding (see the judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 38, and Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 141).

66 Indeed, repeated infringement is an important factor which the Commission must appraise, since the purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including, for example, the time that has elapsed between the infringements in question (judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 39, and *Hoechst* v *Commission*, paragraph 65 above, paragraph 141).

67 The Court of Justice has thus considered the repetition of infringements of the competition rules by an undertaking separated by a relatively short time, namely less than 10 years, showed a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed those rules (judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 40).

68 It therefore follows from the case-law set out at paragraphs 63 to 67 above that, while no limitation period precludes a finding by the Commission of repeated infringement, the fact none the less remains that, in accordance with the principle of proportionality, the Commission cannot take one or more previous decisions penalising an undertaking into account without limitation in time.

69 In the present case, it should be borne in mind that the applicant did not dispute, either during the administrative procedure or before the Court, the Commission's finding, at Article 1(e) of the contested decision, that it had participated in the cartel from 17 May 1995 until 9 February 2000.

70 Nor, moreover, does the applicant dispute either the dates of the decisions in which the Commission previously penalised it for its participation in cartels or the periods during which it participated in the cartels which the Commission previously penalised. In that regard, it should be observed, first of all, that, in the Peroxygen Products decision, the Commission found that the infringement had lasted from 1961 until 13 December 1980 (Article 1 of that decision). Next, in the Polypropylene decision, the Commission found that the infringement had taken place from November 1977 until the end or 1982 or the beginning of 1983 (first indent of Article 1 of that decision). Last, in the PVC decision, the Commission found that the infringement had been committed from August 1980 until May 1984 (recitals 8 and 54 to that decision).

71 It therefore follows from the findings set out at paragraphs 69 and 70 above that the applicant infringed the competition rules by participating in cartels continuously from 1961 until May 1984, for which it was penalised first in 1984, then in 1986 and finally in 1994, and that, in spite of that series of decisions, it repeated its unlawful conduct by participating in a new cartel, penalised in the contested decision, from 17 May 1995 until 9 February 2000.

72 The Commission was therefore correct to take the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account for the purpose of establishing that the applicant had committed a repeated infringement, since that series of decisions, the adoption of which was separated by short intervals and the last of which was adopted one year before the applicant participated in the infringement penalised in the contested decision, demonstrated its tendency towards infringing the competition rules. Accordingly, the Commission did not breach the principle of proportionality in taking that series of decisions into consideration when assessing the applicant's conduct from the aspect of repeated infringement.

73 As regards the applicant's arguments, first, that it follows from the judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 40, that the Commission was not entitled to take the Peroxygen Products decision into account for the purpose of establishing repeated infringement, because an excessive period, namely 11 years, had elapsed between the adoption of that decision and the beginning of the infringement penalised in the contested decision; second, that the Peroxygen Products decision relates to facts going back more than 30 years; and, third, that seven years elapsed between the end of the infringement penalised in the PVC decision and the adoption of that decision, they must be rejected as ineffective. Those arguments do not, in any event, call in question the conclusion set out at paragraph 72 above.

74 Accordingly, the applicant's complaint that the Commission breached the principle of proportionality in taking the Peroxygen Products decision into account for the purpose of establishing repeated infringement, and therefore the first part of the plea in its entirety, must be rejected as unfounded.

Second part, alleging breach of the principle *non bis in idem* and the principle of proportionality, owing to the fact that the Commission had already taken the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account, for the purpose of establishing repeated infringement, in four other decisions penalising the applicant

— Arguments of the parties

75 In the first place, the applicant maintains that the Commission breached the principle *non bis in idem*, under which, according to the case-law, a person who has already been tried can no longer be prosecuted or punished for the same acts. In the present case, the Commission ought to have found that it had already taken the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account

in four decisions which it had adopted between 2003 and 2006 and in which it had penalised the applicant ('the four decisions adopted between 2003 and 2006'). Those decisions are: Decision C(2003) 4570 final and corrigendum C(2004) 4 of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44; 'the Organic Peroxides decision'); Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 — MCAA) (OJ 2006 L 353, p. 12); Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen peroxide and perborate (OJ 2006 L 353, p. 54; 'the Hydrogen Peroxide decision); and Decision C(2006) 2098 final of 31 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates) (OJ 2006 L 322, p. 20; 'the Methacrylates decision'). The applicant contends, in substance, that a decision in which the Commission has taken a previous decision into account for the purpose of establishing repeated infringement precludes it from taking the same infringement into account for the purpose of applying the aggravating circumstance of repeated infringement in a new decision.

76 In the second place, the applicant claims that, in applying an increase in the basic amount of the fine for repeated infringement, on the basis of the same facts as in five different cases, the Commission breached the principle of proportionality. The applicant maintains that that increase is ineffective and disproportionate by reference to the objective of deterrence.

77 First, the increase of the basic amount of the fine for repeated infringement in the contested decision would have been valid only if the facts found in the contested decision had been committed after the facts that gave rise to the four decisions adopted between 2003 and 2006, and not concomitant with those facts. Since the infringements penalised in the four decisions adopted between 2003 and 2006 were contemporaneous with those found in the contested decision, but since those decisions had not been adopted at the time of the facts penalised in the contested decision, the

applicant did not have the opportunity to adjust its conduct on the sodium chlorate market.

78 Second, in the applicant's submission, an increase for repeated infringement corresponding to 50 % of the basic amount of the fine, like that imposed in the four decisions adopted between 2003 and 2006, would have adequately satisfied the objective of deterrence pursued in the contested decision.

79 The Commission contests the applicant's arguments.

— Findings of the Court

80 In the first place, as regards the applicant's complaint that the Commission breached the principle *non bis in idem* owing to the fact that it took the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account, first, in the four decisions adopted between 2003 and 2006 and, second, in the contested decision, it must be borne in mind that, according to consistent case-law, the principle *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 50 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision (Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 103, 119; 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; and the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 184).

81 The application of the principle *non bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (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 338, and the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 185).

82 In the present case, first it must be observed that in taking previous infringements into consideration in the contested decision the Commission did not seek to punish those infringements again, but only to penalise the applicant for its participation in the cartel in the contested decision, by taking account of its conduct constituting repeated infringement. Accordingly, the fact that the Commission took the same infringements into consideration in the four decisions adopted between 2003 and 2006 does not amount to a breach of the principle *non bis in idem*.

83 Second, and in any event, it must be observed that the cumulative conditions of the applicability of the principle *non bis in idem* set out at paragraph 81 above are not satisfied, since the condition of identity of the facts is absent. In the contested decision, the Commission penalises the applicant on account of its participation in the cartel, in respect of which it had not previously initiated proceedings or adopted penalties, which the applicant, moreover, does not claim to be the case.

84 The Commission therefore did not breach the principle *non bis in idem* by taking the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account in finding that the applicant's conduct constituted repeated infringement in the contested decision, although it had already taken those three first decisions into account in the four decisions adopted between 2003 and 2006.

85 Accordingly, the applicant's complaint must be rejected as unfounded.

86 In the second place, in so far as the applicant maintains that the Commission breached the principle of proportionality in applying, in the contested decision, an increase of the basic amount of the fine on account of repeated infringement, first, the applicant's argument that, because the Peroxygen Products decision, the Polypropylene decision and the PVC decision were taken into account in the four decisions adopted between 2003 and 2006 for the purpose of establishing repeated infringement, the objective of deterrence was already satisfied, must be rejected as unfounded.

87 In fact, since it is when considering the gravity of the infringement which it proposes to penalise that the Commission must take repeated infringement by an undertaking into account (judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 26), the fact that the Commission had already taken the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account in the four decisions adopted between 2003 and 2006 did not prevent it from correctly taking the latter three decisions into account in the contested decision for the purpose of deterring the applicant from repeating its unlawful conduct in the future.

88 Moreover, it must be observed that it would be contrary to the objective of deterrence if the fact that the Commission took a first infringement into consideration in a previous decision for the purpose of establishing repeated infringement were to be taken into account as a ground for precluding it from increasing the basic amount of the fine imposed in a subsequent decision on the basis of that infringement. Such a solution would lead to the situation, which would be counterproductive from the aspect of the deterrent objective of the fine, in which an undertaking responsible for a large number of repeated infringements did not have the amount of the fine imposed on it gradually increased according to the number of infringements which it has committed, but in which, on the contrary, the marginal amount of the fine that could be imposed on it reduced gradually according to the increasing number of decisions penalising it.

89 Second, the applicant's argument that the Commission breached the principle of proportionality in imposing on it a new increase to reflect repeated infringement, when

the four decisions adopted between 2003 and 2006 related to facts concomitant with those of the contested decision and when, consequently, that gave it no opportunity to adjust its conduct on the sodium chlorate market, must be rejected as ineffective. It has no bearing on the present case that the four decisions adopted between 2003 and 2006 relate to facts concomitant with those to which the contested decision relates, since the Commission relied exclusively on the Peroxygen Products decision, the Polypropylene decision and the PVC decision, which the applicant does not deny were adopted before the beginning of the infringement penalised in the contested decision, in order to establish in the contested decision that the applicant's conduct constituted repeated infringement.

90 In the light of all the foregoing considerations, the applicant's complaint that the Commission breached the principle of proportionality, as defined at paragraph 63 above, and, accordingly, the second part of the present plea in its entirety, must be rejected as unfounded.

Third part, alleging breach of the principles of proportionality, equal treatment and sound administration owing to the increase by 90 % of the basic amount of the fine imposed on the applicant for repeated infringement

— Arguments of the parties

91 The applicant claims, in the alternative, that even if the Commission had been entitled to increase, in the contested decision, the basic amount of the fine for repeated infringement, the fact would none the less remain that the Commission breached the principles of proportionality, equal treatment and sound administration in setting the rate of that increase at 90 %.

92 First of all, the applicant maintains that nothing in the present case justifies an increase of 90 % of the basic amount of the fine for repeated infringement when that increase was 50 % in the four decisions adopted between 2003 and 2006. The Court should therefore reduce that increase to 50 % in the present case.

93 In addition, the applicant submits that an increase of 90 % of the basic amount of the fine for repeated infringement is disproportionate in so far as, in the contested decision, Elf Aquitaine's fine was also increased by 70 % of the basic amount of the fine for deterrence.

94 Last, the applicant observes that, while it is not unaware of the discretion which the Commission enjoys when setting fines, or of the severity of the Guidelines, the infringements penalised in the Peroxygen Products decision and the Methacrylates decision are contemporaneous with that penalised in the contested decision. In addition, the application of the Guidelines, which provide that the fine may be increased in a case of repeated infringement, results solely from the abnormally long periods during which the Commission investigated the present case. The applicant should not suffer the adverse consequences of the Commission's lack of diligence in investigating the present case.

95 The Commission contests the applicant's arguments.

— Findings of the Court

96 In the first place, as regards the applicant's complaint that the Commission breached the principle of proportionality on the ground that the 90 % increase of the basic

amount of the fine for repeated infringement is disproportionate in the present case, it should be borne in mind, first of all, that under Article 23(2) and (3) of Regulation No 1/2003 the Commission may by decision impose fines on undertakings which have infringed Article 81 EC and, in that context, have regard to the gravity and duration of the infringement.

97 In addition, the first indent of point 28 of the Guidelines provides as follows:

'The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

— Where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 [EC] or 82 [EC]; the basic amount will be increased by up to 100 % for each infringement established …'

98 Next, it must be noted that Article 23(2) and (3) of Regulation No 1/2003 constitutes the relevant legal basis for taking repeated infringement into consideration in calculating the fine (see, by analogy, judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraphs 27 to 29).

99 Furthermore, the Guidelines which the Commission adopts for the purpose of setting fines ensure legal certainty on the part of undertakings, since they determine the method which the Commission has bound itself to use for the purpose of setting fines (see, to that effect, judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 52 above, paragraph 23). The administration may not depart from the Guidelines in an individual case without giving reasons that are compatible with the

principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91).

100 It follows from the case-law, moreover, that the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 292). The Commission enjoys a wide discretion in setting the amount of fines and is not bound by assessments made by it in the past (see Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 123 and the case-law cited). This wide discretion enables it to direct the conduct of undertakings towards compliance with the competition rules (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 216). In that context, it is not required to apply specific mathematical formulae (*Michelin* v *Commission*, paragraph 292).

101 Last, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is stopped from raising that level within the limits indicated in Regulation No 1/2003 if that is necessary to ensure the implementation of competition policy. The proper application of the competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy (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 169, and the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 395).

102 In the present case, it must be held, first of all, that in setting at 90 %, in the contested decision, the rate of increase of the basic amount of the fine for repeated infringement, the Commission acted in application of Article 23(2) and (3) of Regulation

No 1/2003 and the first indent of point 28 of the Guidelines, which the applicant does not dispute. Contrary to the applicant's contention, moreover, and in accordance with the case-law cited at paragraphs 100 and 101 above, the fact that the Commission imposed an increase of 50 % of the basic amount of the fine in previous decisions did not restrict its discretion, in the contested decision, as to the setting of the rate of increase of the basic amount of the fine.

103 Second, it should be observed that the applicant puts forward no argument capable of establishing that, having regard to the circumstances of the case that show its strong tendency towards infringing the competition rules, the Commission exceeded its discretion in this case by increasing the basic amount of the fine by 90 %.

104 Accordingly, the applicant has not succeeded in establishing that the Commission breached the principle of proportionality, as defined at paragraph 63 above, by increasing the basic amount of the fine imposed on the applicant by 90 % for repeated infringement.

105 Furthermore, in so far as the applicant maintains that an increase of 90 % of the basic amount of the fine for repeated infringement is disproportionate, since Elf Aquitaine's fine was increased by 70 % of the basic amount of the fine for deterrence, that argument must be rejected as ineffective.

106 It should be observed, first of all, that since it is common ground that the increase of 70 % of the basic amount of the fine was not imposed on the applicant, but solely on Elf Aquitaine, with which the applicant no longer formed a single undertaking for the purposes of Article 81 EC at the time of adoption of the contested decision, that increase cannot be taken into consideration in the assessment of whether the fine imposed on the applicant alone for repeated infringement is disproportionate. Furthermore, and in any event, those two increases meet two separate objectives of

deterrence. While the 90 % increase of the basic amount of the fine, imposed on the applicant in Article 2(d) of the contested decision, is justified by the additional need to deter the applicant, in view of its tendency towards infringing the competition rules, the 70 % increase of the amount of the fine, imposed in Article 2(e) of that decision on Elf Aquitaine, meets the need to ensure that the fine imposed on that undertaking has a deterrent effect, in view of the fact that, because its global turnover is much larger than that of the other members of the cartel, it is more readily able to raise the necessary funds to pay the fine.

107 Accordingly, the applicant's complaint alleging breach of the principle of proportionality must be rejected as unfounded in part and as ineffective in part.

108 In the second place, as regards the applicant's complaint that the Commission breached the principle of equal treatment in so far as it was able to impose on the applicant, in the contested decision, a different rate of increase of the basic amount of the fine from the rate of 50 % which it had imposed in the four decisions adopted between 2003 and 2006, it must be borne in mind that, according to the case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56 and the case-law cited).

109 In the present case, it must be observed that the sole fact that the Commission, in its previous practice in adopting decisions, applied a certain rate of increase of the basic amount of the fine does not mean, in accordance with the case-law cited at paragraphs 100 and 101 above, that, in the light of the circumstances of the case, it

was deprived of the power to increase, in the contested decision, that rate within the limits which it has set itself in the Guidelines in order to encourage the applicant to alter its anti-competitive conduct.

110 Accordingly, the applicant's complaint alleging breach of the principle of equal treatment resulting from the application of an increase of 90 % of the basic amount of the fine imposed on it for repeated infringement must be rejected as unfounded.

111 In the third place, as regards the applicant's complaint that the Commission breached the principle of sound administration by applying an increase of 90 % of the basic amount of the fine for repeated infringement, it must be borne in mind that, according to the case-law, in cases where the institutions have a power of appraisal in order to be able to fulfil their tasks, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance; those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see, to that effect, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 99).

112 In the present case, it must be emphasised that, as is clear from recitals 525 to 527 to the contested decision, the Commission, which, in accordance with the case-law cited at paragraph 100 above, is not required to apply specific mathematical formulae when setting fines, rightly considered that it was appropriate to impose a high rate of increase of the basic amount of the fine, in view of the fact 'that the first penalties [imposed on the applicant] did not prompt it to change its conduct' (recital 525 to the

contested decision). Nor does the applicant put forward either argument or proof to support its assertion that the Commission did not undertake a careful and impartial examination of the circumstances of the present case that could justify imposing a rate of increase of 90% of the basic amount of the fine, given the applicant's strong tendency towards infringing the competition rules.

113 Accordingly, the applicant has not established that the Commission breached the principle of sound administration in the present case.

114 In that regard, the applicant's argument that it should not have to suffer the adverse consequences of the Commission's lack of diligence in investigating the present case, which led the Commission to apply the Guidelines which, in substance, heavily penalised the conduct consisting in repeated infringement, must be rejected as unfounded. First, the applicant puts forward no argument or proof establishing that the Commission did not investigate the present case within a reasonable time. Second, since the effective application of the competition rules requires that the Commission be able at any time to adapt the level of the fines to its policy (see the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraphs 210 to 212 and the case-law cited), the Commission cannot be criticised for having relied, in order to determine the rate of increase of the basic amount of the fine for repeated infringement, on the Guidelines, which the applicant does not assert were not applicable to the facts of the present case.

115 Accordingly, the applicant's third complaint, and the second plea in its entirety, must be rejected as unfounded.

(b) Third plea, alleging failure to grant the applicant a reduction of the fine under the 2002 Leniency Notice

Arguments of the parties

116 The applicant maintains, in substance, that the Commission erred in not granting it a reduction of the fine of 30 to 50 % under the 2002 Leniency Notice. The applicant was the second undertaking to have submitted an application under that notice, on 18 October 2004. Furthermore, the evidence which it supplied represented significant added value, in view of the evidence which the Commission already had in its file at that time.

117 In the first place, the applicant observes that the approach taken by the Commission in the contested decision is inconsistent with the strictly chronological interpretation adopted in the Hydrogen Peroxide decision, in which the Commission, in spite of the very limited nature of the information supplied, granted a 40 % reduction of the fine to the second undertaking to have submitted an application under the 2002 Leniency Notice.

118 In the second place, the applicant maintains that the information which it supplied to the Commission enabled the Commission to corroborate the information which was not in EKA's application for immunity. The Commission was therefore wrong to consider, at recitals 565 to 577 to the contested decision, that the information supplied by the applicant represented no significant added value, in so far as it merely served to confirm the information which the Commission already had in its possession and which had been supplied by EKA in its application for immunity and also in Finnish

Chemicals' response to the Commission's request for information of 10 September 2004.

119 First, the applicant observes that in its response to the Commission's request for information of 10 September 2004 Finnish Chemicals merely answered the questions about its organisation and confirmed that the meetings listed by EKA had taken place and also the names of those taking part in those meetings. However, Finnish Chemicals neither stated the object of those meetings nor corroborated the information supplied by EKA indicating that a cartel existed on the sodium chlorate market.

120 Second, the applicant observes that it was the first undertaking to have corroborated EKA's statements, and in particular the following five items. First of all, it confirmed that a system of customer and volumes allocation had been put in place in the 1990s and that it had ended early in 2000. Next, it corroborated EKA's oral request for immunity, according to which there existed a compensation system which, where there was a positive gap between the volumes allocated to a participant in the cartel and the sales achieved by it, enabled the producers affected to increase their volumes the following year. Furthermore, the applicant stated that three price increases had been successful. In addition, it supplied much information about the conflict between the members of the cartel concerning the customer MODO. Last, the applicant stated that the cartel came to an end in 2000 following the adoption of competition law compliance programmes.

121 First, it follows from the foregoing that the information supplied by the applicant enabled the Commission to corroborate and supplement the evidence supplied by EKA concerning the nature and duration of the cartel, its mode of operation and also its impact on the relevant market, which Finnish Chemicals had not confirmed in its answer to the Commission's request for information of 10 September 2004.

122 Second, the applicant's contribution had significant added value, in so far as, in describing the infringement in terms similar to those employed by EKA, it enabled the Commission to corroborate the essential elements of the cartel and strengthen its capacity to establish the infringement. Taken in isolation, EKA's application for immunity had only limited probative value, in so far as, as EKA acknowledged in its oral request for immunity, the information which it had supplied had not always been verifiable and could therefore have been contested by other members of the cartel. As the Commission has considered in a number of other decisions, the mere corroboration of factors already in its possession justifies a reduction of the fine under the 2002 Leniency Notice.

123 In the third place, the applicant maintains that the information which it supplied to the Commission shed light on a number of new factors which were not previously in the latter's possession and which therefore significantly strengthened its ability to establish the facts in question. In that regard, the applicant also observes that it follows from the case-law that the Commission cannot give priority to certain documents supplied by one undertaking to the detriment of documents previously supplied by a different undertaking and that the assessment of the added value of the information supplied by an undertaking cannot depend on the Commission's choice as to whether or not to use it.

124 First, as the applicant stated at paragraphs 210 and 211 of its observations in response to the statement of objections, it informed the Commission of the existence of a document, to which reference is made at recital 76 to the contested decision, of which it had not kept a copy, stating, for each common customer, the sales volumes which each sodium chlorate producer was allowed to supply to that customer in the context of the market-sharing agreement. The existence of such a document demonstrates the extent to which the cartel was structured.

125 Second, in its observations in response to the statement of objections, the applicant was the first undertaking to identify the customers in continental Europe which were affected by the allocation of sales volumes between sodium chlorate producers. The applicant maintains, consequently, that that information ought to have enabled the Commission to assess the geographic scope of the cartel and could thus serve as a basis for requests for information, for the purpose of ascertaining that the price increases had indeed been applied. The applicant states in that regard that, contrary to the Commission's assertion, of the nine customers identified by the applicant's representative, Mr L., only two had already been identified by EKA.

126 In the fourth place, the applicant claims, first, that the actual wording of the contested decision shows that the Commission relied on much of the information which it had supplied in order to establish the existence of the infringement and to corroborate certain evidence from other sources. The applicant refers in that regard to recitals 76, 98, 207, 254, 273 and 284 to the contested decision and also to footnotes 116, 118, 142, 259, 305, 325 and 337 to that decision.

127 Next, the applicant states that, contrary to the Commission's assertion, recital 254 to the contested decision deals not with a meeting held in spring 2000, the existence of which was impossible to corroborate, but with a meeting held in 1999 with Finnish Chemicals, during which that undertaking declared that it '[had] become exclusive supplier of MODO, following an agreement of its parent company with MODO, thus breaching the existing agreement between EKA, Finnish Chemicals and [the applicant], in connection with this customer'.

128 The Commission contests the applicant's arguments.

Findings of the Court

129 In its 2002 Leniency Notice, the Commission sets out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction of the fine which would otherwise have been imposed upon them.

130 According to point 20 of the 2002 Leniency Notice, '[u]ndertakings that do not meet the conditions [to obtain exemption from a fine] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'.

131 Point 21 of the 2002 Leniency Notice provides that, '[i]n order to qualify [for a reduction of its fine under point 20 of that notice], an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

132 The first paragraph of point 23(b) of the 2002 Leniency Notice provides for three bands of reduction of the fine. The first undertaking to meet the condition laid down in point 21 of that notice is entitled to receive a reduction of the fine of between 30 and 50 %; the second undertaking is entitled to a reduction of its fine of between 20 and 30 %; and subsequent undertakings are entitled to a reduction of up to 20 % of their fines.

133 The second paragraph of point 23(b) of the 2002 Leniency Notice states that, '[i]n order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 [of that notice] was submitted and the extent to which it represents added value' and that '[i]t may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission'.

134 According to the case-law, the Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 81, and *Gütermann and Zwicky* v *Commission*, paragraph 63 above, paragraph 219).

135 Furthermore, in assessing the cooperation given by members of a cartel, only a manifest error of assessment on the part of the Commission is open to censure, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, especially in comparison with the contributions made by other undertakings (*SGL Carbon* v *Commission*, paragraph 134 above, paragraph 88). It should also be borne in mind in that regard that, whilst the Commission is required to state the reasons for which it considers that information provided by undertakings under the Leniency Notice constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent on undertakings wishing to contest the Commission's decision in that regard to show that, in the absence of such information provided voluntarily by the undertakings, the Commission would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines (*Erste Group Bank and Others* v *Commission*, paragraph 100 above, paragraph 297).

136 Furthermore, the reduction of fines in cases where the undertakings which participated in infringements of competition law have offered cooperation is justified only where it is considered that the cooperation made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (*Dansk Rørindustri and Others* v *Commission*, paragraph 101 above, paragraph 399, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363) In view of the rationale for the reduction, the Commission cannot disregard the usefulness of the information provided, which inevitably depends on the evidence already in its possession (*Gütermann and Zwicky* v *Commission*, paragraph 63 above, paragraph 220).

137 It follows from the case-law, moreover, that where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information that has already been provided by another undertaking by way of cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable with that provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly. Accordingly, it cannot be sufficient to justify a reduction of the fine for cooperation (see, to that effect, Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 301; the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 455; and *Gütermann and Zwicky* v *Commission*, paragraph 63 above, paragraph 222).

138 Last, the cooperation of an undertaking in the investigation does not entitle it to a reduction of its fine where that cooperation went no further than the cooperation incumbent upon it under Article 18 of Regulation No 1/2003 (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 51 above, paragraph 451).

139 In the present case, it should be observed, by way of preliminary point, that it is common ground that, as stated at recital 561 to the contested decision, the applicant was the second undertaking to have submitted an application under the 2002 Leniency Notice after EKA. Furthermore, as the Commission observed at recital 565 to the contested decision, without being disputed by the applicant, only the information in paragraph 3 of the response of 18 October 2004 to the Commission's request for information of 10 September 2004 ('the applicant's response') constitutes information going beyond the applicant's simple obligation to respond to the request for information which the Commission had addressed to it pursuant to Article 18 of Regulation No 1/2003. The information in paragraph 3 of the applicant's response, which concerns the interview which took place on 24 September 2004 with its employee, Mr L., deals directly with facts relating to the infringement in question.

140 It is therefore with sole respect to the information in paragraph 3 of the applicant's response that the Court should examine the four complaints which the applicant raises in order to determine whether the Commission made a manifest error of assessment in considering that the information which the applicant had supplied to it had no significant added value and that it therefore did not justify the grant of a reduction of 30 to 50 % of the amount of the fine imposed on it.

141 In the first place, as regards the applicant's complaint that the Commission ought, in the contested decision, to have granted it a reduction of the fine, as it had done in the Hydrogen Peroxide decision, in spite of the very limited nature of the information which it had supplied about the cartel at issue in the latter decision, it must be rejected as unfounded. Apart from the fact that it is by reference not to its own previous practice in adopting decisions but to the 2002 Leniency Notice that the Commission is required to examine whether the cooperation offered by an undertaking justifies the grant of a reduction of the fine, the applicant's argument does not serve to establish that the information which it supplied represents significant added value in the circumstances of the present case, in the light of the evidence which the

Commission already had in its possession at the time of the applicant's application under that notice.

142 In the second place, as regards the applicant's complaint that it was the first to have corroborated the information supplied by EKA in its oral request for immunity, it is appropriate to examine the five items of information which in the applicant's contention represent significant added value for the Commission.

143 First of all, in so far as the applicant informed the Commission that 'a system of customer and volume sharing [had been put] in place [at the] end [of] 1993 by certain sodium chlorate producers', the Commission observed, at recital 569 to the contested decision, that '[w]hile confirming the scheme in general terms, [the applicant] [had] not provide[d] any written evidence originating from the time to which the facts pertain which would have been capable of strengthening the Commission's ability to prove the facts in question'. In that regard, it must be held that the Commission did not make a manifest error of assessment in deciding that that information did not have significant added value. Apart from the fact that it is clear from EKA's oral request for immunity that that undertaking had already informed the Commission of such a system, the applicant neither supported that information by written evidence nor provided further information as to the dates, places, arrangements and amounts to which that volume and customer sharing related. Accordingly, in accordance with the case-law cited at paragraph 137 above, the mere confirmation by the applicant in its oral statement of the existence of volume and customer sharing cannot be regarded as having significant added value.

144 Next, as regards the information supplied by the applicant concerning the existence of a compensation system between aggrieved producers, which enabled them to increase their volumes the following year, it must be borne in mind that, as stated at paragraph 143 above, the Commission observed, at recital 569 to the contested decision, that, '[a]s regards the mechanism to share the [sodium chlorate] markets, the

Commission [had] already received such information as part of EKA's oral statement' and that '[w]hile confirming the scheme in general terms, [the applicant] [had] not provide[d] any written evidence originating from the time to which the facts pertain which would have been capable of strengthening the Commission's ability to prove the facts in question'. In that regard, it must be stated that the Commission did not make a manifest error of assessment in deciding that that information could have no significant added value. Apart from the fact that it is clear from EKA's oral request for immunity that that undertaking had already informed the Commission about the compensation system put in place in certain Member States, the applicant has provided neither written evidence establishing the existence of that system nor details in its oral statement as to the dates, places and arrangements of that system.

145 Furthermore, as regards the fact that the applicant informed the Commission of three successful price increases, the Commission indicated in that regard, at recital 572 to the contested decision, that, '[a]s regards the price increases in 1993, 1994 and 1995, [Mr L.] confirmed in very general terms the information already given by EKA without volunteering any further information concerning these instances'. In that regard, it must be held that the Commission did not make a manifest error of assessment in deciding that that information could have no significant added value. In addition, apart from the fact that it follows from EKA's oral request for immunity that that undertaking had already supplied the Commission with detailed information on the frequency, the amount and the mechanism of those price increases, the applicant has supplied neither evidence nor details in addition to those already in the Commission's possession in support of its assertions, and thus did not made the Commission's task significantly easier, within the meaning of the case-law cited at paragraph 137 above.

146 Furthermore as regards the 'considerable amount of information about the conflict between the participants in the cartel' following the decision of the customer MODO not to obtain any further supplies from the applicant as from mid-1998 and the various meetings which followed during 1999 and the spring of 2000, which the applicant revealed to the Commission, it must be observed that the Commission states, in particular, at recital 573 to the contested decision, that '[w]hile confirming the main

points of EKA's and Finnish Chemicals' submissions, [Mr L.]'s submission did not bring to light any new facts or additional evidence that significantly strengthened the Commission's ability to prove the case'. In that regard, it must be held that the Commission did not make a manifest error of assessment in deciding that that information had no significant added value. Apart from the fact that EKA had informed the Commission, in its oral request for immunity, of the existence of the conflict between the members of the cartel concerning the customer MODO, it must be observed that the applicant has supplied neither evidence nor details in support of its assertions that would enable the Commission to prove the facts of the infringement, which, as is clear from recitals 215 and 216 to the contested decision, it was required to establish on the basis of the documents supplied by Finnish Chemicals.

147 Furthermore, as regards the applicant's information that the cartel came to an end in the middle of 2000 following the establishment of competition law compliance programmes, the Commission states, at recital 575 to the contested decision, that '[Mr L.] only confirmed EKA's statement concerning the effect of the adoption of [competition law] compliance programmes, without submitting any new evidence in this regard'. In that respect, it must be held that the Commission did not make a manifest error of assessment in deciding that that information did not have significant added value. Apart from the fact that that information alone is lacking in detail as to the precise date which the Commission took for the purpose of establishing the end of the infringement, namely 9 February 2000 (see Article 1(e) of the contested decision), the mere oral confirmation by the applicant of that information, which the Commission already had in its possession, did not make the Commission's work significantly easier, within the meaning of the case-law cited at paragraph 137 above.

148 In the light of the foregoing, the applicant's complaint, that the information which it supplied to the Commission, and which corroborated the information which the Commission already had in its possession, had significant added value, must be rejected.

149 In the third place, in so far as the applicant maintains that certain information which it supplied to the Commission shed light on new elements of which it was not previously aware and which therefore significantly strengthened its ability to establish the facts in question, it is appropriate to examine the two items of information to which the applicant refers in support of that complaint.

150 First of all, as regards the fact that the applicant informed the Commission of the existence of a list, which it did not keep and which stated, for every common customer of the members of the cartel, the volumes of sales which they supplied to that customer, it must be held that the Commission did not make a manifest error of assessment in not granting any reduction of the fine on that basis. Since, as the Commission observed at recital 76 to the contested decision, the applicant did not present it with that list, such information did not permit the Commission to establish the facts constituting the infringement in question.

151 Next, as regards the fact that the applicant was the first undertaking to identify the customers in continental Europe to have been affected by volume sharing, which enabled the Commission to assess the geographic scope of the cartel and served as the basis for requests for information, it should be observed that, while the Commission did not specifically address that argument in the contested decision, it none the less stated, at recital 576 to the contested decision, in particular, that, '[o]verall, the quality and quantity of [the applicant's] submission ha[d] to be regarded as very limited' and that, '[w]hile [the applicant] was able to confirm some aspects of the functioning of the cartel in a very general way, it nevertheless failed to do this in a manner that would have significantly strengthened the Commission's ability to prove the infringement'. In that regard, it must be held that the Commission did not make a manifest error of assessment. Although the list of names of the undertakings affected by the cartel supplemented the list that EKA had supplied to the Commission, the fact none the less remains that, not having supplied details on the implementation, dates and figures of the volume-sharing system applied to those undertakings, such information did not represent significant added value for the Commission. The argument which the applicant put forward at the hearing, namely that the Commission could have supplemented the information which the applicant had supplied by sending requests for

information to the undertakings affected by the cartel, cannot alter that finding. In so far as the applicant itself did not supply that detailed information, of which it must necessarily have been aware, since it had participated in that sharing arrangement, the fact that the Commission might have been able to corroborate or supplement that information by employing its own powers of investigation does not alter the finding that the information supplied by the applicant did not make the Commission's task of establishing the facts constituting the infringement in question significantly easier.

152 Accordingly, the applicant's third complaint, that the information which it supplied to the Commission, and of which the Commission was not previously aware, had significant added value, must be rejected as unfounded.

153 In the fourth place, as regards the applicant's complaint that the very wording of the contested decision shows that the Commission relied on several items of information which the applicant had supplied in order to establish the existence of the infringement and corroborate certain evidence from other sources, it is necessary to examine whether it follows from the recitals to the contested decision to which the applicant refers, and which are set out at paragraph 126 above, that the applicant significantly strengthened the Commission's ability to establish the facts constituting the infringement in question.

154 First of all, as regards recital 76 to the contested decision and the related footnote 116, the Commission describes there the general operation of the cartel, which was characterised in particular by 'frequent contacts in the form of bi- and multilateral meetings and telephone calls without, however, following a fixed scheme'. The Commission also states that, '[a]ccording to [the applicant], a list of shared customers

and of the sales volumes which each of the participating [sodium chlorate] producers was allowed to supply to those customers was drawn up [at] the very beginning of the cartel' and that '[the applicant] has not, however, presented any such list to the Commission'. In that regard, it must be held that, for the same reasons as those set out at paragraphs 144 and 150 above, that information, concerning which the Commission expressly stated that the applicant had supplied no material proof, did not have significant added value. The Commission therefore did not make a manifest error of assessment in deciding that that information had no such value.

155 Furthermore, as regards footnote 118 to the contested decision, the Commission states there that the applicant 'confirmed [EKA's oral statements concerning] the existence of the market-sharing mechanism and the compensation scheme as described by EKA'. In that regard, it should be observed that, while the applicant corroborated the existence of such an anti-competitive practice, that information alone was not in itself sufficient to enable the Commission to prove the facts constituting the infringement. Therefore, for the same reasons as those set out at paragraph 144 above, that information alone, of which the Commission was already aware, cannot be regarded as having significant added value.

156 Next, as regards recital 98 to the contested decision and the related footnote 142, the Commission states there, in particular, that 'EKA further reports that around 1995, together with Finnish Chemicals and [the applicant], it "decided to make a huge price increase, which worked out" for Portugal in the context of the escudo losing value', that '[t]he evidence submitted by EKA shows that, in 1995, EKA increased its prices charged to customers in Portugal by 31 % and 44 % compared to the prices in 1993' and that '[a] successful price increase in 1995 is also confirmed by [the applicant]'. It is therefore clear from the content of the contested decision that that price increase in 1995 was established on the basis of oral information and documents supplied by EKA, which the applicant does not dispute. Therefore, even though the oral information provided by the applicant confirms that supplied by EKA, it cannot be regarded,

in accordance with the case-law cited at paragraph 137 above, as having significant added value, since it had already been provided by EKA and the applicant did not provide additional details of the price increase.

157 In addition, as regards recital 207 to the contested decision and the related footnote 259, the Commission states there that '[i]t is to be noted that, in the context of the discussion between Finnish Chemicals and [the applicant] regarding the customer MODO, Mr [L.] called Mr [B.] (the representative of Quadrimex, Finnish Chemicals' importing company in France) in order to discuss [the applicant's] volume losses' and that '[d]uring these phone calls on 2 and 5 October 1998, Mr [L.] complained about the Scandinavian aggressivity and claimed volume compensations for [the applicant]'. In that regard, it follows from the documents cited at footnote 257 of the contested decision and from point 4.3.1.20, entitled '1998 — Conflict concerning the customer MODO', of the contested decision, that, in order to establish the precise nature of the contacts between competitors concerning supplies to the customer MODO, the dates of those contacts and the volumes allocated, the Commission relied wholly on the precise information which Finnish Chemicals had supplied to it. The Commission therefore did not make a manifest error of assessment in deciding that the information supplied by the applicant in that regard did not have significant added value.

158 Furthermore, as regards recital 254 to the contested decision and the related footnote 305, the Commission observes there that the applicant stated that '[Mr L.] believes to remember a meeting between Finnish Chemicals and [the applicant] aimed at finding out why the volume sharing rules applicable to [the customer] MODO were not respected any more' and that '[d]uring this meeting, which [Mr L.] thinks to have taken place in the first quarter [of] 1999 in Finland, Finnish Chemicals stated [that it had] become exclusive supplier of MODO, following an agreement of its parent company

with MODO, thus breaching the existing agreement between EKA, Finnish Chemicals and [the applicant], in connection with this customer'. In that regard, it should be observed that at recital 255 to the contested decision, the Commission further notes that, '[h]owever, since the contract between MODO and Finnish Chemicals was concluded only in September 1999, the Commission considers that [Mr L.] confused the dates and venues and in fact referred to the meeting of 9 November 1999 in Copenhagen'. Therefore, apart from the fact that the oral information provided by the applicant is, on its own admission, uncertain ('[Mr L.] believes to remember') but also imprecise, it must be held, in any event, that the Commission expressly observes, at recital 255 to the contested decision, that that information is inaccurate, which the applicant, moreover, does not dispute. Therefore the Commission did not make any manifest error of assessment in considering that that information, which had not been corroborated, had no significant added value.

159 In addition, as regards footnote 325 to the contested decision, that footnote refers to recital 273 to that decision, where the Commission observes, in particular, that the applicant 'submitted that a meeting between EKA, Finnish Chemicals and [itself] took place "in the spring of 2000", which, it must be assumed, refers to the meeting on 9 February 2000 as described in recital 283 [to the contested decision]'. At recital 283 to the contested decision, the Commission states that, at the fringes of the meeting of 9 February 2000, EKA 'told [those present] that [it] refused to participate in any further discussions with competitors'. At recital 284 to the contested decision and the related footnote 337, the Commission observes that '[t]he changes on the Community [sodium chlorate] market which occurred in 1999 (particularly in connection with the conclusion of the supply contract between Finnish Chemicals and the customer MODO) led to the termination of contacts among [sodium chlorate] producers … While there were several telephone calls and meetings among competitors as late as January and February 2000 …, the usual level of cooperation entailing mainly efforts to allocate sales volumes and to fix prices ultimately was not restored'. At footnote 337 to the contested decision, the Commission states that 'EKA and [the applicant] refer to their respective internal competition law compliance programmes[,] which were introduced in 1999 and 2000', whereas 'Finnish Chemicals states that contacts with competitors became obsolete once the contract with the customer MODO had been concluded'. In the light of the foregoing, it must be held that the Commission did not

make a manifest error of assessment in taking the view that the information supplied by the applicant did not have significant added value. Apart from the fact that the information supplied by the applicant, namely that the cartel came to an end after the adoption of competition law compliance programmes, lacks precision by reference to the precise date taken by the Commission for the purpose of establishing the end of the infringement, it was on the basis of the information supplied by EKA, as is clear from recital 290 to the contested decision, that the Commission was able to establish that the Commission had ended with the meeting of the trade association CEFIC, which was held on 9 February 2000.

160 Accordingly, the applicant's fourth complaint, namely that it follows from the very wording of the contested decision that the applicant supplied information having significant added value, and the third plea in its entirety, must be rejected as unfounded.

(c) Fourth plea, alleging failure to grant the applicant a reduction of its fine outside the scope of the 2002 Leniency Notice

161 The applicant claims, in substance, that the Commission erred in law and in fact in not granting it a reduction of its fine beyond the scope of the 2002 Leniency Notice. The Court considers it appropriate to examine the three parts of this plea in an order different in part from the order in which the applicant submitted them.

Second part, alleging errors of law and of fact committed by the Commission when it considered that the applicant's cooperation did not justify a reduction of its fine for the attenuating circumstances provided for in the Guidelines

— Arguments of the parties

162 The applicant maintains that the Commission erred in law and in fact in so far as the applicant did not receive any reduction of its fine for attenuating circumstances, in spite of the fact that the fourth indent of point 29 of the Guidelines provides for such a reduction. It maintains that point 29, which the Commission cannot interpret restrictively by limiting its application to exceptional circumstances, provides that an undertaking which has insufficiently cooperated under the 2002 Leniency Notice may receive a reduction of its fine if it provided effective cooperation and if that cooperation is beyond its legal obligation to cooperate.

163 First, the applicant observes that at recitals 385 to 398 to the Commission decision of 20 October 2005 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw Tobacco Italy), the Commission applied the fourth indent of point 29 of the Guidelines and granted a 50 % reduction of the fine for attenuating circumstances to an undertaking from which conditional immunity from a fine granted under the 2002 Leniency Notice had been withdrawn. Having regard to that decision in particular, and also to other Commission decisions, it is incomprehensible that the applicant, which did not contest the facts and which cooperated during the procedure, should not obtain a reduction of its fine for attenuating circumstances.

164 Second, the applicant maintains, first, that it effectively cooperated with the Commission. Not only did it acknowledge having participated in the infringement at the outset of the investigation, as is clear, in particular, from the fact that it was the second undertaking to cooperate with the Commission, but it also provided a large amount of detailed evidence that enabled the Commission to establish the nature and duration of the cartel, its participants and its mode of operation, as is clear from the information which the applicant provided in its response of 18 October 2004 to the Commission's request for information.

165 Furthermore, the applicant offered cooperation going far beyond that resulting from its legal obligations to cooperate. As from the time of its application under the 2002 Leniency Notice, it collaborated closely and consistently with the Commission, as is clear from its answers to the Commission's request for information of 16 February 2007. Not only did the applicant waive its right not to incriminate itself, it also played an active part in establishing the existence of the infringement.

166 The Commission contests the applicant's arguments.

— Findings of the Court

167 The applicant maintains, in substance, that given the cooperation it provided to the Commission during the administrative procedure, the Commission erred in law and in fact in not granting the applicant a reduction of its fine under the fourth indent of point 29 of the Guidelines.

168 It should be observed, first of all, that at the fourth indent of point 29 of the Guidelines the Commission undertook, within the framework of its discretion regarding the attenuating circumstances which it is required to take into account when setting fines, to grant a reduction of the fine when an undertaking 'has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so'.

169 However, the application of the fourth indent of point 29 of the Guidelines cannot have the consequence of depriving the 2002 Leniency Notice of its practical effect. Point 1 of the 2002 Leniency Notice provides that that notice 'sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community'. It therefore follows from the wording and the structure of that notice that undertakings can, in principle, obtain a reduction of the fine for cooperation only where they satisfy the strict conditions laid down in that notice.

170 Therefore, in order to maintain the practical effect of the 2002 Leniency Notice, it can only be in exceptional situations that the Commission is required to grant a reduction of the fine to an undertaking on the basis of the fourth indent of point 29 of the Guidelines. That is the case, in particular, where cooperation provided by an undertaking, which goes beyond its legal obligation to cooperate, but does not give rise to the right to a reduction of the fine under the 2002 Leniency Notice, is of objective use to the Commission. It must be found to be of such use where the Commission relies in its final decision on evidence which an undertaking has submitted to it in the context of its cooperation, without which the Commission would not have been in a position to penalise the infringement concerned in whole or in part.

171 In the present case, it must be observed that the applicant puts forward no argument or evidence to establish that without its cooperation the Commission would not have been able to penalise, in part or in whole, the infringement found in the contested decision. Furthermore, and in any event, it follows from the contested decision that, taking into account the imprecise, inaccurate or unsubstantiated nature of the information supplied by the applicant (see paragraphs 141 to 159 above), that information was not of use to the Commission since it relied on evidence which it had already gathered elsewhere in order to establish the facts constituting the infringement.

172 Accordingly, the applicant has not established that the Commission erred in law or made a manifest error of assessment in not granting it a reduction of its fine on the basis of the fourth indent of point 29 of the Guidelines.

173 The arguments raised by the applicant in that regard do not alter that conclusion.

174 First, in so far as the applicant maintains that it ought to have obtained a reduction of its fine, since it waived its fundamental right not to incriminate itself, that argument must be rejected as unfounded. Apart from the fact that the applicant was free to cooperate with the Commission or to contest its participation in the infringement in question, the Commission was required to grant it a reduction of its fine under the fourth indent of point 29 of the Guidelines only if the circumstances set out at paragraph 170 above had been satisfied in the present case.

175 Second, in so far as the applicant claims that in other cases the Commission granted a reduction of the fines to undertakings for their cooperation under the fourth indent of point 29 of the Guidelines, that argument must be rejected as ineffective. Since it is by reference to the facts of each case that it must be considered whether

the Commission would have been able to penalise a cartel in whole or in part in the absence of the cooperation provided by an undertaking, such an argument does not affect the conclusion set out at paragraph 172 above that the applicant has not established in the present case that the Commission ought to have granted it a reduction of the fine outside the scope of the 2002 Leniency Notice.

176 Accordingly, the second part of the fourth plea must be rejected as unfounded in part and as ineffective in part.

First part, alleging breach of the principles of sound administration and proportionality, regard being had to the fact that the applicant did not contest the facts and cooperated with the Commission

— Arguments of the parties

177 The applicant maintains that the Commission breached the principles of sound administration and proportionality. In that regard, the applicant contends that, in view of the fact that it acknowledged its participation in the infringement at the beginning of the investigation and did not contest the facts after the statement of objections had been notified to it, it ought to have received a reduction of its fine outside the scope of the 2002 Leniency Notice.

178 First, the applicant submits that the non-contestation of the facts justifies a reduction of the fine for three reasons. First of all, it means that the undertaking in question waives its fundamental right not to incriminate itself and to contest the statements of the other undertakings which have sought leniency. Next, it goes beyond the legal obligation to cooperate with the Commission. Last, it significantly alleviates the Commission's work.

179 Second, the applicant observes that the usefulness of the non-contestation of the facts has been recognised in the case-law. First, in the judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 251, this Court considered that a reduction of the fine for non-contestation of the facts and for cooperation was justified where the conduct of the undertaking in question had enabled the Commission to establish the existence of an infringement with less difficulty. At the hearing, the applicant also relied in that regard on *Hoechst* v *Commission*, paragraph 65 above, paragraphs 95 to 97, and on *Gütermann and Zwicky* v *Commission*, paragraph 63 above, paragraph 221. Second, the importance of the recognition of the facts by an undertaking also follows implicitly from *Tokai Carbon and Others* v *Commission*, paragraph 100 above, paragraphs 112, 418 and 457.

180 Third, the applicant observes that the value of the non-contestation of the facts was also recognised by the Commission in its previous practice in taking decisions. The intrinsic utility of the acknowledgement of an infringement was confirmed by the adoption of the Commission notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Regulation No 1/2003 in cartel cases (OJ 2008 C 167, p. 1, points 32 and 33; 'the settlements notice'), which provides for a reduction of 10% of the amount of the fine that may be imposed on the undertaking where it recognises having participated in the infringement. Furthermore, the procedure resulting from the settlements notice is in line with the Commission's practice, when taking decisions, of granting, pursuant to point D.2 of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the 1996 Leniency Notice'), a reduction of 10% of

the amount of the fine where an undertaking 'does not substantially contest the facts on which the Commission bases its allegations'. Furthermore, the fact that the 2002 Leniency Notice does not make provision for, unlike the 1996 Leniency Notice, or preclude the grant of a reduction of the fine where an undertaking does not contest the facts, is not of such a kind as to limit the scope of the general principles of Community law such as the principles of proportionality and sound administration.

181 Fourth, the applicant observes that, under the laws of Germany, France and the United Kingdom, a reduction of the fine may be granted to an undertaking which, in substance, either does not substantially contest the facts or acknowledges them.

182 The Commission contests the applicant's arguments.

— Findings of the Court

183 In the first place, as regards the applicant's complaint that the Commission breached the principle of sound administration by not granting it a reduction of the fine outside the scope of the 2002 Leniency Notice, it must be borne in mind that, as is clear from the case-law cited at paragraph 111 above, under the principle of sound administration, the competent administration is under an obligation to examine, carefully and impartially, all the relevant aspects of the individual case.

184 In the present case, it follows from recital 544 to the contested decision that the Commission considered that, 'taking into account all the facts of this case, there [were] no exceptional circumstances present in this case that could justify granting [the applicant] a reduction for effective cooperation falling outside the 2002 Leniency Notice'; furthermore, the Commission observed at that recital that 'unlike the 1996 Leniency Notice, the 2002 Leniency Notice does not foresee a reduction of the fine for non-contestation of the facts any longer, and the Commission has not created any expectations in this case that a reduction "outside" the 2002 Leniency Notice would be granted'.

185 Accordingly, it must be held that the applicant, which puts forward no argument or proof to establish that the Commission failed to examine carefully and impartially the applicant's cooperation during the administrative procedure, has not demonstrated that the Commission breached the principle of sound administration.

186 This complaint must therefore be rejected as unfounded.

187 In the second place, as regards the complaint that the Commission breached the principle of proportionality by not granting any reduction of the applicant's fine on the ground that it had not contested the facts and had cooperated with the Commission during the administrative procedure, it must be borne in mind, first of all, that, as is clear from the case-law cited at paragraph 63 above, the principle of proportionality means that the Commission must set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and that it must, on that point, apply those factors in a way which is consistent and objectively justified.

188 In the present case, it must be held that the applicant has not established that the Commission exceeded its discretion as to the factors to be taken into consideration when determining the amount of the fine by excluding the applicant's failure to contest the facts and its cooperation during the administrative procedure from entitling the applicant to a reduction of its fine.

189 First, in so far as the applicant claims that it is apparent from the Commission's previous practice in taking decisions that it granted reductions of the fines to undertakings which had not contested the facts and had cooperated with it, the present argument must be rejected as ineffective. While it is common ground that point D.2 of the 1996 Leniency Notice, which the Commission applied in previous decisions penalising the cartels to which the applicant refers, provided for the grant of a reduction of 10 to 50 % of the amount of the fine where, after receiving a statement of objections, an undertaking '[did] not substantially contest the facts on which the Commission base[d] its allegations', it must be held that that notice, which was replaced by the 2002 Leniency Notice, does not apply to the facts of the present case. Contrary to the applicant's contention, moreover, and as the Commission observes, by replacing the 1996 Leniency Notice by the 2002 Leniency Notice, which makes no provision for a reduction of the fine in a simple case of non-contestation of the facts, the Commission unambiguously precluded the grant of a reduction of the fine on that basis in the context of the 2002 Leniency Notice or of the fourth indent of point 29 of the Guidelines. Only where an undertaking supplies, either, as stated, inter alia, at paragraph 131 above, evidence having significant added value, within the meaning of point 21 of that notice, or, as stated at paragraph 170 above, evidence in the absence of which the Commission would not have been able to penalise the infringement in question in whole or in part in its final decision, is the Commission required to grant it a reduction of the fine.

190 Second, the applicant's argument that it follows from the case-law cited at paragraph 179 above that the Commission is required to grant a reduction of the fine to

an undertaking which has enabled the Commission to establish the existence of an infringement with less difficulty, in particular where that undertaking has expressly stated that it did not contest the facts, must be rejected as unfounded. That case-law does not call in question the finding set out at paragraph 175 above that the applicant has not established in the present case that, in the absence of cooperation on its part, the Commission would not have been able to establish the infringement in question in whole or in part. The applicant's arguments that a reduction of the fine for not contesting the facts is justified in that the applicant went beyond the legal obligation to cooperate with the Commission and that it makes the Commission's task significantly easier must also be rejected as unfounded, since, as stated at paragraph 170 above, the grant of a reduction of the fine depends solely on the objective usefulness which the Commission derives from an undertaking's cooperation.

191 Third, the applicant's argument that the Commission expressly acknowledged in the settlements notice that an undertaking's cooperation must be rewarded must be rejected as ineffective. First, as the Commission correctly states, without being contradicted by the applicant, that notice, which was adopted almost one month after the adoption of the contested decision, does not apply to the facts of the present case. Second, and in any event, it should be observed that, according to point 5 of that notice, the Commission has 'a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions' and it is only where the participating undertakings satisfy the conditions of that notice that they are granted a 10 % reduction of the fine. Accordingly, under that notice, it is for the Commission alone, and not for the undertakings, to decide, in the light of the circumstances of each particular case, whether the use of that procedure may make it easier to penalise the infringement in question and, in that context, to grant a 10 % reduction of the fine to an undertaking which satisfies its conditions.

192 Fourth, as regards the applicant's argument that, under the national competition law of a number of Member States of the European Union, non-contestation of the facts

gives entitlement to a reduction of the fine, it must be rejected as ineffective, since those rules, which are not binding on the Commission, do not constitute the relevant legal framework for examining whether the Commission breached the principle of proportionality by not granting the applicant any reduction of its fine for its cooperation.

193 In the light of the foregoing considerations, the applicant's complaint that the Commission breached the principle of proportionality must be rejected as ineffective in part and as unfounded in part and, accordingly, the first part of this plea must be rejected in its entirety.

Third part, alleging breach of the principles of proportionality, sound administration and equal treatment as a result of the fact that Aragonesas and the applicant were wrongly treated in an equivalent way

— Arguments of the parties

194 The applicant claims that the Commission breached the principles of proportionality, equal treatment and sound administration in the contested decision, since an undertaking which acknowledges an infringement and cooperates with the Commission must be treated differently from an undertaking which disputes that infringement.

195 In that regard, the applicant observes that, like Aragonesas, it did not receive any reduction of its fine, whereas Aragonesas had disputed the facts, stating in its response to the statement of objections that it had not participated in the agreements covering

the entire common market, that the evidence presented by the Commission was insufficient to establish the existence of the infringement on the ground that it had been supplied in the context of applications under the 2002 Leniency Notice lodged by other undertakings and that no evidence established that it had systematically cooperated with the other members of the cartel.

— Findings of the Court

196 In the first place, as regards the applicant's complaints that the Commission breached the principles of sound administration and proportionality by not granting it any reduction of the fine for its cooperation outside the scope of the 2002 Leniency Notice, it must be held that the applicant puts forward no argument, in the context of this part of the fourth plea, to support its complaints and that those complaints are confused with the complaints which it raised in the context of the first part of this plea. They must therefore be rejected as unfounded, for the reasons set out at paragraphs 183 to 193 above.

197 In the second place, as regards the applicant's complaint that the Commission breached the principle of equal treatment owing to the fact that the applicant is in a different situation from that of Aragonesas, which had contested the facts during the administrative procedure, it must be borne in mind that, as is clear from the case-law cited at paragraph 108 above, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

198 In the present case, although it is common ground that Aragonesas did contest the facts during the administrative procedure (see recitals 341 to 346 to the contested decision), whereas the applicant did not contest the facts and cooperated with the

Commission (see recital 340 to the contested decision), the fact none the less remains that those two undertakings are in comparable situations, since neither of them satisfies the conditions provided for in the 2002 Leniency Notice and in the fourth indent of point 29 of the Guidelines, that would justify the grant of a reduction of their fines. The Commission was therefore correct to treat the two undertakings in the same way.

199 Therefore the applicant's complaint that the Commission breached the principle of equal treatment, and the third part of the fourth plea and, accordingly, the fourth plea in its entirety, must be rejected as unfounded.

200 In the light of all the foregoing considerations, the applicant's first head of claim must be rejected as unfounded.

B — *The claims, put forward in the alternative, seeking variation of the amount of the fine*

1. *Arguments of the parties*

201 Under its second head of claim, and also in its written pleadings, the applicant requests the Court to vary the amount of the fine imposed on it. In that context, it would have the Court, first, reduce the rate of increase of the basic amount of the fine for repeated infringement from 90 % to 50 % and, second, grant it a reduction of 30 to 50 % in view of its close cooperation during the administrative procedure and the fact that it did not contest the facts.

202 The Commission disputes the applicant's claims.

2. *Findings of the Court*

203 It must be borne in mind that, according to the case-law, as regards the review carried out by the European Union judicature in respect of Commission decisions on competition matters, 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 General Court by Article 31 of Regulation No 1/2003 in accordance with Article 229 EC authorises the Court to vary the contested measure, even without annulling it, by taking into account all the factual circumstances, so as to amend, for example, the amount of the fine (see Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 86 and the case-law cited).

204 First, as regards the request to vary the rate of increase of 90 % of the basic amount of the fine imposed on the applicant for repeated infringement, the Court considers, taking into account in particular the applicant's strong tendency towards infringing the competition rules, that it is not appropriate, in the context of its unlimited jurisdiction, to vary that rate.

205 Second, as regards the request to vary the amount of the fine imposed on the applicant on the ground that it did not contest the facts and cooperated throughout the administrative procedure, the Court considers that, in so far as that cooperation was not such as to enable the Commission to penalise the cartel in whole or in part, it is not appropriate, in the context of its unlimited jurisdiction, to grant the applicant a reduction of the fine.

206 Accordingly, and in the absence of other factors, in the present case, of such a kind as to lead to the variation of the amount of the fine imposed on the applicant, its second head of claim must be rejected as unfounded.

207 Accordingly, the applicant's action must be dismissed in its entirety.

Costs

208 Under Article 87(2) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Arkema France to pay the costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 17 May 2011.

[Signatures]

Table of contents

Background to the dispute ..... II - 2299

Procedure and forms of order sought by the parties ..... II - 2308

Law ..... II - 2310

A — The principal claims, seeking annulment in part of the contested decision ..... II - 2310

1. Admissibility ..... II - 2310

a) First objection to admissibility, alleging that the applicant's first head of claim is inadmissible ..... II - 2311

b) Second objection to admissibility, alleging that the applicant's first plea is inadmissible ..... II - 2312

2. Substance ..... II - 2315

a) Second plea, alleging errors of law in connection with the increase of the basic amount of the fine imposed on the applicant for repeated infringement ..... II - 2315

First part, alleging breach of the rights of the defence and of the principle of proportionality, on the ground that the Peroxygen Products decision was taken into account in the contested decision for the purpose of establishing repeated infringement II - 2316

— Arguments of the parties ..... II - 2316

— Findings of the Court ..... II - 2317

Second part, alleging breach of the principle non bis in idem and the principle of proportionality, owing to the fact that the Commission had already taken the Peroxygen Products decision, the Polypropylene decision and the PVC decision into account, for the purpose of establishing repeated infringement, in four other decisions penalising the applicant ..... II - 2323

— Arguments of the parties ..... II - 2323

— Findings of the Court ..... II - 2325

Third part, alleging breach of the principles of proportionality, equal treatment and sound administration owing to the increase by 90 % of the basic amount of the fine imposed on the applicant for repeated infringement ..... II - 2328

— Arguments of the parties ..... II - 2328

— Findings of the Court ..... II - 2329

b) Third plea, alleging failure to grant the applicant a reduction of the fine under the 2002 Leniency Notice ..... II - 2336

Arguments of the parties ..... II - 2336

Findings of the Court ..... II - 2340

c) Fourth plea, alleging failure to grant the applicant a reduction of its fine outside the scope of the 2002 Leniency Notice ..... II - 2352

Second part, alleging errors of law and of fact committed by the Commission when it considered that the applicant's cooperation did not justify a reduction of its fine for the attenuating circumstances provided for in the Guidelines ..... II - 2353

— Arguments of the parties ..... II - 2353

— Findings of the Court ..... II - 2354

First part, alleging breach of the principles of sound administration and proportionality, regard being had to the fact that the applicant did not contest the facts and cooperated with the Commission ..... II - 2357

— Arguments of the parties ..... II - 2357

— Findings of the Court ..... II - 2359

Third part, alleging breach of the principles of proportionality, sound administration and equal treatment as a result of the fact that Aragonesas and the applicant were wrongly treated in an equivalent way ..... II - 2363

— Arguments of the parties ..... II - 2363

— Findings of the Court ..... II - 2364

B — The claims, put forward in the alternative, seeking variation of the amount of the fine ..... II - 2365

1. Arguments of the parties ..... II - 2365

2. Findings of the Court ..... II - 2366

Costs ..... II - 2367