JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

5 April 2006 *

In Case T-279/02,

Degussa AG, established in Düsseldorf (Germany), represented by R. Bechtold, M. Karl and C. Steinle, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet and W. Mölls, acting as Agents, and H.-J. Freund, lawyer, with an address for service in Luxembourg,

defendant,

supported by

Council of the European Union, represented by E. Karlsson and S. Marquardt, acting as Agents,

intervener,

* Language of the case: German.

APPLICATION, as the primary claim, for annulment of Commission Decision 2003/674/EC of 2 July 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case C.37.519 — Methionine) (OJ 2003 L 255, p. 1), and, in the alternative, for reduction of the fine imposed on the applicant by that decision,

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 27 April 2005,

gives the following

Judgment

Facts

1 Degussa AG (Düsseldorf) is a German company formed in 2000 by the merger of SKW Trostberg and Degussa-Hüls, the latter having itself been formed by the merger in 1998 of the German chemical companies Degussa AG (Frankfurt am Main) and Hüls AG (Marl) ('Degussa' or 'the applicant'). It operates inter alia in the

animal feed sector and is the only undertaking producing all three most important essential amino acids: methionine, lysine and threonine.

2 Essential amino acids are amino acids which cannot be produced naturally by the body and must, therefore, be added to feeds. The first amino acid which, by its absence, interrupts protein synthesis of the other amino acids is called the 'first limiting amino acid'. Methionine is an essential amino acid added to compound feeds and premixes for all animal species. Its main use is in poultry feed (for which it is the first limiting amino acid) and, increasingly, in pig feed and speciality animal feeds.

3 Methionine comes in two principal forms: DL-Methionine ('DLM') and methionine hydroxy analogue ('MHA'). DLM is produced in crystallised form with virtually 100% active content. MHA, which was introduced in the 1980s by Monsanto, the predecessor of Novus International Inc., has a nominal 88% active content. In 2002, it accounted for approximately 50% of world methionine consumption.

4 At the material time, the world's three leading producers of methionine were Rhône-Poulenc (now Aventis SA), whose subsidiary responsible for methionine production was Rhône-Poulenc Animal Nutrition (now Aventis Animal Nutrition SA), Degussa and Novus. Rhône-Poulenc produced methionine in both its forms whereas Degussa produced only DLM and Novus only MHA.

5 On 26 May 1999, Rhône-Poulenc submitted to the Commission a statement admitting its participation in a cartel to fix prices and allocate quotas for methionine

and requesting application of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

6 On 16 June 1999, Commission officials and officials of the Bundeskartellamt (German Federal Cartel Office) carried out an investigation under Article 14(3) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), then in force, at the premises of Degussa-Hüls in Frankfurt am Main.

7 Following that investigation, on 27 July 1999, the Commission sent a request for information to Degussa-Hüls under Article 11 of Regulation No 17 regarding the documents obtained. Degussa-Hüls replied to the request on 9 September 1999.

8 The Commission also sent requests for information to Nippon Soda Co. Ltd ('Nippon Soda'), Novus International Inc. ('Novus') and Sumitomo Chemical Co. Ltd ('Sumitomo') on 7 December 1999 and to Mitsui & Co. Ltd on 10 December 1999. The replies were received during February 2000 and Nippon Soda submitted a supplementary statement on 16 May 2000.

9 On 1 October 2001, the Commission adopted a statement of objections against five producers of methionine, including the applicant. The same statement of objections was sent to Aventis Animal Nutrition ('AAN'), a wholly owned subsidiary of Aventis.

10 In its statement of objections, the Commission accused those companies of having participated from 1986 until, in the majority of cases, the beginning of 1999 in a continuous agreement contrary to Article 81 EC and Article 53 of the Agreement on the European Economic Area ('the EEA Agreement') covering the whole of the EEA. According to the Commission, the agreement in question involved the fixing of methionine prices, the implementation of a mechanism for implementing price increases, the allocation of national markets and market share quotas and a mechanism for monitoring and enforcing those agreements.

11 All the parties submitted written observations in response to the Commission's statement of objections, although Aventis and AAN informed the Commission that they would submit only one response on behalf of both companies.

12 Replies were received by the Commission between 10 and 18 January 2002. Aventis, AAN (together 'Aventis/AAN') and Nippon Soda admitted the infringement and acknowledged the correctness of the facts as a whole. Degussa also admitted the infringement, but only in respect of the period from 1992 to 1997. On 25 January 2002, there was an oral hearing with the undertakings concerned.

13 At the end of the proceeding, considering that Aventis/AAN, Degussa and Nippon Soda had participated in a continuous agreement and/or concerted action covering the whole of the EEA, by which they agreed on price targets for the product, agreed on and implemented a mechanism for implementing price increases, exchanged information on sales volumes and market shares and monitored and enforced their agreements, the Commission adopted Decision 2003/674/EC of 2 July 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case C.37.519 — Methionine) (OJ 2003 L 255, p. 1; 'the Decision').

14 In recitals 63 to 81 to the Decision, the Commission described the cartel as aimed at fixing price ranges and 'rock-bottom prices'. The participants agreed that they needed to increase their prices and discussed what the market would accept. The price increases were then organised in several successive 'campaigns', the implementation of which was reviewed during subsequent cartel meetings. The participants also exchanged information on sales volumes and production capacity and exchanged their respective estimates of the total volume of the market.

15 As regards the implementation of target prices, the Commission found that sales were monitored by the participants, the figures exchanged being compiled and discussed at regular meetings, although no volume control scheme supported by a compensation scheme existed, despite the fact that Degussa had made a proposal to that effect. Regular multilateral (more than 25 between 1986 and 1999) and bilateral meetings were an essential element of the organisation of the cartel. They took the form of 'summit' meetings and more technical meetings at staff level.

16 Finally, the operation of the cartel went through three distinct periods. The first, during which prices were on an upward trend, extended from February 1986 to 1989 and ended with Sumitomo's withdrawal from the arrangement and the entry into the market of Monsanto and MHA. During the second period, extending from 1989 to 1991, prices began to fall dramatically. The cartel members were then in doubt about how to react to this new situation (regain market shares or focus on prices?) and concluded, after holding several meetings in 1989 and 1990, that they needed to focus their efforts on increasing prices. During the third and last period, extending from 1991 to February 1999, the dramatic increase in sales of the MHA produced by Monsanto (Novus since 1991) led the participants in the arrangement to focus primarily on sustaining price levels.

17 The Decision includes inter alia the following provisions:

'*Article 1*

Aventis ... and [AAN], jointly liable, Degussa ... and Nippon Soda ... have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the sector of methionine.

The duration of the infringement was as follows:

— from February 1986 until February 1999.

...

Article 3

The following fines are hereby imposed on the undertakings name[d] in Article 1 in respect of the infringement found [t]herein:

— Degussa ..., a fine of EUR 118 125 000,

— Nippon Soda ..., a fine of EUR 9 000 000

...'

18 For the purpose of calculating the fine, the Commission, without expressly referring to them, essentially applied the methodology set out in the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and the Leniency Notice.

19 In setting the basic amount of the fine, the Commission took into consideration, firstly, the gravity of the infringement. It found that, taking into account the nature of the behaviour under scrutiny, its impact on the methionine market and the size of the relevant geographic market, the undertakings concerned by the Decision had committed a very serious infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement (recitals 270 to 293).

20 Taking the view, moreover, that it was appropriate to apply differential treatment which took account of the effective economic capacity of the undertakings to cause significant damage to competition and to set the fine at a level which ensured that it had sufficient deterrent effect, the Commission considered that, in view of the considerable disparity in the size of the undertakings, it was necessary to take as a basis their respective shares of the world market for methionine and that accordingly Rhône-Poulenc and Degussa constituted a first category of undertakings and Nippon Soda a second category on its own. Consequently, the Commission set the basic amounts of the fines for Aventis/AAN and Degussa at EUR 35 million and the basic amount of the fine for Nippon Soda at EUR 8 million (recitals 294 to 302).

21 In order to ensure sufficient deterrent effect and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission took the view, finally, that the appropriate starting point for a fine,

resulting from the criterion of the relative importance of the undertaking in the market concerned, required upward adjustment to take account of the size and overall resources of Aventis/AAN and Degussa respectively. The Commission therefore decided that the starting point for the fines imposed on Aventis/AAN and Degussa should be increased by 100% to EUR 70 million (recitals 303 to 305).

22 As regards, secondly, the duration of the infringement, the Commission considered that Aventis/AAN, Degussa and Nippon Soda had participated in the infringement continuously from February 1986 until February 1999, that is, for 12 years and 10 months. The basic amount of the fine was therefore set at EUR 157.5 million in the case of Aventis/AAN and Degussa, and at EUR 18 million in the case of Nippon Soda (recitals 306 to 312).

23 Thirdly, the Commission considered that no aggravating or attenuating circumstances were to be taken into account with regard to the undertakings which had participated in the infringement (recitals 313 to 331).

24 Fourthly and lastly, the Commission, by application of the Leniency Notice, reduced Aventis/AAN's fine by 100% under Section B of that notice. By contrast, it considered that Nippon Soda and Degussa did not fulfil either the conditions for a very substantial reduction of the amount of the fine under Section B or those for a substantial reduction of the amount of the fine under Section C of the Leniency Notice. It nevertheless accepted that Nippon Soda fulfilled the conditions set out in the first and second indents of Section D(2) and that Degussa fulfilled the conditions set out in the first indent of Section D(2) of that notice and therefore reduced the amounts of the fines imposed on those undertakings by 50% and 25% respectively (recitals 332 to 355).

Procedure and forms of order sought by the parties

25 By application lodged at the Registry of the Court of First Instance on 16 September 2002, the applicant brought the present action.

26 On 13 December 2002, the Council applied for leave to intervene. By order of 13 February 2003, the President of the Fourth Chamber of the Court of First Instance granted the Council leave to intervene in support of the forms of order sought by the Commission.

27 By decision of the Court of First Instance, the Judge-Rapporteur was attached to the Third Chamber, to which this case was therefore assigned.

28 By way of measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, the Court of First Instance asked the parties to reply to certain questions and to produce certain documents. The parties complied with those requests.

29 Following the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. The parties presented oral argument and replied to oral questions put by the Court at the hearing on 27 April 2005.

30 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, reduce the amount of the fine imposed on it;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

32 The Council contends that the Court should:

— dismiss the application;

— make an appropriate order as to costs.

Law

33 The applicant puts forward essentially four pleas in support of its action. The first plea, in which the applicant raises an objection of illegality against Article 15(2) of Regulation No 17, alleges breach of the principle that penalties must have a proper legal basis. The second plea alleges error of assessment as to the single, continuous nature and as to the duration of the infringement in which the applicant

participated. The third plea alleges errors of assessment, errors of law, errors as to the facts and breach of the principles of proportionality, non-retroactivity and equal treatment, and of the obligation to state reasons in setting the amount of the fine. Finally, the fourth plea alleges breach of the principles of 'respect for professional secrecy', sound administration and the presumption of innocence.

I — *The first plea, alleging breach of the principle that penalties must have a proper legal basis*

A — *The objection of illegality raised against Article 15(2) of Regulation No 17*

1. Arguments of the parties

34 The applicant raises an objection of illegality as provided for in Article 241 EC and submits that Article 15(2) of Regulation No 17, the provision which authorises the Commission to impose fines for infringements of Community competition law, infringes the principle that penalties must have a proper legal basis, as a corollary of the principle of legal certainty, a general principle of Community law, since that provision does not sufficiently predetermine the Commission's decision-making practice.

35 As a preliminary point, the applicant recalls that the principle that penalties must have a proper legal basis is enshrined in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') which provides that '[no] heavier penalty [shall] be imposed than the one that was applicable at the time the criminal offence was committed'. It adds that that same principle (*nulla poena sine lege*) is also enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December

2000 (OJ C 364, p. 1) ('the Charter') and forms an integral part of the constitutional traditions of the Member States (see, for example, Article 103(2) of the German Basic Law). According to the interpretation of the European Court of Human Rights, both the principle of non-retroactivity and the principle that penalties must have a proper legal basis stem from that principle (see, inter alia, Eur. Court HR, *S.W. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-B, § 35, and Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25). According to the case-law of the Court of Justice, the principle that penalties must have a legal basis stems from the principle of legal certainty, which is recognised as a general principle of Community law (Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 10, and Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11) and requires inter alia that Community legislation be clear and foreseeable by individuals, and that certainty and foreseeability are requirements which must be observed all the more strictly in the case of rules liable to entail financial consequences in order that those concerned may know precisely the extent of the obligations which it imposes on them (see Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23, and the case-law cited).

36 With regard to the criteria for determining whether a 'law' within the meaning of Article 7(1) of the ECHR is sufficiently certain and foreseeable, the applicant recalls that the European Court of Human Rights requires that it be accessible to the persons concerned and formulated with sufficient precision to enable them — if need be, with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, according to the European Court of Human Rights, a law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (Eur. Court HR, *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A No 226-A, § 75, and *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A No 82, § 66).

37 The applicant submits that the principle that penalties must have a proper legal basis is intended to apply both to criminal penalties and to penalties which are not strictly criminal in character, and therefore also to Article 15(2) of Regulation No 17,

regardless of the legal nature of the fines imposed by the Commission under that provision. The Court of Justice has held that 'a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis' (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11, and Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15). The statement in Article 15(4) of Regulation No 17, that Commission decisions imposing fines for infringements of Community competition law 'shall not be of a criminal law nature', is immaterial in this regard, since the designation of a legal act is not decisive in its assessment (Eur. Court HR, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A No 22, § 81). On the contrary, it follows from the severity of the fines imposed and from their punitive and preventive function that they are essentially of a quasi-criminal, or even, in the broad sense, criminal law nature.

38 That interpretation is also consistent with that given by the European Court of Human Rights as regards the concept of a criminal charge (Eur. Court HR, *Belilos v. Switzerland*, judgment of 29 April 1988, Series A No 132, §§ 62 and 68; *Öztürk v. Germany*, judgment of 21 February 1984, Series A No 73, § 46 et seq.; and *Engel and Others v. the Netherlands*, cited in paragraph 37 above, § 80 et seq.), according to which even small fines imposed by way of administrative procedures are criminal in nature. The applicant takes the view a fortiori that that is also the case with the fines imposed by the Commission for infringements of Community law, given the size of the amounts involved.

39 The applicant recalls that, according to the Court of Justice, the requirement of clarity is 'indeed imperative in a sector in which any uncertainty may well lead to ... the application of particularly serious sanctions' (Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 46), which is the case with fines imposed under Article 15(2) of Regulation No 17.

40 In addition, the applicant points out that the effect of the division of powers between the Council and the Commission provided for in Articles 83 EC and 85 EC is that only the Council is competent to lay down the appropriate regulations or directives to give effect to the principles set out in Articles 81 EC and 82 EC. The requirements arising from the principle that penalties must have a proper legal basis therefore imply that the Council is not entitled to delegate the power to impose fines to the Commission in the absence of a sufficiently well-defined system.

41 The applicant maintains that the Commission concurrently enjoys powers of investigation, indictment and judgment. Such powers, which are not in keeping with the constitutional traditions of the Member States, should be set within a framework of clear, unequivocal rules. The applicant thus submits that the Council regulation implementing Articles 81 EC and 82 EC should define precisely the content, objective and severity of penalties. In addition, the principle that penalties must have a proper legal basis requires that a ceiling be specified, which must not be excessively high so that the fine does not acquire a criminal law character. If the fine can be unlimited, it is not, in the final analysis, determined in advance by the Council, but imposed by the Commission as the executive authority.

42 The applicant submits that Article 15(2) of Regulation No 17 does not fulfil the requirements arising from the principle that the penalties described above should have a proper legal basis.

43 Firstly, it maintains that Regulation No 17 does not prescribe the cases in which an infringement of Articles 81 EC and 82 EC must be the subject of a fine, leaving the Commission discretion to decide on the appropriateness of a fine. It recalls in that regard the judgment in Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 53, according to which the Commission has complete freedom in the exercise of the discretion which it enjoys in regard to whether or not to impose a fine.

44 Secondly, the applicant submits that Article 15(2) of Regulation No 17 does not contain any limit expressed as a figure. The applicant thus takes the view that that framework is incompatible with the principle that penalties must have a legal basis and that it constitutes a transfer to the Commission of a power belonging, under the Treaty, to the Council. The amount of the fine is not, in reality, determined in advance by the regulation but exclusively by the Commission, in a manner which is neither foreseeable nor ascertainable (see *Commission* v *France*, cited in paragraph 35 above, paragraph 23, and the case-law cited). The need to ensure that the fine has a deterrent effect cannot justify that absence of an absolute ceiling since that requirement must be reconciled with the higher-ranking fundamental principle of Community law that penalties must have a proper legal basis (*Kloppenburg*, cited in paragraph 35 above, paragraph 11, and *Salumi and Others*, cited in paragraph 35 above, paragraph 10).

45 Thirdly, the applicant draws attention to the absence of any criteria laid down by the legislature for setting the fine, apart from the gravity and duration of the infringement. In practice, those two criteria have no restrictive effect on the Commission's discretion. On the one hand, the Commission is not bound by any binding or exhaustive list of the criteria which must be applied (order of the Court of Justice in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 443) and, on the other hand, the Commission takes account of numerous aggravating or attenuating factors which individuals cannot know in advance.

46 Moreover, the requirements arising from observance of the principle of equal treatment do not make it possible to compensate for that vagueness since, according to the case-law, the Commission is not required to ensure that the final amounts of fines reflect any distinction between the undertakings concerned in terms of their turnover (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 278).

47 The applicant's view is confirmed by a judgment of the Bundesverfassungsgericht (German Federal Constitutional Court), according to which a criminal provision laying down as the upper limit of the penalty the value of the convicted person's assets must be annulled as contrary to the principle that penalties must have a proper legal basis (judgment of 20 March 2002, BvR 794/95, NJW 2002, p. 1779). Contrary to the Council's assertions, Paragraph 81(2) of the German Gesetz gegen Wettbewerbsbeschränkungen (Law against Restrictions on Competition; 'the GWB') does not contain any provision analogous to Article 15(2) of Regulation No 17, since the legislature deliberately dispensed with such a framework.

48 Fourthly, the applicant states that the Commission's decision-making practice illustrates the validity of its view. That practice is marked by substantial differences between the amounts of fines imposed and by a recent dramatic increase in those amounts. It thus notes inter alia that eight of the ten largest fines were imposed after 1998 and that a record fine of EUR 855.23 million, including EUR 462 million imposed on a single undertaking, was imposed in 2001 in the 'Vitamins' case (Commission Decision C(2001) 3695 final of 21 November 2001, Case COMP/E-1/37.512). The latter amount is 15 times higher than the average fine imposed between 1994 and 2000 and the second-highest fine (Commission Decision C (2001) 4573 final, Case COMP/E-1/36.212 — Carbonless paper) for 2001 is still equivalent to six times that average value.

49 Fifthly, the applicant submits that the existing system cannot be justified by the necessary deterrent effect which fines must have on undertakings. On the one hand, the applicant acknowledges that, while the exact amount of the fine does not have to be determinable in advance, the objective of deterrence does not authorise the Council to refrain from 'indicating clearly the limits of the power conferred on the Commission'. On the other hand, it points out that the absence of a minimum of foreseeability of the fine has, in reality, had the effect of deterring undertakings from cooperating with the Commission. If it were possible to estimate, even only approximately, the potential consequences of a course of conduct, that would, by contrast, be a much better way of ensuring the intended effect of deterrence, as is the case with national criminal laws.

50 Sixthly, the applicant maintains that the Guidelines cannot be regarded as compensating for the unlawfulness of Article 15(2) of Regulation No 17. On the one hand, those guidelines cannot, in its view, constitute a legal act as referred to in Article 249 EC and, on the other hand, only the Council is entitled to adopt provisions on this question, in accordance with Article 83 EC. It submits that the onus of complying with the principle that penalties must have a proper legal basis therefore rests with the Council. For the same reasons, the unlimited jurisdiction conferred on the Court of Justice by Article 17 of Regulation No 17 cannot compensate for the unlawfulness of Article 15(2) of that regulation. The applicant points out that, despite that jurisdiction, it is primarily the task of the Commission to set the amount of the fine and to establish the facts during the administrative procedure. Moreover, the applicant points out that the vagueness of Article 15(2) of Regulation No 17 and the absence of review criteria render meaningless the unlimited jurisdiction conferred on the Community Courts. Finally, the applicant notes that individuals cannot be expected as a matter of course to bring proceedings before the courts on the ground that the legal framework for the imposition of fines is not sufficiently well defined. It adds that compensation by the Community judicature for the errors of the legislature would go beyond the tasks of the judiciary and would therefore be open to challenge under Article 7(1) EC.

51 The Commission submits that the applicant's argument is unfounded.

52 It points out that Article 15(2) of Regulation No 17 constitutes a clear and unambiguous legal basis enabling undertakings to foresee the possible consequences of their actions with sufficient precision.

53 In addition, it points out that the discretion which it has must be exercised in compliance with the criteria of gravity and duration of the infringement laid down by that article, with the general principles of Community law, in particular the principles of proportionality and equal treatment, and with the case-law of the Court of Justice and the Court of First Instance. The Commission thus maintains that it must comply with those principles whenever it makes use of its discretion (see, with

regard to compliance with the principle of equal treatment, Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 149 et seq., and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 69, 207, 281 and 308, and the Opinion of Advocate General Ruiz Jarabo Colomer in 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, at I-133, point 96 et seq.).

54 Contrary to the applicant's claims, it cannot be inferred in that regard from the judgment in *BMW Belgium and Others* v *Commission*, cited in paragraph 43 above, that those controls do not extend to the decision whether or not to impose a fine. In that case, the fact that the Court of Justice acknowledged that the Commission was entitled to impose a fine on resellers even though it had not done so in earlier cases does not mean that the Commission's power to impose or not to impose a fine is unlimited, since that power must be exercised on the basis of objective reasons corresponding to the purpose of the provision conferring the power in question on the Commission.

55 The applicant is not justified in relying on the fact that the Decision is a 'surprise decision', since the deterrent function of the fine requires that it cannot be calculated in advance by the undertakings and compared with expected profits. The Commission points out that, in any event, the applicant had no basis for a legitimate expectation that it would not face a fine higher than the highest fines imposed during the course of the infringement (*LR AF 1998* v *Commission*, cited in paragraph 46 above, paragraph 241, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraphs 63 and 64).

56 Moreover, the unlimited jurisdiction of the Court of First Instance and the adoption in January 1998 of the Guidelines, which were declared compatible with Article 15(2) of Regulation No 17, contradict the applicant's position that the determination of the fine is arbitrary and non-transparent.

57 Nor can the Council be accused of having transferred powers to the Commission in breach of the Treaty since Article 15(2) of Regulation No 17, by virtue of the criteria, as interpreted by the Community Courts, which it mentions and of the requirement of compliance with the general principles of Community law, constitutes a legal basis which is sufficiently well defined in the light of the objective pursued by the imposition of fines. The complaint that the Guidelines cannot compensate for the lack of definiteness of that provision is therefore to no purpose. Moreover, the Guidelines have improved the legal certainty and transparency of the decision-making procedure.

58 Finally, with regard to the increase in the amounts of fines over the last few years, the Commission points out, firstly, that the increase in the turnovers of undertakings since the 1960s in itself justifies the freedom of action left to the Commission by the contested provision and, secondly, that, according to settled case-law (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 108 and 109; *LR AF 1998* v *Commission*, cited in paragraph 46 above, paragraph 237; and Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraphs 144 and 145), the Commission must be able to raise the level of fines in order to strengthen their deterrent effect. However, that discretion is not unlimited, since the Court of Justice and the Court of First Instance are to examine whether the increases decided upon by the Commission are justified by the alleged interest (Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraphs 323 to 335, and Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 251). Finally, it notes that, despite that increase in the level of fines, manifest and serious infringements of long duration remain relatively frequent.

59 The Council, intervening, contends that the objection of illegality against Article 15 of Regulation No 17 should be rejected as unfounded. The Council acknowledges that a fine, even if it is a non-criminal sanction, must have a clear and unambiguous legal basis. However, it considers that Article 15 of Regulation No 17 fulfils that requirement. It also points out that the principle *nulla poena sine lege* is intended to apply to criminal sanctions, which is not the case with fines imposed pursuant to

Article 15(2) of Regulation No 17, in accordance with paragraph 4 of that article. The requirements deriving from that principle may therefore not be applied in this case (*Maizena*, cited in paragraph 37 above, paragraph 14; Eur. Court HR, *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A No 307).

60 In addition, the Council takes the view that the level of the sanction is sufficiently well defined in so far as Article 15(2) of Regulation No 17 provides for an upper limit to the fine, based on the turnover of the undertaking concerned. An absolute ceiling would not be appropriate since the Commission's decisions relate to particular cases. The Commission's discretion, far from being absolute, is in fact limited by the obligation to take into account the criteria of duration and gravity of the infringement laid down in that article. The Commission is also required to comply with the principles of proportionality and non-discrimination.

61 The Council is of the opinion that it would be difficult to lay down a more restrictive framework making it possible to take account of the circumstances specific to the context of each infringement and to ensure a sufficient deterrent effect. Indeed, the Court has never cast doubt on the validity of Article 15(2) of Regulation No 17, but has rather confirmed it (*Tate & Lyle and Others* v *Commission*, cited in paragraph 58 above, paragraphs 98 to 101).

62 As regards the applicant's complaint that the Commission's practice is characterised by very substantial differences in the amounts of fines imposed and by a recent dramatic increase, the Council points out that those findings merely reflect the fact that the undertakings in question have different turnovers and that the size of the undertakings concerned is increasing.

63 It is also incorrect to claim that the Commission combines the functions of investigating authority, prosecutor and judge since it is subject to unlimited judicial review and therefore cannot be regarded as judge and party.

64 The same applies to the claim that the Council has delegated to the Commission its power to institute fines. The Council points out that the delegated authority enjoyed by the Commission concerns only the power to take decisions on the basis of Article 15(2) of Regulation No 17, which constitutes the expression of the Council's power. That is consistent with the third indent of Article 202 EC.

65 Finally, the Council observes that, contrary to the applicant's claims, comparable rules do exist at Member State level, in particular in Sweden and in Germany.

2. Findings of the Court

66 It should be remembered that it is clear from the case-law of the Court of Justice that the principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of Community law and requires, inter alia, that any Community legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly (see, to that effect, Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17; *Maizena*, cited in paragraph 37 above, paragraph 15; Case C-143/93 *van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and *X*, cited in paragraph 35 above, paragraph 25).

67 That principle, which forms part of the constitutional traditions common to the Member States and which has been enshrined in various international treaties, in particular in Article 7 of the ECHR, must be observed in regard both to provisions of a criminal nature and to specific administrative instruments imposing or permitting the imposition of administrative sanctions (see *Maizena*, cited in paragraph 37 above, paragraphs 14 and 15, and the case-law cited). It applies not only to the provisions which establish the ingredients of an offence, but also to those which define the consequences which flow from a contravention of the former (see, to that effect, *X*, cited in paragraph 35 above, paragraphs 22 and 25).

68 In that regard, it must be observed that, in the words of Article 7(1) of the ECHR:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

69 According to the European Court of Human Rights, it follows from that provision that offences and the relevant penalties must be clearly defined by law. That requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (Eur. Court HR, *Coëme and Others v. Belgium*, judgment of 22 June 2000, *Reports of Judgments and Decisions* 2000-VII, § 145).

70 The Council maintains that the Court of First Instance must not be guided by Article 7(1) of the ECHR and the case-law of the European Court of Human Rights relating to that article in analysing the legality of Article 15(2) of Regulation No 17 since Article 15(4) of Regulation No 17 provides that decisions taken by the Commission pursuant, inter alia, to paragraph 2 of that provision are not of a criminal law nature.

71 Without there being any need to rule on the question whether, by reason inter alia of the nature and severity of the fines imposed by the Commission pursuant to Article 15(2) of Regulation No 17, Article 7(1) of the ECHR has authority to apply to such sanctions, it must be stated that, even if Article 7(1) of the ECHR were to be regarded as applicable to such sanctions, it is clear from the case-law of the European Court of Human Rights that, in order to satisfy the requirements of that provision, it is not necessary for the wording of the provisions pursuant to which those sanctions are imposed to be so precise that the consequences which may flow from an infringement of those provisions are foreseeable with absolute certainty.

72 According to the case-law of the European Court of Human Rights, the existence of vague terms in the provision does not necessarily entail an infringement of Article 7 of the ECHR and the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (Eur. Court HR, *Margareta and Roger Andersson v. Sweden*, cited in paragraph 36 above, § 75). In that connection, apart from the text of the law itself, the European Court of Human Rights takes account of whether the indeterminate notions used have been defined by consistent and published case-law (Eur. Court HR, *G. v. France*, judgment of 27 September 1995, Series A No 325-B, § 25).

73 Moreover, taking into account the constitutional traditions common to the Member States does not mean giving a different interpretation to the general principle of Community law that penalties must have a proper legal basis. With regard to the applicant's arguments based on the judgment of the Bundesverfassungsgericht of 20 March 2002 (see paragraph 47 above), even if it should prove relevant in the context of fines imposed on undertakings for infringements of the competition rules, and on Paragraph 81(2) of the GWB, which apparently does not contain any provision similar to Article 15(2) of Regulation No 17, it must be pointed out that a constitutional tradition common to the Member States cannot be inferred from the legal situation in only one Member State. In that regard, it should be noted, on the

contrary, as observed by the Council, which is not contradicted on this point by the applicant, that the relevant legislation of other Member States includes, for the issue of administrative sanctions such as those imposed for the infringement of national competition rules, upper limits comparable to that specified in Article 15(2) of Regulation No 17, and even criteria similar or identical to those laid down by that Community provision, the Council citing in that regard the example of the Kingdom of Sweden.

74 As regards the validity of Article 15(2) of Regulation No 17 in the light of the principle that penalties must have a proper legal basis, as that principle has been recognised by the Community judicature in accordance with the guidance provided by the ECHR and the constitutional traditions of the Member States, it must be stated that, contrary to what the applicant maintains, the Commission does not have unlimited discretion in setting fines for infringements of the competition rules.

75 Article 15(2) of Regulation No 17 itself limits the Commission's discretion. Firstly, by specifying that 'the Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to 1 000 000 ..., or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement', it provides for a ceiling on fines, based on the turnover of the undertakings concerned, that is to say, based on an objective criterion. Thus, although, as the applicant states, there is no absolute ceiling applicable to all infringements of the competition rules, the fine which may be imposed is nevertheless subject to a quantifiable and absolute ceiling calculated by reference to each undertaking in respect of each infringement, so that the maximum amount of the fine which may be imposed on a given undertaking is determinable in advance. Secondly, that provision requires the Commission to fix fines in each individual case having 'regard ... both to the gravity and to the duration of the infringement'.

76 While it is true that those two criteria leave the Commission wide discretion, the fact remains that they are criteria which have been adopted by other legislatures for similar provisions, allowing the Commission to adopt sanctions taking account of the degree of illegality of the conduct in question. It must therefore be held, at this stage, that Article 15(2) of Regulation No 17, while leaving the Commission a certain discretion, lays down the criteria and limits to which it is subject in the exercise of its power in regard to fines.

77 In addition, it must be pointed out that, in setting fines pursuant to Article 15(2) of Regulation No 17, the Commission is bound to comply with the general principles of law, in particular the principles of equal treatment and proportionality, as developed by the case-law of the Court of Justice and the Court of First Instance.

78 Contrary to the applicant's claims, the limits on the Commission's discretion described above also apply to the decision whether or not to impose a fine, in particular when the Commission applies the Leniency Notice, the validity of which is, moreover, not disputed. In that regard, the fact that the Court of Justice acknowledged, in the judgment cited by the applicant (*BMW Belgium and Others* v *Commission*, cited in paragraph 43 above, paragraph 53), that the fact that in similar previous cases the Commission did not consider that there was reason to impose fines on certain economic operators did not deprive it of such a power, expressly granted to it by Regulation No 17, where the conditions required for the exercise of that power were satisfied, cannot mean that the Commission has discretion not to impose a fine without being required to comply, first, with the self-limitation on the exercise of its discretion resulting from the Guidelines and the Leniency Notice and, above all, secondly, with the general principles of law, in particular the principles of equality and proportionality, as well as, generally, with the effectiveness of Articles 81 EC and 82 EC and the principle of free competition resulting from Article 4(1) EC.

79 It should also be added that, under Article 229 EC and Article 17 of Regulation No 17, the Court of Justice and the Court of First Instance have unlimited jurisdiction to review decisions whereby the Commission has fixed fines and may thus not only annul the decisions taken by the Commission but also cancel, reduce or increase the fines imposed. Thus, the Commission's administrative practice is subject to unlimited review by the Community judicature. Contrary to the applicant's assertions, that review does not lead the Community judicature to exceed the limits of its powers in breach of Article 7(1) EC, since, on the one hand, such a review is expressly prescribed by the aforementioned provisions, the validity of which is not disputed, and since, on the other hand, the Community judicature carries it out in accordance with the criteria referred to in Article 15(2) of Regulation No 17. Consequently, review by the Community judicature has in fact made it possible, through a consistent and published body of case-law, to define any indeterminate concepts contained in Article 15(2) of Regulation No 17.

80 Moreover, on the basis of the criteria used in Article 15(2) of Regulation No 17 and defined in the case-law of the Court of Justice and the Court of First Instance, the Commission itself has developed a well-known and accessible administrative practice. Although the Commission's decision-making practice does not in itself serve as a legal framework for fines in competition matters (see Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 87, and the case-law cited), the fact remains that, under the principle of equal treatment, the Commission must not treat comparable situations differently and must not treat different situations in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

81 Furthermore, it is settled case-law that the Commission may at any time adjust the level of fines if the proper application of the Community competition rules so requires (*Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraph 109, and *LR AF 1998* v *Commission*, cited in paragraph 46 above, paragraphs 236 and 237), since such an alteration of an administrative practice may then be regarded as objectively justified by the objective of general prevention of infringements of the Community competition rules. The recent

increase in the level of fines, alleged and criticised by the applicant, cannot therefore, in itself, be regarded as unlawful under the principle that penalties must have a proper legal basis, since it remains within the statutory limits laid down by Article 15(2) of Regulation No 17, as interpreted by the Community Courts.

82 Moreover, it should be borne in mind that, for the sake of transparency and in order to increase legal certainty on the part of the undertakings concerned, the Commission has published the Guidelines in which it sets out the method of calculation which it undertakes to apply in each individual case. In that regard, the Court of Justice has also held that, in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. In addition, although the Guidelines do not constitute the legal basis of the Decision, they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the Decision and, consequently, ensure legal certainty on the part of the undertakings (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, paragraphs 211 and 213). It follows that, contrary to the applicant's assertions, the adoption by the Commission of the Guidelines, in so far as it fell within the statutory limits laid down by Article 15(2) of Regulation No 17, cannot be regarded as marred by lack of competence and merely contributed to defining the limits of the exercise of the discretion which the Commission already had under that provision.

83 Consequently, in view of the various considerations set out above, a prudent trader, if need be by taking legal advice, can foresee in a sufficiently precise manner the method and order of magnitude of the fines which he incurs for a given line of conduct. The fact that that trader can, in advance, know precisely the level of the fines which the Commission will impose in each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis, since, due to the gravity of the infringements which the Commission is required to penalise, the

objectives of punishment and deterrence justify preventing undertakings from being in a position to assess the benefits which they would derive from their participation in an infringement by taking account, in advance, of the amount of the fine which would be imposed on them on account of that unlawful conduct.

84 In that regard, even if undertakings are not able, in advance, to know precisely the level of fines that the Commission will adopt in each individual case, it should be noted that, under Article 253 EC, in the decision imposing a fine, the Commission is required, despite the generally known context of the decision, to provide a statement of reasons inter alia for the amount of the fine imposed and for the method chosen in that regard. That statement of reasons must show clearly and unequivocally the reasoning followed by the Commission so as to enable those concerned to know the grounds justifying the measure taken in order to assess whether it is appropriate to bring the matter before the Community judicature and, if necessary, to enable the latter to carry out its review.

85 Finally, with regard to the argument that, by establishing the framework of the fine in Article 15(2) of Regulation No 17, the Council, in breach of Articles 83 EC and 229 EC, in fact transferred to the Commission a power appertaining to it, it is without foundation.

86 Firstly, as observed above, although Article 15(2) of Regulation No 17 leaves the Commission a wide discretion, it limits its exercise by laying down objective criteria by which the Commission must abide. Secondly, it should be noted, as the Council pointed out at the hearing, that Regulation No 17 was adopted on the basis of Article 83(1) EC which provides that '[t]he appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council ... on a proposal from the Commission and after consulting the European Parliament'. The purpose of those regulations or directives, as stated in Article 83(2)(a) and (d) EC respectively, is to 'ensure compliance with the prohibitions laid down in Article 81(1) [EC] and in Article 82 [EC] by making provision for fines and periodic penalty payments' and to 'define the respective functions of the

Commission and of the Court of Justice in applying the provisions laid down in this paragraph'. It should be noted, moreover, that, under the first indent of Article 211 EC, the Commission is to 'ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied' and that, under the third indent of that article, it is to have 'its own power of decision'.

87 It follows that the power to impose fines for infringements of Articles 81 EC and 82 EC cannot be regarded as belonging originally to the Council which has transferred it or delegated its exercise to the Commission, as provided for in the third indent of Article 202 EC. Under the provisions of the Treaty cited above, that power is part of the Commission's role of ensuring the application of Community law, that role having been defined, set within a framework and formalised, as regards the application of Articles 81 EC and 82 EC, by Regulation No 17. The power to impose fines, which that regulation confers on the Commission, therefore stems from the provisions of the Treaty itself and is intended to facilitate the effective application of the prohibitions laid down in those articles (see, to that effect, *Tate & Lyle and Others* v *Commission*, cited in paragraph 58 above, paragraph 133). The applicant's argument must therefore be rejected.

88 It follows from all those considerations that the objection of illegality raised with regard to Article 15(2) of Regulation No 17 must be rejected as unfounded.

B — *Interpretation of Article 15(2) of Regulation No 17 in the light of the principle that penalties must have a proper legal basis*

89 If the Court does not declare Article 15(2) of Regulation No 17 invalid, the applicant maintains in the alternative that that provision should be implemented and interpreted strictly in the light of the principle that penalties must have a proper

legal basis, along the lines of the Commission's decision-making practice and of the case-law relating to Articles 81 EC and 82 EC. It sets out, in that connection, certain proposals intended to ensure that the fine is sufficiently foreseeable and claims that the Decision should be annulled.

90 The Commission and the Council take the view that those arguments are unfounded.

91 It is sufficient in that regard to observe, first of all, that the applicant's arguments set out in the second part, put forward in the alternative, of the plea alleging breach of the principle that penalties must have a proper legal basis merely reiterate, in part, some of the arguments already expanded in the first part of that same plea, directing them against the Commission's decision-making practice resulting from the application of the Guidelines and against the Decision, in so far as it illustrates that practice. Apart from the fact that the Commission's decision-making practice cannot form the subject of any action for annulment, it should be pointed out, as has been stated previously, that Article 15(2) of Regulation No 17 does not fail to have regard to the principle that penalties must have a proper legal basis and that the Commission's decision-making practice and the Guidelines have in fact helped, under the supervision of the Community Courts, to increase legal certainty on the part of undertakings. The Decision cannot therefore be regarded as unlawful on the sole ground that it constitutes an application of the Commission's allegedly unlawful decision-making practice in regard to fines. Those claims must therefore be rejected.

92 In addition, in so far as the applicant raises, in this part of the plea, arguments relating to the alleged failure to state reasons for the Decision as regards, in particular, the determination of the basic amount, the actual impact of the infringement on the market and the increase made in the amount of the fine in order to ensure that it had sufficient deterrent effect, those arguments are essentially covered by the third plea, which deals specifically with the question of the statement of reasons for the Decision and in the context of which they must be examined.

93 Finally, the applicant's remaining arguments consist of general and theoretical considerations regarding the decision-making practice which the Commission should pursue, new provisions which the Council should adopt and developments in case-law upon which the Court of First Instance should embark and, consequently, do not raise any legal grounds of challenge against the Decision and must therefore be disregarded.

94 Moreover, in the reply and at the hearing, the applicant added that the turnover to which the maximum limit of the fine fixed at 10% of the turnover in the business year preceding the adoption of the decision imposing the fine relates should be taken to be the turnover on the relevant market and not the total turnover.

95 To the extent that it can be inferred from that claim that the applicant seeks to challenge the Decision in that it imposed on it a fine exceeding the amount of 10% of its turnover on the methionine market in the business year preceding the adoption of the Decision, without there even being any need to consider whether that argument is admissible under Article 48(2) of the Rules of Procedure, and in particular whether there is a close connection between that argument and one of the pleas in the application, it is sufficient to point out that neither Regulation No 17, nor the case-law, nor the Guidelines provide that the amount of fines must be fixed directly by reference to the size of the market concerned, that factor being only one of several relevant considerations. Under Regulation No 17, as interpreted by the case-law, the amount of the fine imposed on an undertaking for an infringement of competition law must be proportional to the infringement, seen as a whole, having regard, in particular, to the gravity thereof (see, to that effect, Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 240, and, by analogy, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). As the Court of Justice stated in paragraph 120 of its judgment in *Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, in assessing the gravity of an infringement regard must be had to a large number of factors the nature and importance of which vary according to the type of infringement in

question and the particular circumstances of the case (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraph 532).

96 It must also be noted in that connection that, according to settled case-law, the only express reference to the turnover of the undertaking in question, namely the limit of 10% of the turnover relied on for the purpose of determining fines in Article 15(2) of Regulation No 17, relates to the overall worldwide turnover of the undertaking (see, to that effect, *Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraph 119) and not the turnover achieved by it on the market affected by the anti-competitive conduct penalised. It is clear from the same paragraph of that judgment that that limit is designed to ensure that the fines are not disproportionate to the size of the undertaking as a whole (*JFE Engineering* v *Commission*, cited in paragraph 95 above, paragraph 533).

97 It follows that the second part of the first plea must be rejected.

98 Consequently, the first plea must be rejected in its entirety.

II — *The second plea, alleging an error of assessment regarding the single and continuous nature and the duration of the infringement*

99 The applicant denies, principally, having participated in a single continuous infringement between February 1986 and February 1999. It admits its participation in an infringement between 1986 and 1988 and after 1992 but claims, firstly, that the anti-competitive practice was interrupted between 1988 and 1992, and, secondly, that it ended definitively in 1997. In the alternative, it submits that the Commission should, in any event, have taken into account the fact that the agreements were, at the very least, suspended from 1988 to 1992 and after 1997.

A — *Interruption of the infringement between 1988 and 1992*

1. Arguments of the parties

100 According to the applicant, following the withdrawal from the cartel of Sumitomo, the 'summit' meetings and the anti-competitive agreements were interrupted in 1988 and resumed only in 1992.

101 Firstly, it submits that, by stating in recital 212 to the Decision that, since the participants in the cartel had not expressed their intention to modify the agreements or to withdraw from them, it could not be regarded as established that the cartel had ceased between 1988 and 1992, and by accepting in recital 251 et seq. to the Decision that, since the participants in the cartel had never informed one another of their intention to terminate the agreements, it was necessary to infer from this that there had been no formation of a new cartel but only the organic development of a complex cartel structure, the Commission implicitly acknowledged that it did not have direct proof of the existence of the cartel between 1988 and 1992. It thus based its finding on presumptions and (in its view) inevitable conduct, in disregard of the requirements concerning the taking of evidence and of the principle *in dubio pro reo* (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 354; Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 261 to 266; and Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 16). In addition, mutual communication of the intention to terminate a cartel does not in any way constitute a condition for the termination of an agreement contrary to competition law (*LR AF 1998* v *Commission*, cited in paragraph 46 above, paragraph 59 et seq.). Consequently, it is not incumbent on the applicant to prove that it did not participate in the infringement during the period under consideration, but on the Commission to prove that it did in fact take part in it (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58).

102 Secondly, the applicant claims in essence that the Commission erred in its assessment of the various documents intended to prove the existence of a cartel between 1988 and 1992.

103 In support of its claims, firstly, the applicant observes that the account of the facts given by Nippon Soda in its observations of 23 February 2000, on which the Commission relies, only once mentions the existence of meetings between 1988 and 1990, which continued in one form or another and only at staff level until 13 May 1998. However, the Commission fails to take into account the fact that Nippon Soda's submissions indicate, on the one hand, that the 'summit' meetings ended in 1988 and, on the other, that the meetings at staff level between 1988 and 1990 related only to the way in which the participants could protect themselves against competition from Monsanto and to the organisation of an exchange of information, which does not constitute an infringement of competition law.

104 Secondly, as regards the note of 5 May 1990 produced by Nippon Soda ('the note of 5 May 1990'), from which the Commission infers that a meeting took place in 1989, the applicant claims, on the contrary, that that document sets out by way of introduction the reasons for which the commercial cooperation relations were broken off in 1989, namely the existence of a dispute between Sumitomo, on the one hand, and Degussa and Rhône-Poulenc, on the other. In addition, the note of 5 May 1990 indicates that the purpose of the meeting in August 1989 was to dissuade Degussa from selling methionine at a discount. However, it is apparent from the note in question that Degussa categorically rejected all efforts to dissuade it from so doing, its commercial objective being to compete with Monsanto and Sumitomo. That meeting can therefore, at the very most, be regarded only as an attempt by Nippon Soda and Rhône-Poulenc to persuade the applicant to participate in an infringement and, in any event, proves the absence of any anti-competitive intent on its part.

105 Moreover, the Commission was wrong to infer from the note of 5 May 1990, in recitals 103 to 106 to the Decision, that the possibility of a further meeting had been

raised but that it was not known whether such a meeting had actually taken place, even though in the note Nippon Soda states on the contrary that it was not possible to reach a joint estimate of the selling price, since even Rhône-Poulenc was not interested in a joint price policy.

106 Finally, the note of 5 May 1990 concludes that there was 'every reason to believe that Degussa [was] not greatly concerned about what Rhône-Poulenc actually [thought]'. The applicant therefore questions the basis for the Commission's statement in recital 106 to the Decision that Degussa, Rhône-Poulenc and Nippon Soda met several times in 1989 and 1990 to discuss prices and market data and to plan their joint reaction to the new market situation. It points out that, on the contrary, Degussa clearly expressed to the other undertakings concerned its intention not to continue the implementation of the agreements.

107 Thirdly, the applicant maintains that the Commission also failed to demonstrate to the requisite legal standard that it participated in an infringement between 1990 and 1992. Rhône-Poulenc's supplemental submission of 5 December 2000 shows that the meeting of 10 June 1990 between Degussa and Rhône-Poulenc had resulted only in the decision to contact Nippon Soda to discuss falling prices and the organisation of more regular meetings. The Commission's assertion that the 1986 cartel had never stopped and that Nippon Soda was already involved in the adoption of such measures is therefore incorrect (recital 110 to the Decision).

108 Moreover, Nippon Soda's note concerning the meeting in Seoul on 7 November 1990 ('the note of the meeting of 7 November 1990') contains no indication of any agreement on the announcement of a price increase or its implementation, but on the contrary shows that Rhône-Poulenc and Degussa did not envisage any second price increase without Monsanto's participation. Nor does that document support the conclusion, as the Commission claims, that there was a first price increase, as the

note of 5 May 1990 shows. Furthermore, the applicant claims in essence that the wording contained in that note cannot be relied on since it is not the original but a translation, probably from Japanese, as indicated by the typography and the obvious error relating to the year observed in the date 'November 1998'.

109 Nor has the Commission been able to establish the existence of any agreement for 1991. In its statement of 26 May 1999, Rhône-Poulenc states that the purpose of the 1991 meetings 'was to create and increase the level of confidence between the three competitors'. Those meetings therefore constituted preparatory negotiations which had not reached the attempted agreement or concerted practice stage. That analysis is also confirmed in Rhône-Poulenc's supplemental submission of 5 December 2000.

110 The Commission maintains that it has demonstrated to the requisite legal standard the applicant's participation in a single continuous infringement between February 1986 and February 1999 and reiterates its assertions contained in recitals 96 to 115, 212, 255 and 256 to the Decision.

2. Findings of the Court

111 The applicant does not deny, in the present action, its participation in two cartels which it considers separate, one extending from February 1986 to autumn 1988, during which period the cartel included the Japanese producer Sumitomo, and the other from March 1992 to October 1997, on which date it considers that the infringement ended, contrary to the Commission's assertions that the infringement continued until February 1999. With regard to the period from 1988 to 1992, it submits that the Commission has not demonstrated the existence of a cartel in

which it participated and that, consequently, the Commission made an error of assessment by considering that it had participated in a single continuous infringement from March 1986 to March 1999.

112 It is therefore important to determine whether the Commission has proved to the requisite legal standard that, during the period from autumn 1988 to March 1992, the applicant participated in actions constituting an infringement of Article 81(1) EC and of Article 53 of the EEA Agreement and forming part, in the light of the uncontested infringements prior and subsequent to that period, of an 'overall plan', because their identical object distorted competition within the common market. From that point of view, it is necessary to assess, in respect of that period, the evidence gathered by the Commission and the conclusions which it reached in recital 95 et seq. to the Decision.

(a) The applicant's participation in an agreement and/or concerted practice between 1988 and 1992

113 As a preliminary point, it should be noted that the applicant complains in the first place that the Commission inferred, in recitals 212 and 251 et seq. to the Decision, from the mere circumstance that the participants in the 1986 cartel had not manifested their intention, following the withdrawal of Sumitomo in 1988, to terminate the arrangements, that it was not established that the cartel was interrupted. By basing its finding on such a presumption, the Commission reversed the burden of proof which in principle rests on it.

114 It must be recalled in that regard that it is settled case-law that the requirement of legal certainty, on which economic operators are entitled to rely, entails that when there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of

the circumstances constituting the infringement. With regard to the alleged duration of an infringement, the same principle of legal certainty requires that, if there is no evidence directly establishing the duration of the infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (*Baustahlgewebe* v *Commission*, cited in paragraph 101 above, paragraph 58, and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79).

115 The principle of the presumption of innocence, as it results in particular from Article 6(2) of the ECHR, is one of the fundamental rights which, according to the case-law of the Court of Justice, reaffirmed by the preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and by Article 47 of the Charter, are recognised in the Community legal order. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies inter alia to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, inter alia, Eur. Court HR, *Öztürk v. Germany*, cited in paragraph 38 above, and *Lutz v. Germany*, judgment of 25 August 1987, Series A No 123-A; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176).

116 In the present case, in recital 212 to the Decision, the Commission made the following observation:

'... Indeed, it is demonstrated in recitals 95 to 125 that the participants continued to take part in meetings throughout 1989, 1990 and 1991 without publicly distancing themselves from what occurred at them. Given the manifestly anti-competitive nature of the earlier meetings, the lack of evidence that the participation in the meetings was without any anti-competitive intention establishes that the illegal scheme was in fact continued ...'

117 However, it is clear from the Commission's reasoning set out in recitals 96 to 125, 212 and 255 to the Decision that, far from relying solely, or even predominantly, on the lack of any manifestation by the parties to the 1986 cartel of their intention to terminate it after 1988, it carried out a detailed analysis of the documentary evidence made available to it by the participants in the cartel, from which it inferred not only that the latter had never manifested their intention to terminate the arrangements, but that, moreover, the cartel's activities had never been interrupted.

118 In the light of the Decision as a whole, the Commission cannot therefore be accused of having based its assessment of the single and continuous nature of the infringement, and therefore of its existence between 1988 and 1992, on the sole consideration that, since the participants in the 1986 cartel had not manifested their intention to terminate it, it had to be presumed that the purpose of the meetings held from 1989 to 1991 was anti-competitive and that they constituted the continuation of the earlier cartel. Consequently, the applicant's argument that the Commission established the existence of the infringement subsequent to autumn 1988 by relying on a mere presumption cannot be accepted.

119 On the other hand, it must be ascertained whether the documentary evidence on which the Commission relied is capable of demonstrating to the requisite legal standard that the applicant participated in an infringement of competition law between 1988 and 1992 and, if so, whether that infringement constitutes the continuation of the earlier cartel, the existence of which is not disputed by the applicant.

120 Examination of the file shows that, between 1988 and 1992, it is necessary to distinguish two periods, the first extending from the end of 1988, the time of Sumitomo's withdrawal from the original cartel, until late summer 1990, and the second extending from late summer 1990 until March 1992, when the applicant admits to having participated in what it considers to be a separate infringement.

The period from the end of 1988 to late summer 1990

121 With regard to the period from the end of 1988 to summer 1990, it should be noted that the Commission maintained, in recitals 98 to 106 to the Decision, that, following Sumitomo's withdrawal from the original cartel, Degussa, Rhône-Poulenc and Nippon Soda, despite the major difficulties which they had in coordinating their action, met several times in 1989 and 1990 to discuss prices and market data and to plan their joint reaction to the new market situation characterised by the entry of Monsanto. For that purpose, the Commission referred to the following meetings which, moreover, the applicant does not deny were held:

Date	Place	Participants
August 1989	Not mentioned	Nippon Soda, Degussa, Rhône-Poulenc
Autumn 1989	Japan	Nippon Soda, Degussa
10 June 1990	Frankfurt am Main	Degussa, Rhône-Poulenc

122 The applicant's argument consists, in essence, in maintaining that those meetings do not prove the continuation of the cartel and that the documents on which the Commission relies prove, on the contrary, that the participants in those meetings were in disagreement and in particular that the applicant rejected any proposal for a price-fixing arrangement.

123 However, it is clear from Nippon Soda's reply of 23 February 2000 to the Commission's request for information ('Nippon Soda's submission of 23 February 2000') and from the note of 5 May 1990 that, while it must be admitted that the 'summit' meetings ended in 1988, the fact remains, and is not disputed by the applicant, that, according to those same documents, meetings at staff level continued to be held between 1988 and 1998 and that part of the purpose of those meetings was to replace the earlier summit meetings.

124 Moreover, although it is true that it cannot be inferred from Nippon Soda's submission of 23 February 2000 that, for the period from 1989 to 1990, the participants in the meetings had agreed to fix prices, allocate customers or restrict production capacities, it must nevertheless be pointed out that that submission mentions, in points 2.8 and 2.9, that a more flexible system of 'target prices' had developed and that the purpose of the meetings was to protect themselves against competition from the new entrant into the market, Monsanto, and to exchange information to that end. In point 6.2, under the heading 'Purpose of the meetings held after 1 January 1990', Nippon Soda confirms that description by stating that, in 1990, Monsanto's activities represented the main threat for the parties to the agreements and that the meetings, which are presented as regular, therefore concentrated on pooling information relating to those activities and on discussing target prices.

125 Moreover, it is apparent inter alia from the note of 5 May 1990 that one meeting was held in August 1989 between Nippon Soda, Rhône-Poulenc and Degussa and another in autumn 1989 between Degussa and Nippon Soda, which the applicant does not dispute. The purpose of those meetings was to dissuade Degussa from selling methionine at a discount. According to that same document, Degussa rejected that proposal, so that there are no grounds for assuming that the parties reached a price-fixing agreement at those meetings. However, the note points out that Degussa stated on that occasion, inter alia, firstly, that such price reductions were necessary in order to maintain its sales volumes and therefore its fixed costs and, secondly, that in its view the reasonable price of methionine was around 2.80 United States dollars (USD) per kilogram and that the current level of USD 3/kg was therefore too high.

126 The applicant maintains that that note demonstrates that no cartel was possible between the participants in the meetings at that time.

127 In that regard, it must be acknowledged that the note of 5 May 1990 reveals that Degussa did lower its prices substantially between 1989 and the summer of 1990 in order, inter alia, to regain customers from Monsanto. Nippon Soda also states that

relations between Degussa and Rhône-Poulenc had deteriorated and that it was therefore likely that the latter's strategy would probably be, in the short term, to continue to compete with Monsanto, Degussa, Sumitomo and Nippon Soda.

128 However, it is important to note that, although the Commission has not established the existence of a price-fixing agreement, it has proved that the applicant participated in meetings with Nippon Soda and Rhône-Poulenc throughout that period and that, during those meetings, information on market conditions was exchanged, the price level was discussed and the participants set out the commercial strategy which they intended to adopt on the market, the applicant having inter alia announced the price which it considered reasonable at that time, namely USD 2.80/kg.

129 Consequently, it cannot be inferred from that brief period of disagreement between the participants, from the end of 1988 to late summer 1990, that the collusion had ended, since not only did the meetings continue to be held regularly but, in addition, those meetings were specifically intended to agree on the reaction to be adopted in the light of the new market data. The fact that the applicant temporarily lowered prices in order to regain customers from Monsanto and that it consistently rejected proposals made by Nippon Soda and Rhône-Poulenc not to lower prices cannot therefore lead to the conclusion that the applicant intended to distance itself from the content of the meetings and act independently, particularly since, according to the note of 5 May 1990, it intended to agree with the other participants on a price rise in July 1990 and since, to that end, it was crucial to persuade Rhône-Poulenc to join in the concerted efforts to raise prices.

130 It must also be observed that the alleged dispute between Degussa and Rhône-Poulenc, which moreover is presented only as conjecture in the note of 5 May 1990, did not prevent those undertakings from meeting twice during the summer of 1990, the first time at the offices of Degussa in Frankfurt am Main on 10 June 1990 and the

second time in Paris. At that second meeting, according to the undisputed statements of Rhône-Poulenc, the parties exchanged market information. In particular, Rhône-Poulenc showed Degussa its global sales figures and Degussa's sales were discussed although no specific figure was made available by the latter.

131 It follows that, as pointed out in essence by the Commission in recital 103 to the Decision, although the original cartel experienced, between the end of 1988 and the summer of 1990, some wavering due to the withdrawal of Sumitomo and the arrival of Monsanto on the market, Degussa, Rhône-Poulenc and Nippon Soda continued, during that period, to meet with a view to agreeing a common strategy for combating competition from Monsanto and that, from that point of view, information relating inter alia to the prices and sales of Rhône-Poulenc, Nippon Soda and Degussa, as well as information relating to Monsanto's activities, was exchanged.

132 However, it is sufficient to recall at this stage that the concept of 'concerted practices' consists of a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 64). The criteria of coordination and cooperation, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or

contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, cited in paragraph 101 above, paragraphs 173 and 174, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 720).

133 Consequently, in order to prove that there has been a concerted practice, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1852). It is sufficient that, through its declaration of intention, the competitor has eliminated or, at the very least, substantially reduced the uncertainty as to the conduct to be expected from it on the market (Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 242, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 260).

134 In addition, as the applicant points out, the mutual communication by the participants in a cartel of their intention to terminate it is not a condition of its cessation, the fact remains that, according to settled case-law, where an undertaking participates, even without taking an active part, in meetings between undertakings with an anti-competitive purpose and does not publicly distance itself from what occurred at those meetings, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be held as established that it participates in the cartel (*Hercules Chemicals* v *Commission*, cited in paragraph 133 above, paragraph 232; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98; and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 85 and 86).

135 However, while it is true that the material in the file described above indicates that the participants in the meetings may have had certain disagreements, the fact remains that the meetings continued to take place and that Degussa cannot be

considered to have publicly distanced itself from what occurred at them, since, inter alia, it indicated what its conduct on the market would be and the price which it considered reasonable and since it itself manifested its intention to organise a concerted action to increase prices in July 1990.

136 Moreover, although it is clear from the very terms of Article 81(1) EC that a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 118, and *Hüls* v *Commission*, cited in paragraph 115 above, paragraph 161), there must be a presumption, subject to proof to the contrary, which it is for the economic operators concerned to adduce, that the undertakings participating in the concerted action and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (*Commission* v *Anic Partecipazioni*, paragraph 121, and *Hüls* v *Commission*, paragraph 162). That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here, since the cartel began in 1986.

137 In the light of the foregoing, it must therefore be concluded that the Commission was fully entitled to take the view, in recital 106 to the Decision, that 'it [was] at least established that the parties [had been] ... in contact with each other, [had] exchanged information on prices and sales and [had] discussed price increases during 1989 and 1990' and to infer from that, taking as a basis, in recital 194 et seq. to the Decision, the case-law cited above, that the applicant had participated in an agreement and/or concerted practice during that period.

138 The question whether, as the Commission observes in recital 106, Nippon Soda's note of 7 November 1990 suggested that a 'first' price increase campaign had already taken place during the summer of 1990 is immaterial in that regard, since the Commission does not base its conclusions on that circumstance, which is presented, incidentally, as merely likely. Moreover, it must be acknowledged that such an

assumption cannot be regarded as completely unfounded in view of the fact that, firstly, the note in question clearly states, by way of introduction, that Rhône-Poulenc and Degussa were 'nervous about the proposed second price rise' and, secondly, Degussa had already shown its intention to increase prices in July 1990 and had, to that end, contacted Rhône-Poulenc and Nippon Soda in order to set up a tripartite meeting.

139 Likewise, the applicant's argument that Rhône-Poulenc's supplemental submission of 5 December 2000 shows that the representatives of the latter and Degussa met for the first time on 10 June 1990, that they decided on that occasion to contact Nippon Soda and that therefore there was, at that time, neither an agreement nor a continuation of any programme cannot cast doubt on Nippon Soda's statements or the note of 5 May 1990 provided by the latter, from which it is clear that the meetings at staff level continued during the period in question and, in particular, that one meeting was held between Nippon Soda, Rhône-Poulenc and Degussa in August 1989 and another, between Degussa and Nippon Soda, in autumn 1989.

140 Rhône-Poulenc's supplemental submission of 5 December 2000, on which the applicant relies, simply states that Mr H. and Mr B., of Rhône-Poulenc, encouraged Mr K., who had joined that undertaking in April 1990, to contact Mrs R., of Degussa, in order to introduce himself as the successor to Mr B. Consequently, the fact that Mr K. and Mrs R. met for the first time on 10 June 1990 cannot mean that contacts between Rhône-Poulenc, Degussa and Nippon Soda had ceased between the end of 1988 and that date. Likewise, the mere indication in that submission that, at the bilateral meeting on 10 June 1990, Rhône-Poulenc and Degussa decided to contact Nippon Soda to discuss the fall in methionine prices and the possibility of holding more regular meetings cannot support the conclusion that those undertakings had ceased all contact, whether bilateral or trilateral, after Sumitomo's withdrawal from the cartel at the end of 1988.

The period from late summer 1990 to March 1992

141 With regard to the period from late summer 1990 to March 1992, it must be pointed out that Rhône-Poulenc's statement of 26 May 1999 shows unequivocally that Degussa, Rhône-Poulenc and Nippon Soda met in Hong Kong at the end of summer 1990 to the discuss the recent fall in methionine prices and agreed, on that occasion, to increase their prices from USD 2.50/kg to USD 2.80/kg.

142 Nippon Soda's note relating to the meeting held in Seoul on 7 November 1990, which the Commission speculates could in fact be the same meeting as that of 19 November 1990 which Rhône-Poulenc places in Hong Kong in its supplemental submission of 5 December 2000, states, for its part, that the participants had agreed on the following points: firstly, maintenance of prices in force in the German mark (DEM) area (namely, DEM 5.10/kg) during the first quarter of 1991; secondly, announcement of a price increase of approximately 10% in that same area with effect from April 1991; thirdly, a general increase in prices as part of a second campaign as from January 1991 and, consequently, fourthly, adjustment of prices in areas where price levels were low (in particular Canada) so as to deter resellers from re-exporting. In addition, a meeting was to take place in Europe at the end of February 1991 to discuss prices for April 1991 and the period thereafter.

143 It follows that, in November 1990 at the latest, there was a joint intention among the participants at the meetings to initiate a price increase, the detailed arrangements of which were specified and, consequently, it must be held that an agreement existed between them.

144 In that regard, the argument put forward by the applicant, which does not dispute the content of Nippon Soda's note, claiming that, on the contrary, that note demonstrates that Degussa did not envisage the price increase without the participation of Monsanto, cannot be accepted.

145 Firstly, it is by no means apparent from that note, and in particular from point (iii) ('Both Rhône-Poulenc and Degussa will have to get in touch separately with Monsanto and attempt to persuade it to join the second price increase campaign. In order to be ready for the proposed price increase, expected to take place during and after January 1991, meetings would need to be held with Monsanto during November 199[0]') cited by the applicant, that Monsanto's participation was a necessary condition for the agreement. The note in question merely mentions the fact that Rhône-Poulenc and Degussa were to try to persuade Monsanto to participate in the cartel, before the proposed price increase in January 1991, without indicating that the agreements would fall through in the absence of such participation. The planned actions therefore appear to be more a means of increasing the effectiveness of the agreement than a condition for its existence.

146 Secondly, even assuming that those words may be construed as laying down a condition for the implementation of the agreement, the fact remains that there existed between the parties a common intention to increase the price of methionine on the market and that, consequently, the anti-competitive agreement was concluded (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraph 228). In addition, the part of the agreement which provided for the adjustment of prices in areas where price levels were low in order to dissuade resellers from re-exporting was unconnected with any participation by Monsanto.

147 Moreover, the alleged circumstantial factors referred to by the applicant, intended to demonstrate that Nippon Soda's note of 7 November 1990 is not an original but a translation, not only constitute mere allegations, the genuineness of which it was not in a position to establish, but, furthermore, are in no way such as to call in question the probative value of that document and must be rejected as unfounded.

148 Finally, it must be observed that, in any event, the applicant does not dispute Rhône-Poulenc's assertion contained in its statement of 26 May 1999, and referred to by the Commission in its defence, that Nippon Soda, Degussa and Rhône-Poulenc agreed in Hong Kong at the end of summer 1990 to increase prices from USD 2.50/kg to USD 2.80/kg.

149 With regard to the period following the agreement of November 1990, the applicant again claims that the Commission has not demonstrated its participation in an agreement or concerted practice until March 1992, since, according to it, the meetings which it admits attending consisted only in increasing the level of trust between the competitors.

150 That assertion is manifestly unfounded. The applicant fails to take into account the fact that, although, as it asserts, Rhône-Poulenc's statement of 26 May 1999 does indeed mention that the quarterly meetings which began in 1991 were held in various European and Asian cities and were intended to raise the level of trust between the parties, that same document adds that, at those meetings, the participants 'discussed production, competitors in China and Asia, customers and recent contracts' and that '[t]hey often exchanged sales figures calculated on a regional or country basis'. Consequently, 'although there was never any allocation of customers, there was a constant effort to maintain prices'. Rhône-Poulenc's supplemental submission of 5 December 2000 supplements that account by stating that those quarterly meetings gave rise to an exchange of information on pricing strategies and production issues, and that regional target prices were agreed. In addition, it states that, whenever one of the participants complained about the conduct of another competitor on the market, the parties would try to resolve the dispute. Finally, Rhône-Poulenc concludes that the unanimously shared message was to refrain from taking drastic actions, and in particular from significantly reducing prices.

151 The Commission was therefore fully entitled, relying, in recitals 115 to 123 to the Decision, on the documents described above, to reject, in recital 125 to the Decision, Degussa's argument that its participation in meetings with an anti-competitive purpose was not demonstrated before 1992.

152 It is true that the Decision does not mention precise details regarding the dates and places of those meetings for 1991. However, Rhône-Poulenc's statements, which are not disputed by the applicant, clearly indicate that the decision to hold quarterly meetings was taken at the very beginning of 1991. In addition, both Nippon Soda and Rhône-Poulenc present those meetings as a continuous practice from 1991 until 1998. Consequently, the mere fact, relied on by the applicant, that it was not possible to establish any details regarding the circumstances of time and place of the cartel's meetings during 1991 cannot suffice as a basis for the conclusion that the activities of that cartel ceased during that period, particularly since it was demonstrated that an agreement had been found from the end of 1990 and since the applicant does not dispute its participation in an agreement in March 1992.

153 It must be recalled that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (*Dunlop Slazenger* v *Commission*, cited in paragraph 114 above, paragraph 79, and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 188). Given that, firstly, the Commission correctly established the existence of an unlawful agreement in November 1990, secondly, the applicant does not dispute the existence of an infringement from 1992 onwards and, finally, the concurring statements of Rhône-Poulenc and Nippon Soda mention regular quarterly meetings from the beginning of 1991 onwards, those requirements must be deemed to be satisfied in this case.

154 It follows from the foregoing that the Commission was fully entitled to consider that the applicant participated in an agreement and/or concerted practice between the end of 1988 and March 1992.

(b) The single and continuous nature of the infringement

155 It must be remembered that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 136 above, paragraph 81). When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (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 258).

156 It should be pointed out that those involved in the cartels in which the applicant admits having participated before the end of 1988 and after March 1992 are, with the exception of Sumitomo, which withdrew in 1988, the same participants and that the object of those cartels is the same as the object of that in which the applicant participated between 1988 and 1992, namely, a concerted action to maintain and increase the market prices of methionine in the EEA and exchange of information on prices, market shares and sales volumes.

157 It follows that the Commission was fully entitled to conclude, in recitals 206 to 212 to the Decision, that the infringement in which Degussa, Rhône-Poulenc and Nippon Soda had participated had to be classified as single and continuous.

158 The applicant's claim that the infringement was interrupted between the end of 1988 and March 1992 must therefore be rejected.

B — *End of the infringement*

1. Arguments of the parties

159 The applicant submits that the Commission was not in a position to prove its participation in the cartel after autumn 1997, which was when the cartel ended following the departure of Mr H., of Rhône-Poulenc, since his successor, Mr Z., decided to put an end to any contact with the competitors.

160 The resumption of contacts was authorised, in March 1998, by Mr G., the new managing director of Rhône-Poulenc, only for the purpose of putting an end to the cartel while avoiding excessive market disturbance.

161 Finally, the existence of an agreement relating to price increases, concluded between Degussa and Rhône-Poulenc, does not prove the continuation of the activities of the original cartel, which included Degussa, Rhône-Poulenc and Nippon Soda.

162 The Commission contends that the applicant's objections relating to lack of proof of its allegations, set out in recitals 180 to 185 to the Decision, are unfounded.

2. Findings of the Court

163 Firstly, it should be pointed out that although, as the Commission notes in recital 180, after Mr H.'s departure from Rhône-Poulenc in the autumn of 1997, his replacement, Mr Z., did indeed give instructions to end all contact with that company's competitors, the fact remains that, as early as March 1998, Mr Z.'s successor, Mr G., authorised the continuation of contacts with competitors in order to facilitate a 'soft landing' and avoid excessive market disturbance, while at the same time ordering the cessation of the quarterly meetings.

164 However, the consideration that, according to the managing director of Rhône-Poulenc, who did not attend the meetings, the intended purpose of the contacts between the parties to the cartel was to enable the cartel to be brought to an end gently not only does not prove that that was actually the case, but, moreover, tends on the contrary to show that Rhône-Poulenc and its competitors intended to continue to collude until a later date when the cartel would be brought definitively to an end. Indeed, that is corroborated by the purpose of the meetings which were held after Mr G. gave his authorisation, as will be examined below. Furthermore, according to the statements of Rhône-Poulenc itself, it was not until February 1999 that the management finally ordered the definitive cessation of contacts with the competitors.

165 The circumstance that the Commission suggested as a probable explanation for the discontinuation of the quarterly meetings, in recital 181 to the Decision, their high visibility and associated risk of discovery, since the investigations of the US antitrust authorities in the vitamins sector were already well advanced by that time, is immaterial in that regard. On the one hand, that explanation is only an assumption from which the Commission does not draw any inferences with respect to the

applicant and, on the other, it does not in any way affect the correctness of the Commission's finding that, from March 1998, contacts with the competitors were again authorised by Mr G., the managing director of Rhône-Poulenc.

166 Secondly, the Court notes that the applicant does not dispute that the following meetings, which are mentioned in recitals 179 to 184 to the Decision, were held:

Date	Place	Participants
May 1998	Frankfurt am Main or Düsseldorf	Degussa, Rhône-Poulenc, Nippon Soda
Late summer/early autumn 1998	Heidelberg	Degussa, Rhône-Poulenc
4 February 1999	Nancy	Degussa, Rhône-Poulenc
4 February 1999 (evening)	Paris	Nippon Soda, Rhône-Poulenc

167 It must therefore be observed that, during the period from autumn 1997 to February 1999, Degussa and Rhône-Poulenc met on two occasions, the first in late summer or early autumn 1998 in Heidelberg, and the second on 4 February 1999 in Nancy. According to the Commission, Degussa and Rhône-Poulenc agreed on those two occasions respectively to increase prices and to set target prices (USD 3.20/kg, that is, DEM 5.30/kg).

168 The applicant does not expressly dispute those circumstances, but claims that the Commission cannot rely on them in order to demonstrate that they constituted the continuation of the earlier cartel, which involved three participants (Degussa, Rhône-Poulenc and Nippon Soda).

169 That argument cannot be accepted.

170 As the Commission rightly points out, Rhône-Poulenc's statements show that bilateral contacts, particularly by telephone, continued between Rhône-Poulenc and Degussa, on the one hand, and Rhône-Poulenc and Nippon Soda, on the other, between April 1998 and 4 February 1999.

171 Moreover, in its statements, which were produced as an annex by the applicant itself, Nippon Soda mentions in particular having met a representative of Rhône-Poulenc at a dinner in Paris in October 1998, and representatives of Degussa, on a first occasion in Frankfurt am Main in October 1998, and on a second occasion in Tokyo in autumn 1998. According to Nippon Soda, the purpose of those meetings was to enable the participants to discuss market conditions and price trends. That document further states that Rhône-Poulenc and Nippon Soda met on 4 February 1999 in Paris, on the same evening as the meeting held between Degussa and Rhône-Poulenc in Nancy, and on that occasion discussed demand and conditions on the methionine market (recital 183 to the Decision).

172 Finally, nor does the applicant dispute the fact that a tripartite meeting was held in May 1998 (Rhône-Poulenc placing it in Frankfurt am Main, Nippon Soda in Düsseldorf), during which, according to Rhône-Poulenc's statements, which are not disputed by the applicant, Nippon Soda stated that it would adopt any price increase.

173 It follows from the foregoing that the applicant cannot claim that the Commission has not demonstrated to the requisite legal standard that Nippon Soda took part in that concertation between autumn 1997 and February 1999. It is clear, as the Decision points out in recital 184, that the three participants in the cartel maintained bilateral contacts throughout that period. Both Rhône-Poulenc and the

applicant continued to be in contact with Nippon Soda in order to discuss market conditions and price levels, even though Nippon Soda had indicated its agreement in principle with any price increase at the last tripartite meeting in May 1998. In those circumstances, the mere fact that those three companies did not meet trilaterally after that trilateral meeting clearly cannot lead to the conclusion that the cartel had ended by that time.

174 In that regard, the applicant's argument that it is apparent from recital 184 to the Decision that the Commission based its reasoning on the mere presumption that bilateral contacts had been maintained after the meeting in May 1998 is manifestly without substance. It is apparent from recitals 182 to 184 that the Commission has demonstrated, on the basis of the concurring statements of Rhône-Poulenc and Nippon Soda, the existence of such contacts, as has been detailed above. The only presumption which the Commission makes in recital 184 concerns the identification of the tripartite meeting at which the participants decided to end trilateral contacts, which has no bearing on the correctness of its findings.

175 In any event, even if it cannot be demonstrated that Nippon Soda participated in the cartel after the autumn of 1997, the fact remains that it is clear from Rhône-Poulenc's supplemental submission of 5 December 2000, on the probative force of which the applicant has been unable to cast doubt, that Rhône-Poulenc and the applicant attended two meetings, one in late summer or early autumn 1998 in Heidelberg, the other on 4 February 1999 in Nancy, at which target prices and price increases were agreed upon. The hypothetical withdrawal of Nippon Soda from the earlier cartel cannot affect either the manifestly anti-competitive nature of those meetings or the fact that they constitute the continuation of the earlier cartel, in accordance with the case-law cited in paragraph 155 above.

176 It follows from the foregoing that the applicant's complaint regarding the date of termination of the infringement taken into account by the Commission must be rejected.

C — *Suspension of the cartel*

177 The applicant claims, in the alternative, should the infringement be held to be single and continuous, that the Commission should have taken into account the fact that the infringement was, at the very least, suspended from the end of 1988 until March 1992 and from autumn 1997 onwards, following the example of the reasoning in the 'Pre-Insulated Pipe Cartel' case (Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1)).

178 In that regard, it must be observed at the outset that this claim is irrelevant in so far as it concerns the period after the autumn of 1997. Suspension of a cartel can be acknowledged only where it is established that a given infringement, although single and continuous, was disrupted for a brief period in such a way as to preclude inclusion of that period in the calculation of the total duration of the infringement, assuming, of course, that the cartel was then resumed fully. That method thus serves to reconcile the concept of a single continuous infringement with the requirements arising from the need for precise determination of the duration of the infringement and, therefore, in so far as the calculation of the amount of the fine depends inter alia on the latter criterion, from the principle of proportionality of the fine.

179 The applicant claims that the cartel was suspended from the autumn of 1997 until 4 February 1999, that is, the date taken into account by the Commission as the end of the infringement. In essence, this argument thus effectively disputes the date of termination of the infringement and therefore reiterates the applicant's claims in that regard. The applicant's claim relating to the suspension of the cartel after autumn 1997 must therefore be rejected on the grounds set out in paragraphs 163 to 176 above, from which it is apparent that, following the last tripartite meeting in May 1998, bilateral contacts between Nippon Soda, Rhône-Poulenc and the applicant continued until 4 February 1999.

180 With regard to the period from the end of 1988 until March 1992, it must be recalled that the Commission's decision-making practice does not in itself serve as a legal framework for fines in competition matters (see, inter alia, *Scandinavian Airlines System* v *Commission*, cited in paragraph 80 above, paragraph 87, and the case-law cited). In addition, it must be observed that, in *Lögstör Rör* v *Commission*, cited in paragraph 58 above, paragraphs 59 to 65, the Court merely pointed out that the Commission had itself acknowledged and taken into account, in its decision relating to the Pre-Insulated Pipe Cartel case, the circumstance that the cartel had been suspended from October 1993 to March 1994 and that, therefore, contrary to the applicant's claims, the Commission had not alleged that it participated in an anti-competitive activity during that period.

181 It follows that the circumstance that the Commission took into account, in the Pre-Insulated Pipe Cartel case, the fact that, in its view, the cartel had been suspended cannot, on its own, suffice to demonstrate the unlawfulness of the Decision in so far as the Commission did not proceed likewise in the latter.

182 Moreover, the present case must be distinguished from the Pre-Insulated Pipe Cartel case relied on by the applicant. In that case, the Commission did in fact take the view, in recital 152 to its decision, that, for a six-month period between October 1993 and March 1994, the cartel, considered as a single continuous infringement, had been in abeyance. It took account in that regard of the fact, on the one hand, that the producers had stated that a 'price war' had broken out and that price levels on the major markets had indeed fallen by 20% and, on the other hand, that, although the producers continued to meet bilaterally and trilaterally during that period, no details, apart from the demand for compensation made by Tarco and refused by Lögstör, were available as to the purpose of those meetings (recital 52).

183 In this case, although it is true that it is apparent from Nippon Soda's note of 5 May 1990 that Degussa temporarily reduced methionine prices, the similarity to the Pre-

Insulated Pipe Cartel case cannot extend beyond that one finding of fact. Contrary to the situation which prevailed in the latter case, in the present case the Commission had at its disposal conclusive evidence that, although the participants in the cartel failed to reach agreement on a price increase by, at the latest, November 1990, the purpose of the meetings held between the end of 1988 and November 1990, in which the applicant participated, was to agree on a joint reaction to the entry into the market of Monsanto and to exchange information on the activities of the latter, on sales volumes and on methionine prices, as has been established previously.

184 In addition, contrary to what was held in the Pre-Insulated Pipe Cartel case, it is apparent from Rhône-Poulenc's statement of 26 May 1999 that the fall in methionine prices from the summer of 1989 was due, not to the fact that the participants in the cartel had re-established free competition between them, but to the arrival on the market of Monsanto and MHA and to the general fall in demand. It is also clear from Nippon Soda's note of 5 December 1990 that it was specifically in order to win back customers from Monsanto that Degussa first lowered its prices and then proposed to the participants in the cartel a price increase for July 1990, since Monsanto itself had announced an increase in its prices in July 1990.

185 Finally, as has been observed previously, the Commission has correctly established that an agreement to increase prices was concluded in late summer and/or November 1990, which was followed by quarterly meetings during which market information was exchanged and target prices were fixed.

186 In the light of the evidence relied on by the Commission, the applicant's complaint, claiming that the infringement was, at the very least, suspended between 1988 and 1992, must therefore be rejected as unfounded. However, that conclusion does not

prejudge the issue of the specific effects of the infringement on the market during that period.

187 It follows from all the foregoing considerations that the second plea must be rejected in its entirety.

III — *The third plea, alleging errors of assessment, error in law and as to the facts, breach of the principles of proportionality, equal treatment and non-retroactivity of penalties and of the duty to state reasons in the determination of the amount of the fine*

188 The third plea divides essentially into four parts relating, respectively, to the gravity of the infringement, the increase in the fine in order to ensure a sufficient deterrent effect, the applicant's cooperation and the breach of the principle of non-retroactivity of penalties.

A — *Gravity of the infringement*

189 The applicant puts forward, essentially, three complaints alleging, firstly, failure to state reasons in the determination of the gravity of the infringement, secondly, error of assessment as to the size of the relevant geographic market and, thirdly, error of assessment as to the impact of the infringement on the market.

1. The statement of reasons for the gravity of the infringement

(a) Arguments of the parties

190 The applicant submits, in essence, that insufficient reasons are stated for the Commission's assessment of the nature of the infringement as very serious, in particular as regards the fact that the basic amount of the fine, namely EUR 35 million, is higher than the minimum provided for by the Guidelines for infringements classified as very serious, that is, EUR 20 million. It maintains in particular that, in accordance with the principle that penalties must have a proper legal basis, the Commission should have weighted the various considerations taken into account for the purposes of classifying the infringement as very serious and setting the aforementioned basic amount.

191 The Commission contends that this complaint is unfounded.

(b) Findings of the Court

192 It is settled case-law that the statement of reasons for an individual decision must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording of the measure in question but also to the context in which that measure was adopted (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

193 As regards in particular the calculation of the amount of fines imposed by the Commission for infringements of Community competition law, it must be recalled that, according to the case-law, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73). Furthermore, the scope of the obligation to state reasons must be determined in the light of the fact that the gravity of infringements must be determined by reference to numerous factors; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of the Court of Justice in *SPO and Others* v *Commission*, cited in paragraph 45 above, paragraph 54; *LR AF* 1998 v *Commission*, cited in paragraph 46 above, paragraph 378; and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1532).

194 It must also be remembered that the obligation to state reasons does not require the Commission to set out in its decision the figures showing the method of calculating the fines, but only to indicate the factors which enabled it to determine the gravity of the infringement and its duration (*Sarrió* v *Commission*, cited in paragraph 193 above, paragraphs 73 and 76, and *Atlantic Container Line and Others* v *Commission*, cited in paragraph 193 above, paragraph 1558).

195 In the present case, it must be observed that the Commission first explained, in recitals 271 to 275, that, since the infringement consisted of market-sharing and price-fixing practices — price being the essential component of competition — it had by its very nature to be classified as very serious. The Commission then set out, in recitals 276 to 291, the reasons which led it to consider that the infringement had a material impact on the market. Next, the Commission pointed out, in recital 292, that the relevant geographic market consisted of the Community in its entirety and, following its creation, the whole of the EEA. Finally, it explained, in recitals 294 to 300, that it was necessary to take account of the effective capacity of the undertakings to cause significant damage to competition and therefore, having regard to the market shares of the participants in the cartel, to divide them into two categories, the first including Degussa and Rhône-Poulenc, and the second Nippon

Soda. The Commission finally concluded from this, in recital 302, that the basic amount of the fines determined for gravity had to be set at EUR 35 million in the case of Degussa and Rhône-Poulenc, and at EUR 8 million in the case of Nippon Soda.

196 It must therefore be concluded, in the light of the factual description of the operation of the cartel given in recitals 79 to 185, that the Commission set out to the requisite legal standard the reasons which, in its view, justified the classification of the infringement as 'very serious'. Under the case-law cited in paragraphs 193 and 194 above, the requirement to state reasons does not require the Commission to specify the arithmetic weighting of the criteria taken into account in the determination of the gravity of the infringement. The applicant's argument that, by not specifying the weighting of the criteria used in that regard, namely, the nature of the infringement, the size of the relevant geographic market and the actual impact of the infringement on the market, the Commission infringed the principle of lawfulness, of which the obligation to state reasons is one expression, must therefore be rejected.

197 Finally, with regard to the applicant's argument that the Decision does not set out the reasons justifying the setting of an amount higher than the minimum amount provided for by the Guidelines for very serious infringements, it must be pointed out that, under the third indent of Section 1.A of those Guidelines, the lawfulness of which is not challenged by the applicant, the 'likely' basic amounts of fines for an infringement classified as very serious are 'above [EUR] 20 million'. The Commission thus intended to reserve the right, in accordance with the wide discretion which it enjoys in regard to fines, to set basic fines higher than that amount in the light of the circumstances of each case. In those circumstances, there is no reason to require it to set out the specific reasons which led it to decide to set a basic amount higher than EUR 20 million, since its decision shows to the requisite legal standard the reasons which in themselves justify the setting of the basic amount at the level determined by that decision. As is clear from paragraph 196 above, it must be held that the Commission set out to the requisite legal standard the factors which, in its view, justified setting the basic amount of the fine determined according to the gravity of the infringement at EUR 35 million.

198 The applicant's complaint alleging failure to state reasons for the classification of the infringement as very serious and for setting the basic amount of the fine determined according to gravity of the infringement at EUR 35 million must therefore be rejected as unfounded.

2. Size of the relevant geographic market

(a) Arguments of the parties

199 The applicant maintains that, contrary to what the Commission claims in its defence, it is implicitly evident from certain passages of the Decision that the cartel was regarded as global. In particular, the Commission stated that price increases had been discussed 'for each region and country' (recital 128) and made reference to regions of the world other than the EEA throughout the Decision (recitals 138, 139, 155 and 158). However, on the one hand, that finding is not at all supported by evidence. On the other hand, by taking into account the fact that the infringement was global in scope, the Commission infringed the *ne bis in idem* principle and reached a disproportionate assessment of the impact of the cartel.

200 The Commission contends that this argument is unfounded.

(b) Findings of the Court

201 Although certain passages of the Decision do briefly mention discussions relating to countries other than European (see, inter alia, recitals 87, 138 and 139), it is

nevertheless clear from recital 2 to the Decision that the Commission limited its finding of the infringement to the whole of the EEA. That is confirmed in recital 292, during the examination of the size of the relevant geographic market.

202 It is therefore incorrect to state, as the applicant does, that the Commission considered that the cartel was global in scope. In any event, even if that were the case, it must be observed that, in the determination of the amount of the fine explained in recitals 268 to 312, the Commission did not in any way take into consideration the possible global scope of the cartel, since the few factors, cited above, which would give substance to such scope appear only incidentally, in the part describing the operation of the cartel agreement (recitals 79 to 185). On the contrary, it is apparent from, inter alia, recitals 272, 275 and 293, and from the very title of the section concerning the 'actual impact of the infringement on the methionine market in the EEA', that only the characteristics of the infringement relating to the common market and, following its creation, the EEA were taken into account in the determination of the amount of the fine.

203 It must therefore be concluded that the Commission did not take into account, contrary to what the applicant maintains, the aggravating circumstance arising from the alleged global dimension of the cartel. The present complaint must therefore be rejected.

3. Assessment of the impact of the infringement on the market

(a) Arguments of the parties

204 The applicant claims that the Commission has not demonstrated to the requisite legal standard the actual impact which the infringement had on the market.

205 It points out that the cartel agreement provided for no mechanism for increasing prices and that only target prices were defined. Similarly, there were no mechanisms for allocating quotas, volumes or customers, nor any monitoring and compensation mechanisms for enforcing target prices.

206 The applicant also points out that the Commission, while noting the fact that Novus's non-participation in the cartel prevented achievement of the target prices (recital 276 et seq.) and that, despite the infringement, prices had fallen from 1992 to 1997 (recital 287 et seq.), wrongly considered that those circumstances did not demonstrate that the implementation of the agreements had not influenced the structure and fluctuations of prices on the methionine market, and thus incorrectly assessed the real impact of the infringement on the market.

207 By merely noting the impact of the infringement on the market, the Commission infringed the Guidelines, which provide, in the third indent of Section 1.A, with regard to the categories of infringements based on their gravity, that, '[w]ithin each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed'. Likewise, although it acknowledges that the infringement constituted a complex factual situation which adapted, over the years, to real market conditions, the Commission did not make any distinction as regards the actual effects of that complex situation.

208 By failing to adduce proof of the actual impact of the cartel, the Commission failed to comply with the requirements concerning the burden of proof. The applicant points out that, in recital 287 to the Decision, the Commission states that the participant undertakings had not proved that the implementation of the agreement had no influence on the setting and fluctuation of prices on the methionine market. However, it is in fact incumbent on the Commission to prove both the scale of the impact and the actual existence of the infringement (*Hüls* v *Commission*, cited in paragraph 115 above, paragraph 154, and *Baustahlgewebe* v *Commission*, cited in

paragraph 101 above, paragraph 58). Since, in the applicant's view, the Commission has not proved the scale of the actual impact of the infringement on the market, it must be held that no such impact existed, and therefore that the amount of the fine should be lower. In those circumstances, the applicant submits that only the minimum amount provided for in the case of very serious infringements was acceptable, that is, EUR 20 million.

209 The Commission submits that that argument is unfounded.

210 It points out, first of all, that it certainly did not state, in the part of the Decision relating to the actual impact of the infringement, that there were mechanisms either for increasing prices or for allocating quotas, volumes or customers, or for monitoring and compensation in order to enforce target prices, so that the applicant's arguments in that regard are devoid of purpose.

211 Secondly, the Commission points out that, in addition to its actual effect on the market, it took into account the nature of the infringement and the size of the relevant geographic market, which are not contested by the applicant.

212 In addition, the Commission points out that the anti-competitive agreements were implemented and that the target prices were usually announced to customers through the specialised press. Such announcements are bound to have an impact on the market (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 177). The participants' efforts to reverse the fall in prices following Monsanto's arrival on the market and the fall in demand were successful, moreover.

213 The Commission therefore concludes that there is no doubt that the cartel had a real impact on the market, which can be assessed, although it is impossible to determine to what extent the actual prices diverged from the prices which would have been charged had the collusion not occurred. The Guidelines provide that the Commission must take into consideration the actual impact of the infringement on the market and not the extent of that impact.

(b) Findings of the Court

214 It must first of all be noted that, although the Commission did not expressly refer to the Guidelines in the Decision, it nevertheless determined the amount of the fine imposed on the applicant by applying the method of calculation which it laid down for itself in those Guidelines.

215 As the Guidelines (first paragraph of Section 1.A) state, '[i]n assessing the gravity of the infringement, account must be taken of ... its actual impact on the market, where this can be measured'.

216 Likewise, under the case-law, the Commission is required to undertake such an examination where it appears that that impact can be measured (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraph 143).

217 It was in that context that the Commission relied on the fact that the infringement had had, in its view, a real impact on the methionine market in the EEA (recitals 276 to 291).

218 As a preliminary point, in this case, it is sufficient, for the purpose of reviewing the Commission's assessment of the effects of the infringement, to examine its assessment of the effects of the cartel on prices.

219 On the one hand, it must be observed that, although the infringement was described by the Commission as a cartel aimed at maintaining or increasing prices, in which information on sales volumes and market shares was exchanged, the impact of the infringement on the market was assessed solely in the light of its effects on prices. On the other hand, examination of the cartel's effects on prices also makes it possible, in any event, to determine whether the objective pursued by the exchanges of information on sales volumes and market shares was achieved, given that those exchanges were specifically aimed at ensuring effective implementation of the price cartel (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraph 148, and the case-law cited).

220 Moreover, in response to the applicant's argument that the absence, not contested by the Commission in the context of the present complaint, of mechanisms for increasing prices, allocating volumes or customers, monitoring and compensation demonstrates that the infringement did not have any actual effects on the market, it must be pointed out that, although the absence of such mechanisms could provide an explanation for the non-existence of actual effects of the infringement on prices, where no such effects were found to exist, it does not give grounds for presuming that the infringement did not have such effects. Consequently, the evidence relied on by the Commission to demonstrate the existence of such an impact must be examined.

221 In that regard, the Commission considered that, during the entire period of the cartel, the cartel members managed to maintain prices at a level higher than they would have been without the illicit arrangements (recital 289).

222 It must be recalled that, when determining the gravity of the infringement, account must be taken of, inter alia, the legislative background and economic context of the conduct to which exception is taken (*Suiker Unie and Others* v *Commission*, cited in paragraph 101 above, paragraph 612, and *Ferriere Nord* v *Commission*, cited in paragraph 45 above, paragraph 38). It is clear from the case-law that, in assessing the actual impact of an infringement on the market, it is incumbent on the Commission to refer to the competition which would normally have existed had it not been for the infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraphs 619 and 620; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 235; and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645).

223 It follows that, in the case of price-fixing arrangements, the finding by the Commission that the agreements did in fact enable the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel allows the Commission to take into consideration, in determining the amount of the fine, the significance of the harmful effects of the infringement on the market and therefore to set the amount of the fine, in the light of the gravity of the infringement, at a higher level than it would have been set had it not been for such a finding.

224 In that assessment, the Commission must take into account all objective conditions on the relevant market, having regard to the prevailing economic and, where necessary, legislative context. Account must be taken of the existence, where appropriate, of 'objective economic factors' showing that, in a context of 'free play of competition', the level of prices would not have evolved in an identical manner to the level of prices applied (*Cascades* v *Commission*, cited in paragraph 212 above, paragraphs 183 and 184, and *Mayr-Melnhof* v *Commission*, cited in paragraph 222 above, paragraphs 234 and 235).

225 In this case, the Commission relied on three main considerations in support of its conclusions regarding the actual impact of the cartel on the level of prices.

226 Firstly, it took the view, on the one hand, that the infringement had been committed by undertakings which, at the material time, 'held the lion's share' and, on the other hand, that, in view of the fact that the arrangements brought to light were specifically aimed at raising prices to a level higher than they would otherwise have been and at restricting the quantities sold and that they had been implemented continuously over a period of more than 10 years, they were bound to have had a material impact on the market (recitals 276, 278, 281 and 287).

227 In that regard, the Commission pointed out that the cartel agreements were implemented and that the parties exchanged their sales figures throughout the duration of the cartel in order to agree new target prices. The Commission adds that the new target prices were effectively announced to customers through the specialised press (recital 278).

228 Secondly, the Commission noted that, during the earlier years of the cartel, the parties focused on increasing methionine prices. With the arrival on the market of Monsanto in 1989 and the general fall in demand, the downward trend of prices was nevertheless reversed through the combined efforts of the cartel members. Thereafter, their efforts were focused on maintaining the existing prices (recital 279).

229 This is confirmed by a note submitted by Nippon Soda concerning a meeting held on 17 May 1993, which shows that prices in the methionine market were rising. Degussa managed to sell methionine at a price of DEM 6.80/kg to one of its larger customers, Cebeco. Prior to the meeting of 7 November 1990, prices were still USD 2.50/kg (DEM 4.03/kg). Moreover, at their November 1990 meeting, the cartel members agreed to increase prices from USD 2.50/kg to USD 2.80/kg (DEM 4.51/kg). Nippon Soda mentions higher prices: the first increase, relating to January 1991, was supposed to push the price up to USD 3.30-3.50/kg (equivalent to an average value of DEM 5.10/kg, according to Nippon Soda's own information; DEM

5.31-5.64/kg on the basis of the figures of Eurostat (the statistical office of the European Communities)) and the second up to USD 3.60-3.70/kg (DEM 5.80-5.92/kg) (recital 280).

230 Thirdly and finally, the Commission pointed out, in recital 290, that it is inconceivable, given the risks involved, that the parties would repeatedly have agreed to meet in locations across the world to set target prices over the period of the infringement if they had perceived the cartel as having little or no impact on the methionine market.

231 It must first be observed, as is noted in essence by the Commission in recital 277 to the Decision, that proving the actual effects of an infringement on the market may, in certain cases, be particularly difficult given that such proof involves comparing the situation arising from that infringement with the situation which would have been observed had it not arisen, a comparison which is, by its very nature, hypothetical. In that regard, account must be taken, in the assessment of the considerations on which the Commission relied in order to demonstrate the impact on the market, on the one hand, of the fact that the infringement goes back in part to an earlier period (the starting point of the infringement, not disputed by the applicant, was determined by the Commission as the beginning of 1986) and, on the other hand, as regards the period after 1993, of the fact that the trend of prices was downward (on account, inter alia, of the competition from Novus), which implies that it was necessary for the Commission to demonstrate, not that prices were increasing because of the collusion, but that they would have fallen further, in relation to their actual level, had the collusion not occurred.

232 As regards the first set of considerations noted by the Commission, it must be stated that both the fact that the parties to the cartel held a majority share of the market and the fact that the circumstance that the arrangements brought to light were specifically intended to increase prices to a level higher than that which they would otherwise have reached and to restrict the quantities sold, which relates to the purpose of the agreement and its effects, are only indications tending to show that the infringement was capable of producing significant anti-competitive effects and

not that that was actually the case. Moreover, it must be pointed out that, according to the Commission's own findings, the cartel members' market share had fallen progressively, from the time of Monsanto's entry into the market, reaching 60% towards the end of the infringement, whereas Novus (formerly Monsanto) had become, during that period, the world's leading methionine producer with more than a 30% share of the market (recital 44), a fact which had in fact been giving rise to concern on the part of those members since the end of 1993 (recital 150).

233 However, it must also be pointed out that the Commission demonstrated to the requisite legal standard that the cartel agreements had been implemented and, inter alia, according to the wording of recital 278, that prices were adjusted according to market conditions (recitals 88, 128, 130, 139, 150 and 154) and, as regards in particular the periods from 1986 to 1988 and from 1992 to 1995, that the new target prices were actually announced to customers, usually through the specialised press (recitals 88, 136, 157 and 167). However, as the Commission points out, such price announcements have, by their very nature, an impact on the market and on the conduct of the various operators, both on the supply side and on the demand side, given that such announcements influence the pricing process in that the price announced constitutes a point of reference for individual negotiation of transaction prices with customers (see, to that effect, Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 342), who inevitably saw their scope for price negotiation restricted (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 132 above, paragraph 745).

234 By contrast, it must be pointed out that the implementation of collusive price agreements and the announcement of target prices between autumn 1988 and summer 1990 have not been demonstrated, even though the Commission acknowledges that Monsanto's entry into the market created confusion among the participants (recital 100).

235 With regard, next, to the Commission's analysis of the price increase, contained in recital 280, it must be held that it shows conclusively that the price targets set by the cartel members increased between 1990 and 1993. It must be borne in mind that, according to the note of 5 May 1990, methionine prices fell substantially in 1989, reaching USD 2.00/kg. However, as the Commission points out, it is apparent from Rhône-Poulenc's statements that, in late summer 1990, the price of methionine was USD 2.50/kg (DEM 4.03/kg) and that it was to be increased to USD 2.80/kg (DEM 4.51/kg). In addition, in the note of the meeting of 7 November 1990, Nippon Soda states that, by that time, prices were of the order of USD 3.40 to 3.50/kg in the German mark area. Finally, in the note of 17 May 1993, Nippon Soda states that the trend of prices was upward and that Degussa had sold methionine, during the second quarter of 1993, to one of its customers at a price of DEM 6.80/kg. In addition, it is apparent from recitals 132 to 152, the content of which is not contested by the applicant, that, from 1992 to 1993, the target prices were increased from DEM 6.05 (recital 132) to DEM 6.20/kg (recital 137), the latter figure being intended to remain in force, albeit with certain exceptions, until the third quarter of 1993 (recital 144). Although those targets were still not reached, recital 136 shows that the average price of methionine in Europe was DEM 5.60/kg (USD 3.35/kg) during the fourth quarter of 1992 and DEM 5.20/kg (USD 3.23/kg) during the first quarter of 1993. It follows that, from summer 1990 onwards, even though the trend of prices was previously downward, both the target prices and the transaction prices increased and, to a certain extent, were stabilised, from which the Commission was correctly able to infer that the combined efforts of the participants in the cartel had had an actual impact on the market during that period.

236 Nevertheless, it must also be pointed out that the Commission has not similarly demonstrated the cartel's influence prior to summer 1990, which it seems expressly to acknowledge as regards, in particular, the period from autumn 1988 to summer 1990, or on the downward trend of prices from 1993 onwards.

237 As regards the period from autumn 1988 to summer 1990, it has been pointed out previously that, following the withdrawal from the cartel of Sumitomo, the arrival on

the market of Monsanto and the general fall in demand, the cartel wavered somewhat, which manifested itself in particular in a significant fall in the prices charged by Degussa, which was seeking primarily to regain market shares from Monsanto, that fall having had an impact on the market as a whole.

238 Likewise, as regards the period from 1993 to the end of the cartel, it is apparent from recitals 152 to 179 that the target prices gradually fell and that the participants found that those targets were not being reached (recitals 152, 153 and 160). It must be observed, moreover, that the Commission itself acknowledged that the target prices had not been reached and that the arguments put forward by Degussa, namely, Novus's non-participation in the cartel and the absence of mechanisms for increasing prices, allocating volumes or customers and monitoring, served to explain that circumstance (recitals 284 to 287). It also acknowledged that the fact that methionine prices had fallen over time illustrated the difficulties experienced by the parties in increasing prices in a difficult market situation (recital 288).

239 Despite those findings, the Commission nevertheless concluded, in recital 289, that, throughout the period of the cartel, the cartel members had managed to maintain prices at a level higher than they would have been without the illicit arrangements.

240 Finally, as regards the last consideration highlighted by the Commission, and reiterated in the present action, that the participants in the cartel would not have met regularly throughout the period of the cartel if the latter had had no effect on the market, it must be held that it is based on pure conjecture rather than objective economic factors. Since it has no probative force, it must be rejected (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraph 159).

241 It follows from all the foregoing that the Commission has only partially demonstrated the actual impact of the cartel on the methionine market from 1986 to 1999. In particular, the Commission should have taken into account the fact that, from autumn 1988 to summer 1990, the disagreement between the members of the cartel, combined with the competition from the new market entrant and the general fall in demand, led to a significant fall in prices, calling in question the proof of the actual effects of the collusion during that period and reinforcing the hypothesis that there were no such effects. That is true a fortiori since it has not been possible to demonstrate the conclusion of any agreement on prices during that period, as was noted during the examination of the duration of the infringement.

242 It is not apparent from the Decision that the Commission specifically took into account that consideration. On the contrary, the Commission asserted in recitals 97 and 255 that the activities of the cartel had continued with the same intensity. Likewise, it is apparent from recital 291 that the Commission rejected the applicant's objections in that regard and took the view that the latter's conduct during that period did not imply that the participants did not implement the collusive agreement. However, as has been stated previously, it must be held that the Commission has not shown that any new agreement on prices was concluded between autumn 1988 and summer 1990, or that the earlier agreement was implemented after the withdrawal of Sumitomo from the cartel at the end of 1988.

243 In addition, it must be pointed out that methionine prices gradually fell from 1993 until the end of the infringement and that, during that period, the target prices were not reached, inter alia because of the competition from Novus, which held a share of more than 30% of the global methionine market at the end of the infringement (25 to 26% at EEA level, as stated in recital 286) and, in the opinion of those very members, expressed from the end of 1993, was in the process of gaining the highest share of the methionine market (recital 150). Moreover, it is true that the Commission highlighted the announcement, in the specialised press, of target prices set by the participants in the cartel until the beginning of 1995 (recitals 136, 155, 157 and 167), which must be considered to have necessarily had certain effects on the price-fixing process. On the other hand, it is important to point out that the Decision does not mention any announcement of prices from that time onwards. Consequently, it must be held that the Commission has not fully demonstrated,

contrary to its assertions in recital 289, that after the period from 1992 to 1993 prices had been maintained at a higher level than would have prevailed had there been no illicit arrangements, such demonstration being particularly lacking with regard to the period from the beginning of 1995 to the end of the infringement.

244 It is therefore necessary for the Court to analyse the implications of that conclusion within the scope of its unlimited jurisdiction in regard to fines.

4. Conclusion on the determination of the amount of the fine according to the gravity of the infringement

245 As has been stated above, it must be held that the Commission has only partially demonstrated the actual impact of the infringement on the market, in particular as regards the period from autumn 1988 to summer 1990 and from 1995 until the end of the infringement.

246 However, it must also be pointed out that the Commission nevertheless held, in recital 289, that, throughout the period of the cartel, in particular after the period from 1992 to 1993, the cartel members had managed to maintain prices at a higher level than would have prevailed had there been no illicit arrangements. Likewise, in its conclusion concerning the gravity of the infringement (recital 293), the Commission took into account the fact that, in its view, the conduct of which the participants in the cartel were accused had had an actual impact on the market.

247 It follows that the Commission determined the amount of the fine according to the gravity of the infringement having regard to the circumstance that that infringement had had, in its view, an actual impact on the market, even though such an impact could not be fully demonstrated throughout the period of the cartel.

248 In those circumstances, the Court, by virtue of its unlimited jurisdiction in regard to fines, considers that the amount of the fine determined according to the gravity of the infringement, which was set by the Commission in recital 302 at EUR 35 million, must be reduced.

249 However, account must be taken, in that regard, of the fact that, as the Commission points out, it is apparent from recital 273 to the Decision that the infringement was classified as very serious in the light of 'its very nature', since the Commission noted that the infringement had consisted of market sharing and price fixing, 'which, by their very nature, constitute the most serious type of infringement of ... Article 81(1) EC and Article 53(1) of the EEA Agreement' (recital 271). Moreover, the Commission added, in recital 275, that '[i]t is clear that illicit agreements aimed at fixing prices and sharing the market jeopardise, by their very nature, the proper functioning of the single market'.

250 The Court has already held, in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraphs 258 and 259, that the seriousness of the infringement may be established by reference to the nature and the object of the abusive conduct and that, according to settled case-law, factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects (*Thyssen Stahl* v *Commission*, cited in paragraph 222 above, paragraph 636, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 199).

251 The Court of Justice has confirmed that approach by holding that the effect of an anti-competitive practice is not a conclusive criterion for assessing the proper amount of a fine. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as price fixing and market sharing (Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 118).

252 In addition, it must be remembered that horizontal price agreements have always been regarded as among the most serious infringements under Community competition law (*Tate & Lyle and Others* v *Commission*, cited in paragraph 58 above, paragraph 103, and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 262).

253 Finally, it is also important to point out that the Commission did not attach primary significance to the criterion of the actual impact of the infringement on the market in setting the basic amount of the fine. The Commission also based its determination on other considerations, namely, the finding that the infringement was to be classified as very serious by its very nature (recitals 271 to 275) and that the relevant geographic market consisted of the Community as a whole and, following its creation, the EEA as a whole (recital 292).

254 Consequently, in the light of all the foregoing considerations, the Court considers that the Commission was fully entitled to classify the infringement as very serious. However, in view of the fact that the actual effects of the infringement have been only partly demonstrated, the Court considers that the amount of the fine determined according to the gravity of the infringement must be reduced from EUR 35 million to EUR 30 million.

B — *The increase in the fine in order to ensure a sufficient deterrent effect*

255 The applicant alleges in this context, firstly, an error in law and an error as to the facts in the determination of its turnover, secondly, breach of the principle that penalties must have a basis in law, of the obligation to state reasons and of the principles of proportionality and equal treatment in the determination of the rate of increase and, thirdly, an error of assessment as to the sufficient deterrent effect in the light of its conduct subsequent to the termination of the infringement.

1. Error in law and error as to the facts concerning the applicant's turnover

(a) Arguments of the parties

256 Firstly, the applicant claims that the amount of its turnover taken into account by the Commission for 2000 is incorrect. That amount is not EUR 16 900 million but EUR 10 715 million, as the Commission was informed in the applicant's letter of 5 June 2002 in reply to its request of 28 May 2002. In the light of the direct connection between the objectives pursued by the increase in the fine and the turnover of the undertaking, the error made by the Commission constitutes a failure by it to have regard to material circumstances which, had they been taken into consideration, would have led it to take a different decision. Consequently, the Commission made an error of assessment such as to justify annulment of the Decision.

257 Secondly, the applicant submits that the Commission wrongly took into account, in the calculation of the amount of the fine, the situation of the new undertaking Degussa AG (Düsseldorf). The latter was formed by the merger between Degussa-Hüls and SKW in 2000 (see paragraph 1 above), that is, according to the applicant, after the end of the infringement. In addition, Degussa-Hüls is itself the result of the merger between Degussa AG (Frankfurt am Main) and Hüls AG (Marl) in 1998 (see the same paragraph), that is, also subsequent to the alleged anti-competitive conduct, according to the applicant. The infringement was therefore committed by Degussa AG (Frankfurt am Main), an undertaking to which the Commission should have referred when calculating the amount of the fine. However, that undertaking's turnover for the financial year 1997/98 was DEM 15 905 million.

258 The applicant admits that the new economic entity resulting from the merger is, in principle, responsible for the infringements committed earlier by the entities which merged. However, that responsibility is confined to the original infringement and the harm caused by it. By taking into account the turnover of the entity formed by the

merger, the Commission therefore infringed the 'guilt principle' (*nulla poena sine culpa*), recognised by the criminal law systems of the Member States and by Article 6(2) of the ECHR and Article 49(3) of the Charter, under which the penalty imposed must be proportionate to the guilt of the undertaking to which it applies. The case-law of the Court of Justice has also recognised that principle, which results in part from the principle of proportionality, as the factor determining the severity of the penalty (Case 179/82 *Lucchini* v *Commission* [1983] ECR 3083, paragraph 27; Case 2/83 *Alfer* v *Commission* [1984] ECR 799, paragraphs 17 and 18; and Case 83/83 *Estel* v *Commission* [1984] ECR 2195, paragraph 39 et seq.).

259 The applicant infers from the fact that the purpose of the fine is as much to punish illegal activities as to prevent their recurrence (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 172 to 176) that the infringement constitutes the condition for both the existence and the severity of the penalty.

260 Consequently, by considering the situation of the undertaking after the time of commission of the infringement, the Commission based the calculation of the amount of the fine on the objective of deterrence and prevention alone, thus failing to take into account the relationship between the penalty and the gravity of the wrong committed.

261 As regards the first of those complaints, the Commission acknowledges that the applicant's global turnover in 2000 was EUR 10 715 million according to the data provided in the letter of 5 June 2002. However, it claims that that figure is manifestly incorrect.

262 In that regard, firstly, the Commission points out that the applicant had shown in its report and accounts for 2000 a turnover of EUR 16 900 million. That figure was reproduced in the statement of objections then, in the absence of any objection on the applicant's part in its reply to that statement, in the Decision.

263 Secondly, the Commission points out that the annual report and accounts and the management report for 2000 mention a pro forma turnover of EUR 20 300 million and a turnover excluding sale and purchase of precious metals of EUR 16 900 million. The summarised profit-and-loss account of the Degussa Group, including the results of Degussa-Hüls between 1 January and 31 December 2000 and SKW from 1 July to 31 December 2000, showed income of EUR 18 198 million at 31 December 2000. The Commission infers from this that the figure of EUR 10 715 million put forward by the applicant in its letter of 5 June 2002, and presented as Degussa-Hüls's turnover including SKW's turnover in the six months following the merger between those two undertakings, is incorrect.

264 In addition, the applicant stated in its management report that the pro forma estimate covering the results of Degussa-Hüls and SKW for a 12-month period was to be regarded as 'more significant from an economic point of view' than the assessment in the prescribed form recording SKW's results only for a six-month period. The undertaking's internal management and strategic direction were therefore established on the basis of those data. In those circumstances, the Commission takes the view that the applicant cannot complain that it took into account figures which the applicant itself regarded as economically more significant and highlighted in its annual report and accounts intended for the public.

265 In any event, the Commission contends that the result of taking into account SKW's turnover excluding the pro forma results (of the order of EUR 2 000 million) for the first quarter of 2000 was barely different.

266 The Commission assumes, finally, that the applicant is seeking to claim that the merger between Degussa-Hüls and SKW was not entered in the register of companies until 9 February 2001 and that therefore only Degussa-Hüls's turnover, which was perhaps EUR 10 715 million, could be taken into account for the 2000 financial year. It points out, firstly, that, in that case, the applicant should not have

stated, in its letter of 5 June 2002, that the amount of EUR 10 715 million included SKW's turnover in the six months following the merger with Degussa-Hüls and, secondly, that, according to the applicant's annual report and accounts, the two companies merged with retroactive effect from 30 June 2000, as is confirmed moreover by the fact that applicant was able to draw up the group accounts as at 31 December 2000 by combining the accounts of Degussa-Hüls and SKW.

267 As regards the second of those complaints, firstly, the Commission contends that it took into account in the calculation of the amount of the fine determined according to the gravity of the infringement, in addition to the applicant's turnover, the applicant's participation in a very serious infringement (recital 293) and the applicant's share of the world market and the EEA market for 1998.

268 Secondly, the Commission points out that the infringement continued until February 1999, that is, after the merger between Degussa and Hüls (recital 306). In that regard, the applicant made reference, during the administrative procedure, to a turnover of EUR 12 354 million for the 1998/99 financial year.

269 However, in the Commission's view, a turnover of EUR 8 100 million, EUR 10 715 million EUR 12 354 million or EUR 16 900 million justifies, in any event, its classification of the applicant as a large undertaking and therefore an increase in the fine for the reasons set out in recital 303.

(b) Findings of the Court

270 The applicant complains in essence that the Commission, on the one hand, made an error as to the facts regarding the amount of its turnover for 2000 and, on the other,

made an error in law by taking into account, for the purpose of determining the increase in the fine, its turnover for 2000 even though the infringement had, according to the Decision, ended in February 1999.

271 The second of those complaints must be examined first.

The taking into account of the applicant's turnover for 2000

272 In determining the amount of fines for infringements of competition law, the Commission must take into account not only the gravity of the infringement and the particular circumstances of the case but also the context in which the infringement was committed and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (see, to that effect, *Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraph 106).

273 In that regard, the Guidelines provide, moreover, that, apart from the nature of the infringement, its impact on the market and the latter's geographic size, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (fourth paragraph of Section 1.A).

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

275 In this case, the Commission, without expressly referring to the Guidelines, noted, in recital 303, that it was necessary 'to ensure that the fine ha[d] a sufficient deterrent effect and [took] account of the fact that large undertakings ha[d] legal and economic knowledge and infrastructures which enable[d] them more easily to recognise that their conduct constitute[d] an infringement and be aware of the consequences stemming from it under competition law'. It therefore took the view, in recitals 304 and 305, that on the basis of the worldwide turnovers of Aventis, Degussa and Nippon Soda, namely, EUR 22 300 million, EUR 16 900 million and EUR 1 600 million respectively for the financial year 2000, the starting point for a fine resulting from the criterion of the relative importance in the market concerned should be increased by 100% to take account of the size and overall resources of Aventis and Degussa respectively.

276 In the Decision, the Commission considered, correctly, as has been held above, that the infringement had ended in February 1999. As observed by the applicant, the Commission based its determination of the upward adjustment of the basic amount on the turnovers of the undertakings in question in the financial year 2000 (recital 304), and thus after the termination of the infringement. Contrary to the applicant's assertions, that circumstance is not such as to vitiate the method of calculation used by the Commission.

277 It is apparent from recital 303 that the Commission had regard to two factors justifying the 100% increase in the basic amount in the case of Aventis and Degussa. Such an increase was necessary, on the one hand, to ensure that the fine had a sufficient deterrent effect and, on the other, to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement.

278 As regards the first of those factors, it must be borne in mind that the objective of deterrence which the Commission is entitled to pursue when setting the amount of a

fine is intended to ensure compliance by undertakings with the competition rules laid down by the Treaty for the conduct of their activities within the Community or the EEA. The Court considers that that objective can be properly achieved only if regard is had to the situation of the undertaking at the time when the fine is imposed.

279 A distinction must be made between, on the one hand, the scale of the infringement on the market and the share of responsibility to be borne for it by each participant in the cartel (a matter covered by the fourth and sixth paragraphs of Section 1.A of the Guidelines) and, on the other, the deterrent effect which the imposition of the fine must have.

280 As regards the scale of the infringement on the market and the share of responsibility to be borne for it by each participant in the cartel, it has been held that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market (see, inter alia, *Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraph 121, and *Mayr-Melnhof* v *Commission*, cited in paragraph 222 above, paragraph 369) and that the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

281 That approach was indeed followed by the Commission in recitals 294 to 302 in determining the amount of the fine according to the gravity of the infringement. The Commission took into consideration, on that occasion, the market share worldwide and in the EEA of each of the undertakings present on the methionine market in 1998, in the last calendar year of the infringement, and deduced from this that Aventis and Degussa represented a first category and Nippon Soda a second, so that differential treatment had to be applied to them. Moreover, the applicant does not contest that conclusion.

282 Consequently, it must be held, at this stage, that the applicant's argument that the Commission considered only the turnover of the new entity Degussa AG (Düsseldorf) formed in 2000 and thus based its reasoning only on the objective of deterrence, without taking into account the harmful anti-competitive effects of its conduct at the time of the infringement, is unfounded.

283 However, the second of those concepts, namely, the need to ensure that the fine has a sufficient deterrent effect, where it is not found to justify raising the general level of fines in the context of the implementation of a competition policy, requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the contrary excessive, in particular in the light of the financial capacity of the undertaking in question, in accordance with the requirements arising from, on the one hand, the need to ensure effectiveness of the fine and, on the other, compliance with the principle of proportionality.

284 The Court has thus already held that one of the undertakings concerned, 'owing to its enormous worldwide turnover by comparison with the turnovers of the other members of the cartel, ... could more readily raise the necessary funds to pay its fine, which, if the fine was to have a sufficiently deterrent effect, justified the application of a multiplier' (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 241).

285 However, inter alia as a result of transactions bringing about transfers or concentrations, an undertaking's overall resources may vary, decreasing or increasing significantly within a relatively short space of time, in particular between the end of the infringement and the adoption of the decision imposing the fine. It follows that those resources must be valued, so as properly to achieve the objective of deterrence, in accordance with the principle of proportionality, at the time when

the fine is imposed. In that regard, for the same reasons, it must be noted that, under Article 15(2) of Regulation No 17, the upper limit of the fine set at 10% of the turnover of the undertaking concerned is to be determined according to the turnover in the business year preceding the decision (*Sarrió* v *Commission*, cited in paragraph 193 above, paragraph 85).

286 It follows that there is no reason to hold that the Commission erred in law by relying on turnovers relating to a business year subsequent to the termination of the infringement. However, it must be observed that, in accordance with what has been stated above, and having regard to the fact that the Decision was adopted on 2 July 2002, the Commission should in principle have taken into account, in order to ensure that the fine had a sufficient deterrent effect, the turnovers of the various addressees of the Decision in the 2001 business year. In reply to a question put by the Court at the hearing, the Commission nevertheless stated, on the one hand, that the turnovers of Sumitomo and Nippon Soda for that year were not available at the time of the adoption of the Decision and, on the other, that the turnovers of the undertakings for 2000 had been subject to an auditing of accounts. However, it must be held that those circumstances, which are not contested by the applicant, show that the Commission did not take into consideration the turnovers of the undertakings concerned for 2001, but the most recent turnovers available to it, namely, the turnovers relating to the 2000 business year.

287 It follows that the Commission cannot be criticised for having taken into consideration, when determining the increase for deterrent effect, the applicant's turnover in 2000.

288 The applicant's argument that the Commission was wrong in taking into account the turnover resulting from the mergers between, respectively, Degussa and Hüls in 1998, and Degussa-Hüls and SKW in 2000, which both took place after the

termination of the infringement, in addition to having only a partial factual basis in so far as it was demonstrated that the infringement had ended in February 1999, is therefore irrelevant in that regard. Indeed, it must be noted that the circumstances of this case illustrate precisely the need to value the aggregate resources of the undertaking concerned on the basis of its latest available turnover.

289 As regards the second factor taken into account by the Commission for the purpose of upwardly adjusting the basic amount of the fine, namely, the legal and economic infrastructures available to the undertakings to enable them to recognise that their conduct constitutes an infringement, it must be pointed out, in contrast with what has been stated previously, that it is intended to punish large undertakings more severely since they are presumed to have sufficient knowledge and structural resources to be aware that their conduct constitutes an infringement and to assess the potential benefits of it.

290 On that assumption, the turnover on the basis of which the Commission determines the size of the undertakings in question, and therefore their capacity to determine the character and consequences of their conduct, must relate to their situation at the time of the infringement. In this case, as regards that aspect, the Commission was therefore not entitled to take into account the applicant's turnover for 2000 since the infringement ended in February 1999.

291 However, that finding cannot, in itself, affect the validity of the Commission's conclusion that the basic amount of the fine imposed on the applicant had to be increased by 100%.

292 On the one hand, as stated in recitals 303 to 305 to the Decision:

'Sufficient deterrence

(303) In order to ensure that the fine has a sufficient deterrent effect and takes account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission will further determine whether any further adjustment of the starting amount is needed for any undertaking.

(304) With respective worldwide turnovers of EUR 22 300 million and EUR 16 900 million in 2000, Aventis and Degussa are much larger players than Nippon Soda (worldwide turnover of EUR 1 600 million (2000)). In this respect, the Commission considers that the appropriate starting point for a fine resulting from the criterion of the relative importance in the market concerned requires further upward adjustment to take account of the size and overall resources of Aventis and Degussa respectively.

(305) On the basis of the above, the Commission considers that the need for deterrence requires that the starting point for their fine determined under recital 302 should be increased by 100% (x2) to EUR 70 million as regards Degussa and Aventis ...'

293 It follows from the foregoing that, although the Commission mentioned the factor relating to legal and economic infrastructures, in reality it justified the increase in the basic amount essentially by the need to ensure that the fine had a sufficient deterrent effect, as is shown by the conclusion in recital 305 and the heading of the section itself.

294 On the other hand, it must be observed that, in any event, the applicant's aggregate turnover for the 1997/98 financial year amounts, according to the data provided by it, to approximately DEM 15 900 million. However, it cannot be maintained that, by the same token, the applicant did not have at its disposal the legal and economic infrastructures which are available to large undertakings, which the applicant does not claim. The taking into account of the applicant's turnover in 2000 (established by the Commission at EUR 16 900 million) cannot therefore have any bearing on the Commission's consideration that the basic amount had to be increased to take account of the fact that the applicant had at its disposal the resources necessary to enable it to recognise that its conduct constituted an infringement and be aware of the consequences stemming from it.

295 It follows that the applicant's plea alleging that the Commission made an error in law by taking into account, in order to justify the increase in the amount of the fine determined according to the gravity of the infringement, its turnover for the 2000 financial year cannot justify annulment of the Decision or reduction of the amount of the fine.

Error as to the facts regarding the amount of the applicant's turnover for 2000

296 The applicant claims that the turnover for 2000 (EUR 16 900 million) taken into account by the Commission is incorrect since it is really EUR 10 715 million, as is

apparent from the letter sent by it to the Commission on 5 June 2002 in response to a request from the latter on 28 May 2002.

297 In its replies to the Court's written questions and at the hearing, the applicant stated that the turnover of EUR 10 715 million was the only one to have been certified by the auditors as in conformity with United States generally accepted accounting principles. It submits that, in the absence of Community provisions laying down rules for calculating the turnover of undertakings, legal certainty requires that only turnovers established and certified in accordance with the rules applicable to the undertaking concerned, that is, in this case, the aforementioned accounting principles, should be taken into consideration.

298 The Commission claims that the amount of EUR 16 900 million which it took into account is taken from the applicant's management report drawn up for 2000. However, at the hearing, the Commission admitted that the turnover to be taken into consideration had to reflect the actual situation of the undertaking and that, consequently, in view of the fact that the merger between the applicant and SKW had taken place on 1 July 2000, there was no need to take into account SKW's pro forma turnover from 1 January to 30 June 2000.

299 The file and in particular the applicant's replies to the Court's written questions contain the following information:

— the amount of EUR 16 900 million taken into account by the Commission includes a pro forma valuation of SKW's turnover from 1 January to 31 December 2000 as well as the turnover in three non-core areas of activity (dmc^2, Dental and Phenolchemie) disposed of by the applicant in 2001 ('the turnover in the three areas of activity disposed of in 2001');

— the amount of EUR 10 715 million referred to by the applicant includes SKW's turnover only for the period from 1 July to 31 December 2000 and excludes the turnover in the three areas of activity disposed of in 2001;

— the turnover in the three areas of activity disposed of in 2001 amounts to EUR 4 131 million.

300 The parties agreed on those facts at the hearing and the Court took formal note of this.

301 It follows from the foregoing that the difference between the turnovers referred to by the parties is explained by the fact that those figures do not include the same items. Whereas the amount taken into account by the Commission includes both SKW's turnover from 1 January to 31 December 2000 and the turnover in the three areas of activity disposed of in 2001, the turnover referred to by the applicant, on the one hand, includes SKW's turnover only for the period from 1 July to 31 December 2000 and, on the other hand, does not include the turnover in the three areas of activity disposed of in 2001.

302 The Court takes the view that, as has been stated previously, in determining any increase in the fine intended to ensure that it has a deterrent effect, it is important to take into account the undertaking's financial capacity and actual resources at the time when the fine is imposed on it, and not the inherently notional pro forma valuation entered in its balance sheet, which results from the application of accounting rules imposed on itself by the undertaking concerned.

303 Consequently, there is no reason to take account either of SKW's pro forma turnover during the period from 1 January to 30 June 2000 or of the pro forma subtraction of the turnover in the three areas of activity disposed of in 2001.

304 It must be observed that, during the 2000 business year, which had to be taken into account in determining the increase in the fine to ensure that it had a sufficient deterrent effect, in accordance with what has been stated above, on the one hand, SKW's turnover from 1 January to 30 June 2000 did not accrue to the applicant, since the merger of that company with the applicant took place on 1 July 2000, but, on the other hand, the turnover from the three areas of activity disposed of in 2001 did accrue to it.

305 Consequently, the relevant turnover in this case is the result of adding together the turnover of EUR 10 715 million referred to by the applicant and the turnover of EUR 4 131 million in the three areas of activity disposed of in 2001, that is, EUR 14 846 million.

306 None of the arguments put forward by the Commission, which did however admit at the hearing that the turnover taken into account in the Decision was incorrect, can call that conclusion into question.

307 Firstly, the fact that, in its response of 10 January 2002 to the statement of objections of 1 October 2001, the applicant raised no objection to the taking into account of the amount of EUR 16 900 million is not only not in itself decisive, but is also irrelevant since the Commission mentioned that amount only in the part describing the cartel members, and the statement of objections actually contained no estimate of the fine which could be envisaged. If the Commission had intended in any event to take into account the amount mentioned in the statement of objections, it would moreover be necessary to ask why it sent to the applicant, on 28 May 2002, a request for information with a view to obtaining particulars of its turnover. Furthermore, in its

response of 5 June 2002 to that request for information, the applicant expressly stated that the turnover amounting to EUR 10 715 million indicated for the 2000 financial year included only SKW's turnover from 1 July to 31 December 2000. It follows that the Commission was able to find a discrepancy between that amount and the amount of EUR 16 900 million mentioned in the statement of objections. In those circumstances, the Commission could, or even should, have asked the applicant for further information in order to satisfy itself that the amount to be taken into consideration was correct.

308 Secondly, the fact that the pro forma valuation mentioned in the applicant's management report is regarded in that report by the applicant as more significant from an economic point of view, on the one hand, is not established by the Commission and, on the other hand, is in any event not such as to invalidate the conclusion that, in the determination of the deterrent effect which the fine must have, the Commission is required to take into consideration the actual situation of the undertaking at the time when it assesses the amount of the fine which it envisages imposing on it, a point which it acknowledged at the hearing, moreover.

309 Thirdly and finally, contrary to the Commission's assumptions, it must be pointed out that the applicant does not in any way claim that only the turnover of Degussa-Hüls, to the exclusion of that of SKW, had to be taken into account in the determination of the amount of its turnover for 2000 because the merger was entered in the register of companies only on 9 February 2001. The letter of 5 June 2002 sent by the applicant to the Commission states unequivocally, moreover, that the turnover mentioned includes SKW's turnover during the last six months of 2000. The Commission's argument based on that consideration is therefore ineffective.

310 It follows from the foregoing that the turnover taken into account by the Commission in the determination of the increase in the fine intended to ensure that

the latter had a sufficient deterrent effect is incorrect. That amount nevertheless does not constitute the support necessary for the Commission's finding of the infringement in which the applicant participated. The Commission's error can affect only the determination of the amount of the fine, in regard to which the Court of First Instance has unlimited jurisdiction. It follows that the incorrectness of the turnover taken into consideration by the Commission is not such as to entail annulment of the Decision. The applicant's claim to that effect must therefore be rejected.

311 However, the Court needs to consider whether that circumstance is such as to lead to a breach of the principle of equal treatment and thus to justify a reduction of the fine imposed on the applicant.

2. Breach of the principle that penalties must have a basis in law, of the obligation to state reasons and of the principles of proportionality and equal treatment in the increase in the amount of the fine for deterrent effect

(a) Breach of the principle that penalties must have a basis in law and of the obligation to state reasons

Arguments of the parties

312 The applicant maintains that the Commission did not fulfil, in determining the increase in the basic amount, its obligation to state reasons, which must reveal the criteria for the determination of the fine (Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 173). It also contests the 100% increase in the basic amount made by the Commission on account of the deterrent effect which the fine

must have, in that that increase appears to be arbitrary and is not amenable to any review of legality. That method has the effect of allowing the Commission unfettered discretion in the determination of the amount of the fine, whatever the basic amount of the fine originally determined may be.

313 The Commission submits that that argument is unfounded. It maintains that the Decision clearly sets out the reasons which led it to double the basic amount applied to the applicant in recitals 303 to 305 to the Decision.

Findings of the Court

314 With regard, first of all, to the alleged breach, by the Commission, of the obligation to state reasons, it must be observed that the Decision clearly states, in recitals 303 to 305, that the 100% increase, in the applicant's case, in the basic amount of the fine determined according to the gravity of the infringement has its basis in the need to ensure that the fine has a sufficient deterrent effect in view of the applicant's size and overall resources and to take into account the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement. The Decision then expressly draws attention to the applicant's turnover in 2000 in order to justify the increase in the basic amount of the fine.

315 The Decision thus clearly discloses the Commission's reasoning, thereby enabling the applicant to apprise itself of the factors which the Commission took into account in increasing the amount of the fine and to challenge its validity, and the Court to carry out its review. The applicant's complaint alleging breach of the obligation to state reasons in this respect must therefore be rejected.

316 In so far as the applicant also submits that the method consisting in doubling the basic amount is arbitrary and constitutes a breach of the principle that penalties must have a basis in law, it must be pointed out that the need to ensure that the fine has a sufficient deterrent effect is a legitimate objective which the Commission is entitled to pursue when setting the amount of a fine and is intended to ensure compliance by undertakings with the competition rules laid down by the Treaty. Nevertheless, as was stated in connection with the first plea, the Commission is required to comply with the general principles of law, and in particular the principles of equal treatment and proportionality, not only in the determination of the basic amount, but also when increasing that amount with a view to ensuring that the fine has a sufficiently deterrent effect.

317 It follows that, although the Commission does have a necessary element of discretion in setting the rate of increase for deterrent effect, the fact remains that its power is restricted by compliance with the aforementioned principles, which is amenable to judicial review, in regard to which, moreover, the Court of First Instance has unlimited jurisdiction. The applicant's complaint must therefore be rejected.

(b) Breach of the principles of proportionality and equal treatment

Arguments of the parties

318 The applicant maintains that the 100% increase by the Commission in the amount of the fine determined according to the gravity of the infringement (EUR 35 million) in order to ensure that that fine had a sufficient deterrent effect constitutes a breach of the principle of equal treatment.

319 It claims that, according to its estimates, in 2000, the size of Degussa was barely half that of Aventis. By imposing the same increase in the fine on both those undertakings, the Commission therefore infringed the principle of equal treatment, even if account is taken of the amount incorrectly used by the Commission as the basis for its calculation. In view of the fact that its turnover lies between that of Nippon Soda and that of Aventis, the applicant maintains that the increase which should have been applied to it is equivalent to half of that applied to Aventis, that is, EUR 27.5 million.

320 In addition, the applicant submits that the doubling of the basic amount constitutes a breach of the principle of proportionality of the penalty in that, in the light of the offending conduct of which it was accused, excessive importance was attached to the objective of deterrence.

321 The Commission contends that the doubling of the basic amount of the fine imposed on Aventis and Degussa reflects the fact that those two undertakings, in terms of their size and overall resources, are appreciably larger than Nippon Soda (recital 304).

322 It points out, in that regard, that the increase in the basic amount reflects the need to ensure that the fine has a sufficient deterrent effect and to take appropriate account of the fact that large undertakings have more extensive legal and economic knowledge and infrastructures (recital 303). However, in this case, it is important first and foremost to have regard to the difference in size between the applicant and Aventis, on the one hand, and Nippon Soda, on the other (recital 304). If it were necessary to take into consideration the amount put forward by the applicant, its turnover would be equivalent to 6.7 times that of Nippon Soda, whereas the turnover of Aventis would be equivalent to only double that of the applicant. Thus, the Commission would in any event have had to apply identical treatment to the applicant and to Aventis. The Commission also recalls that it is not necessary to apply an arithmetical formula by which the amount of the fine is increased in

proportion to the turnover of the undertaking concerned, since the objectives pursued by increasing fines can already be achieved by classifying the undertakings according to their size (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 464).

Findings of the Court

323 So far as the applicant's complaint alleging breach of the principle of equal treatment is concerned, it must be recalled, as the Commission points out, that the approach of dividing the cartel members into several categories, which has the consequence that a flat-rate starting amount is fixed for all the undertakings in the same category, although it effectively ignores the differences in size between undertakings in the same category, cannot in principle be condemned (*Tokai Carbon and Others* v *Commission*, cited in paragraph 284 above, paragraphs 217 to 221). The Commission is not required, when determining the amounts of fines, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect any distinction between the undertakings concerned in terms of their overall turnover (see *CMA CGM and Others* v *Commission*, cited in paragraph 252 above, paragraph 385, and the case-law cited).

324 The fact nevertheless remains, according to the case-law, that such a division into categories must comply with the principle of equal treatment under which comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified (*CMA CGM and Others* v *Commission*, cited in paragraph 252 above, paragraph 406). From the same perspective, the Guidelines provide, in the sixth paragraph of Section 1.A, that 'considerable' disparity between the sizes of the undertakings committing infringements of the same type is, inter alia, such as to justify a differentiation for the purposes of assessing the gravity of the infringement. Moreover, according to the case-law, the amounts of fines must at least be proportionate in relation to the factors taken into account in assessing the gravity of the infringement (*Tate & Lyle and Others* v *Commission*, cited in paragraph 58 above, paragraph 106).

325 Consequently, where the Commission divides the undertakings concerned into categories for the purpose of setting the amount of the fines, the thresholds for each of the categories thus identified must be coherent and objectively justified (*CMA CGM and Others* v *Commission*, cited in paragraph 252 above, paragraph 416, and *LR AF 1998* v *Commission*, cited in paragraph 46 above, paragraph 298).

326 In this case, it must be pointed out that the classification of the undertakings by category on the basis of their market shares was made by the Commission in recitals 294 to 301 to the Decision. That classification is not contested by the applicant and resulted, in recital 302, in the setting of a basic amount determined according to the gravity of the infringement of EUR 35 million for Degussa and Aventis and EUR 8 million for Nippon Soda.

327 The applicant nevertheless contests the fact that the Commission applied to that amount, in order to ensure that the fine had a sufficiently deterrent effect, the same rate of increase to Degussa and to Aventis (100%) on the basis of those undertakings' overall turnovers, even though those turnovers are, in its view, dissimilar.

328 It must be pointed out that, having regard to the objective pursued by it, namely, adjustment of the amount of the fine having regard to the overall resources of the undertaking and its capacity to mobilise the funds necessary for the payment of that fine, the setting of the rate of increase of the basic amount in order to ensure that the fine has a sufficiently deterrent effect is intended more to ensure the effectiveness of the fine than to reflect the harmfulness of the infringement to normal competition and thus the gravity of the infringement.

329 It follows that the requirement relating to the objectively justified nature of the method consisting in classifying the undertakings by category must be interpreted more strictly where that classification is made, not for the purpose of determining the amount of the fine according to the gravity of the infringement, but for that of determining the increase in the basic amount with a view to ensuring that the fine imposed has a sufficient deterrent effect.

330 It must be recalled that, according to case-law, in the context of determining the amount of the fine according to the gravity of the infringement, even if the effect of the division into groups is that certain applicants are allocated the same basic amount even though they differ in size, that difference in treatment is objectively justified by the importance attached to the nature of the infringement in comparison with the size of the undertakings in the assessment of the gravity of the infringement (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 50 to 53, and *CMA CGM and Others* v *Commission*, cited in paragraph 252 above, paragraph 411).

331 However, that justification is not intended to apply to the determination of the rate of increase of the fine with a view to ensuring that it has a sufficient deterrent effect, given that that increase is essentially and objectively based on the size and resources of the undertakings, and not on the nature of the infringement. It is moreover important to note that, in the Decision, the rate of increase with a view to ensuring that the fine had a sufficient deterrent effect was set when the basic amount according to the gravity of the infringement had previously been established (recital 303).

332 Furthermore, it is apparent from recital 304 to the Decision, which states that 'the appropriate starting point for a fine resulting from the criterion of the relative importance in the market concerned requires further upward adjustment to take account of the size and overall resources of Aventis and Degussa respectively', that the Commission does not mention any other factors, apart from the applicant's possession of legal and economic infrastructures enabling it to recognise that its conduct constitutes an infringement and to be aware of the consequences stemming from it, which could objectively justify the application of the same increase to the amounts imposed on the applicant and Aventis.

333 In those circumstances, and in view of the fact that the Commission expressly relied, in recital 304, on the respective overall turnovers of the undertakings concerned, it must be held that the rate of increase in the amount of the fine determined according to the gravity of the infringement should have reflected, at the very least approximately, the significant difference between those turnovers.

334 However, although the Commission was entitled to consider that the respective turnovers of Degussa (EUR 16 900 million) and Aventis (EUR 22 300 million) in 2000 demonstrated that they were 'much larger players than Nippon Soda' (EUR 1 600 million) and that the latter therefore did not need to have an increase imposed on it in order to ensure that the fine had a sufficient deterrent effect, it must be observed that it applied the same rate of increase to Degussa and Aventis even though, according to the Commission's own figures, Degussa's turnover was approximately 25% lower than that of Aventis. That proportion even rises to over 33% if the turnover of EUR 14 846 million is taken into account, in accordance with what was stated in paragraphs 302 to 305 above.

335 Consequently, the Commission was not entitled, without infringing the principle of equal treatment, to increase the amount of the fine determined according to the gravity of the infringement by applying the same rate as that applied to Aventis.

336 None of the Commission's arguments is capable of calling that conclusion into question.

337 Firstly, although it is true that it was important to take account of the significant difference in size between Degussa and Aventis, on the one hand, and Nippon Soda, on the other, which justified the absence of any increase in the fine for deterrent effect in the latter's case, that consideration could not dispense the Commission from also taking account of the difference in size between Degussa, on the one hand, and Aventis, on the other. This analysis is all the more valid since the incorrect turnover taken into account by the Commission did in fact result in an underestimation of that difference.

338 Secondly, as was noted above, although it is true that the Commission is not required, when determining the amounts of fines, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect any distinction between the undertakings

concerned in terms of their overall turnover (see *CMA CGM and Others* v *Commission*, cited in paragraph 252 above, paragraph 385, and the case-law cited), the fact remains that the classification of undertakings by category, in accordance with the principle of equal treatment, must be objectively justified, since that requirement has to be interpreted more strictly where that classification is designed, not to determine the specific weight of the offending conduct of each undertaking, but to set the rate of increase in the amount of the fine determined according to the gravity of the infringement in order to ensure that the fine has a sufficient deterrent effect, an operation which serves a different and separate purpose and is based on an objective assessment of the undertakings' capacity to mobilise the funds necessary for the payment of the fine.

339 Consequently, the Court considers it necessary, in the exercise of its unlimited jurisdiction, to reduce the rate of increase in the amount of the fine determined according to the gravity of the infringement applied to Degussa, so that that rate reflects the significant difference in size between Degussa and Aventis (see, to that effect, *Tokai Carbon and Others* v *Commission*, cited in paragraph 284 above, paragraphs 244 to 249).

340 For that purpose, it must however be pointed out that, although the Commission essentially based the determination of the rate of increase in the fine on the need to ensure that it had a sufficient deterrent effect, as is apparent both from the heading of the section covering recitals 303 to 305 and from recitals 304 and 305 themselves, it also took account, in recital 303, of the fact that large undertakings had legal and economic knowledge and infrastructures which enabled them more easily to recognise that their conduct constituted an infringement and to be aware of the consequences stemming from it. As the Commission points out and as was noted above, there is no need in that regard to distinguish between two undertakings whose turnovers in any event justify their classification as large undertakings having such infrastructures.

341 It follows that account must be taken of that aspect by holding that the element common to Aventis and Degussa, namely, as has been seen above, the possession of a legal and economic infrastructure by virtue of their large size, justifies the fact that the rate of increase does not reflect the whole difference between the turnovers of those undertakings.

342 In the light of all the foregoing considerations, the Court, in the exercise of its unlimited jurisdiction, considers that the amount of the fine determined according to the gravity of the infringement set for the applicant, namely EUR 30 million in accordance with paragraph 254 above, must be increased by 80% to EUR 54 million.

343 In those circumstances, as regards the second complaint, put forward by applicant in the reply, alleging breach of the principle of proportionality, the Court takes the view that, having regard to the applicant's overall size, the 80% increase in the basic amount should not be considered disproportionate in the light of the applicant's responsibility within the cartel and of its capacity to cause significant harm to competition, which result from the substantial market share which it held on the methionine market during the period of the infringement (of the order of 25% of the EEA market in 1998), which the Commission duly took into account (recitals 297 to 301). Such an increase cannot therefore amount to attaching to the objective of deterrence excessive importance in relation to the conduct of which the applicant is accused. The present complaint must therefore be rejected.

3. Error of assessment regarding the deterrent effect of the fine in the light of the applicant's conduct after the termination of the infringement

(a) Arguments of the parties

344 The applicant submits that, by considering that the basic amount of the fine had to be doubled, the Commission overestimated the deterrent effect of that fine by failing

to take into account the fact that Degussa had already ended the infringement before the proceeding was initiated by the Commission and that it then immediately took measures, namely, a 'compliance programme', to prevent any infringement in the future. In particular, the Commission was wrong in rejecting, in recital 330 to the Decision, the applicant's efforts in question by asserting that they could not constitute an attenuating circumstance under the Guidelines. Such an attitude does not reward undertakings wishing to ensure that they are in compliance with the provisions of competition law and which, therefore, do not need to have measures designed for additional deterrent effect taken against them.

345 The applicant points out that, if the Guidelines had to be interpreted as meaning that the applicant's attitude in this case had no bearing on the amount of the fine, they would to that extent conflict with the principle of proportionality between offences and penalties, which, as a generally accepted principle in States governed by the rule of law, applies to the Community legal order pursuant to Article 6(1) EU.

346 Finally, the applicant notes that the concept of deterrence includes a preventive aspect with respect to the offender (special prevention) and with respect to any other economic operators which might, in the future, commit similar infringements (general prevention). In this case, special prevention is already ensured by the applicant's adoption of the compliance programme. If the Commission were to consider that the increase is guided only by general preventive considerations, the applicant submits that it would conflict with the case-law of the Court of Justice and the Court of First Instance (Case 36/75 *Rutili* [1975] ECR 1219, paragraphs 51 to 53; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 27 to 30; and Case C-340/97 *Nazli and Others* [2000] ECR I-957, paragraph 63).

347 The Commission submits that this complaint is unfounded.

(b) Findings of the Court

348 The applicant essentially complains that the Commission did not take into account, when assessing the deterrent effect which the fine must have, the fact, on the one hand, that it had ended the infringement before the Commission initiated the proceeding and, on the other hand, that it had adopted an internal programme of compliance with Community competition law.

349 As regards the first of those considerations, it is sufficient to point out that, although, according to the Decision, the infringement did indeed end in February 1999, that is, before the opening of the proceeding on 1 October 2001, that termination took place on the initiative of Rhône-Poulenc, as stated in recital 185. Moreover, in any event, the applicant, which does not actually dispute that finding, merely asserts that the infringement ended in 1997 following the departure of Mr H. from Rhône-Poulenc and the policy adopted by his successors. It is therefore not entitled to rely on that circumstance in order to claim a reduction in the increase based on the need to ensure that the fine has a deterrent effect. Furthermore, the fact that the infringement had already ended at the time of the opening of the proceeding can in no circumstances constitute conclusive evidence that the applicant intended, in the future, to comply once and for all with the Community competition rules. The objective of special prevention pursued by the imposition of the fine, mentioned by the applicant, is intended not only to put an end to the infringement, but also to prevent the offenders from subsequently resuming their conduct.

350 As regards the second of those considerations, it is settled case-law that, whilst it is indeed important that the applicant took steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance does not alter the fact that an infringement was found to have been committed. It follows that the mere fact that in certain cases the Commission took the implementation of a compliance programme into considera-

tion as a mitigating factor does not mean that it is obliged to act in the same manner in any given case (*Hercules Chemicals* v *Commission*, cited in paragraph 133 above, paragraph 357; Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraphs 417 and 419; and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraph 280).

351 According to that case-law, the Commission is therefore not required to take a circumstance such as that into account as an mitigating factor, provided that it adheres to the principle of equality of treatment, which requires that it should not assess the matter differently for any undertaking addressed by the same decision (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 53 above, paragraph 281).

352 Although the applicant relies on that circumstance in connection with the increase in the basic amount of the fine for deterrent effect, and not formally as a mitigating factor, the same approach must apply in this case.

353 There is no indication whatsoever in the Decision that the Commission differentiated in this respect in its assessment as between the three addressee undertakings, and the applicant does not claim that that was the case.

354 It follows that the Commission cannot be accused of not having taken account of the fact that the applicant adopted a programme of compliance with Community competition law after the termination of the infringement.

355 None of the applicant's arguments can call that conclusion into question.

356 Firstly, as regards the alleged breach of the principle of proportionality, in accordance with the abovementioned case-law, it must be pointed out that the applicant's attitude subsequent to the infringement does not alter the existence and gravity of the infringement (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 82 above, paragraph 373), which constitutes a continuing and manifest infringement of Article 81(1) EC. In the light of those circumstances, the principle of proportionality, which requires that the fine imposed be not excessive in relation to the characteristics of the infringement, did not require the Commission to take into account the applicant's attitude after the termination of that infringement.

357 It follows that neither the Decision nor the Guidelines, which in any event neither provide for nor exclude the taking into account of such circumstances, can, on that basis, be regarded as infringing the principle of proportionality.

358 Secondly, as regards the argument alleging that the Commission, by refusing to take account of the adoption of the applicant's compliance programme, wrongly based its view exclusively on a general preventive objective, contrary to the case-law of the Court of Justice, it must be pointed out that the case-law cited by the applicant concerns deportation measures ordered against nationals of other Member States on grounds of public policy. In that context, the Court of Justice has held that, under Article 3 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964 (I), p. 117), in order to be justified, such measures must be based exclusively on the personal conduct of the individual concerned (see, recently, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66). The Court of Justice has therefore concluded, in particular, that Community law precludes the deportation of a national of a Member State based on reasons of a general preventive nature, that is one which has been ordered for the purpose of deterring other aliens, in particular where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy (Case 67/74 *Bonsignore* [1975] ECR 297, paragraph 7; *Nazli and Others*, cited in paragraph 346 above, paragraph 59; and *Orfanopoulos and Oliveri*, paragraph 68).

359 It follows that, far from constituting a general principle, the prohibition of general preventive grounds applies to the particular situation of measures derogating from the principle of freedom of movement for citizens of the Union enshrined in Article 18(1) EC and adopted by Member States on grounds of public policy. Clearly, that prohibition cannot therefore purely and simply be transposed to the context of fines imposed by the Commission on undertakings for infringements of Community competition law.

360 On the contrary, it is settled case-law that it is open to the Commission to have regard to the fact that anti-competitive practices such as those in this case, although they were established as being unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them and, consequently, it is open to the Commission to consider that it is appropriate to raise the level of fines so as to reinforce their deterrent effect (see, for example, *Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraph 108), which reflects, at least in part, the need to confer on fines a deterrent character in relation to undertakings other than those on which the fines are imposed.

361 In addition, it must be pointed out that the fact that there is no doubt that the mere adoption by an undertaking of a programme of compliance with the competition rules cannot constitute a valid and definite guarantee of future and continuing compliance by that undertaking with those rules, with the result that such a programme cannot require the Commission to reduce the fine on the ground that the objective of prevention pursued by it has already been at least partly achieved. Moreover, contrary to the applicant's claims, there is no indication whatsoever in the Decision that the Commission based the increase in the basic amount on the need to ensure a deterrent effect with respect to other undertakings.

362 On the one hand, the taking into account of the applicant's size, in recitals 303 to 305, and the resulting increase in the basic amount specifically constitute an aspect which serves to adapt the fine on the basis of factors peculiar to the applicant. On the other hand, it is apparent from recital 330 that the Commission rejected the

adoption of the compliance programme as an attenuating circumstance on the ground that 'this initiative came too late and cannot, as a prevention tool, dispense the Commission from its duty to penalise an infringement of the competition rules committed by Degussa in the past'. That must be construed as recalling, correctly, and as the applicant points out in its plea of illegality against Article 15(2) of Regulation No 17, that the fine pursues not only a preventive, but also a punitive, objective. It was therefore not only with a view to deterring undertakings unconnected with the infringement that the Commission rejected the applicant's argument on this point, but because it considered that the compliance programme did not warrant a reduction in the penalty for the infringement.

363 The fact that the applicant now puts forward that argument in the context of the assessment of the deterrent effect of the fine, and not in that of attenuating circumstances, is immaterial in that regard, given that the need to ensure such an effect reflects not only the objective of prevention pursued by the fine, as the applicant seems to envisage, but also that of punishment.

364 It follows from all the foregoing that the applicant's complaint alleging a manifest error of assessment by the Commission of the deterrent effect of the fine in the light of its conduct after the termination of the infringement must be rejected as unfounded.

C — *The applicant's cooperation*

1. Arguments of the parties

365 The applicant challenges the Commission's refusal to grant it a reduction in the fine under the second indent of Section D(2) of the Leniency Notice, on the ground that it contested the facts relating to the duration of the cartel, as presented in the

statement of objections. The applicant maintains that it accepted the probative documents produced but that it merely expressed a difference of opinion regarding the Commission's interpretation of them, resulting in differing legal assessments and differing conclusions. Consequently, the determination of the duration of the infringement does not, in this case, constitute a finding of fact but an issue of legal classification, concepts which the Commission confused in Section C of the statement of objections.

366 The Commission submits that this complaint is unfounded.

2. Findings of the Court

367 It must be remembered that the applicant was granted, under recitals 353 and 354 to the Decision, a 25% reduction in the amount of the fine pursuant to the first indent of Section D(2) of the Leniency Notice.

368 Section D of the Leniency Notice is worded as follows:

'1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement,

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

369 However, the Commission considered, in recital 354, that Degussa had contested the facts set out in the statement of objections in so far as they concerned the duration of the cartel. It therefore concluded that Degussa did not fulfil the conditions set out in the second indent of Section D(2) of the Leniency Notice and that, consequently, it did not qualify for an additional reduction in the amount of the fine on that basis.

370 It must therefore be determined whether the Decision is vitiated by an error of fact as to whether, after the statement of objections, the applicant contested the correctness of the facts on which the Commission based its allegations.

371 For that purpose, the applicant's response to the statement of objections must be examined.

372 Firstly, as the applicant points out, that document states that the account of the facts in the statement of objections 'is in essential respects not contested' (pp. 3 and 9 of the response to the statement of objections). However, contrary to the applicant's

interpretation of that statement, it was in fact intended to show that the facts were in part contested and it did not enable the Commission, moreover, to establish with certainty those facts which were contested and those which were not. That consideration is reinforced by the applicant's statement (p. 9 of the response to the statement of objections) that the Commission's presentation of the facts regarding the duration of the infringement was in part incorrect. The applicant even added, in point 12 of its response (p. 14 of the response to the statement of objections), that the account of the facts was correct only as from the middle of 1992, the date when Degussa participated in the infringement at the Barcelona meeting, while making it clear that the duration of the cartel was limited to the years from 1992 to 1997 (p. 33 of the response to the statement of objections).

373 Although those formal considerations cannot, in themselves, lead to the conclusion that the applicant substantially contested the correctness of the facts presented by the Commission in the statement of objections, they are in any case sufficient to establish that the applicant did not positively indicate the fact that it did not contest those facts in their entirety. The applicant did, on the contrary, create ambiguity, from the Commission's point of view, as to whether or not it contested the correctness of the facts alleged and, if so, precisely which facts were contested.

374 Secondly, although, under the heading 'D. Facts' (p. 9 of the response to the statement of objections), the applicant did in fact submit comments contesting the Commission's position, it must nevertheless be admitted that, for the most part, those comments are aimed, in essence, not at refuting directly the correctness of those facts (in particular the holding of meetings and the matters discussed at them), but at contradicting the Commission's interpretation of them and the conclusion which it reached as to the existence of an infringement before 1992 and after 1997.

375 It is true that contesting the Commission's legal assessment of certain facts cannot be treated in the same way as contesting the actual existence of those facts, even though, in this case, the distinction between those two concepts proves to be ambiguous.

376 Nevertheless, in any event, it must be observed, as the Commission points out, that in point 13 of its response to the statement of objections (pp. 14 and 15), the applicant stated that, in its view, after the 'summit' meeting in Copenhagen in 1997, there had been no further meetings at which target prices had been established. However, it is apparent from point 61 of the statement of objections that the Commission clearly stated that Degussa and Rhône-Poulenc had met in Heidelberg in the late summer or early autumn of 1998 and that a price increase had been concluded on that occasion. The Commission added that a further meeting between those undertakings had then been held in Nancy on 4 February 1999 and that it had resulted in the setting of a target price of USD 3.20/kg (DEM 5.30/kg). It is therefore apparent, at the very least to the extent described above, that the applicant contested the correctness of the facts set out by the Commission after the statement of objections.

377 In addition, in its response, under the heading 'E. Legal assessment', the applicant stated, in the part dealing with the duration of the infringement, that it had no information on the existence of meetings during the period from 1989 to 1990 and that it was therefore unable either expressly to contest the holding of such meetings (p. 29 of the response to the statement of objections) or to confirm it (p. 30 of the response to the statement of objections). However, the Commission had described in detail, in points 22 to 29 of the statement of objections, three meetings which Degussa had attended during that period (in August 1989 at an unspecified location, on 10 June 1990 in Frankfurt am Main and in November 1990 in Hong Kong and/or Seoul). Thus, once again, although the applicant's ambiguous wording does not permit the conclusion that it denied that those meetings were held, it must however be stated that that wording likewise did not enable the Commission to consider that it accepted the facts in that regard.

378 Similarly, where the Commission described the cartel, in the statement of objections, as having begun in February 1986 (see, in particular, points 18 to 21 and 97), the applicant did not express a view, in its response to the statement of objections, on the Commission's assertions concerning the period from February 1986 to the end of 1988, while making it clear that, in its opinion, the cartel had lasted only from 1992 to 1997.

379 It follows that the Commission did not err as to the facts by stating that the applicant had in part substantially contested the correctness of the facts set out in the statement of objections.

380 As to whether the Commission was entitled, on that basis, to consider that the applicant did not qualify for an additional reduction in the amount of the fine pursuant to the second indent of Section D(2) of the Leniency Notice, it must be recalled that, according to the case-law, the reduction of fines where there is cooperation on the part of the undertakings participating in infringements of Community competition law has its basis in the consideration that such cooperation facilitates the Commission's task (*BPB de Eendracht* v *Commission*, cited in paragraph 80 above, paragraph 325, and *Finnboard* v *Commission*, cited in paragraph 233 above, paragraph 363, confirmed on appeal by judgment of the Court of Justice in Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, and *Mayr-Melnhof* v *Commission*, cited in paragraph 222 above, paragraph 330).

381 In that regard, it has nevertheless been held that an undertaking which simply refrains, during the administrative procedure, from expressing any view on the Commission's factual allegations, and thus from acknowledging the correctness of those allegations, does not in fact further the Commission's task (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 37).

382 Similarly, it is not sufficient for an undertaking to state in general terms that it does not contest the facts alleged, in accordance with the Leniency Notice, if, in the circumstances of the case, that statement is not of any help to the Commission at all (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 193).

383 Finally, a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part.

It is clear from the very concept of cooperation, as described in the Leniency Notice, and in particular in the introduction to and Section D(1) of that notice, that it is only where the conduct of the undertaking concerned reveals such a spirit of cooperation that a reduction may be granted on the basis of that notice (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 82 above, paragraphs 395 and 396).

384 It follows from all the foregoing that, in this case, the ambiguous acknowledgement by the applicant of certain facts alleged in the statement of objections, even though it contested certain others, did not contribute to facilitating the Commission's task effectively enough for that acknowledgement to be taken into account in the application of the Leniency Notice. Thus, the Commission was entitled to consider, without making any manifest error of assessment, that that acknowledgement could not justify a reduction in the amount of its fine in the light of that notice, as interpreted by the case-law.

385 It follows that the complaint alleging, in essence, an error as to the facts and/or a manifest error of assessment as to the applicant's cooperation during the administrative procedure must be rejected as unfounded.

D — *Breach of the principle of non-retroactivity of penalties*

386 At the hearing, the applicant submitted that, by applying the new criteria for setting fines contained in the Guidelines to infringements which took place before the adoption, in 1998, of those Guidelines, the Commission infringed the principle of non-retroactivity of penalties.

387 Without there being any need to consider the admissibility of this argument put forward at the hearing under Article 48(2) of the Rules of Procedure of the Court of First Instance, and in particular as to whether it is a new plea or merely supplements a plea contained in the application, with which it is closely connected, it is sufficient to observe that the Court of Justice and the Court of First Instance have already adjudicated on the validity of the argument in question.

388 As stated in paragraphs 224 to 231 of the judgment in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 82 above, in order to ensure that the principle of non-retroactivity is observed, it is necessary to ascertain whether the change in the Commission's general competition policy in the matter of fines, resulting, inter alia, from the Guidelines was reasonably foreseeable at the time when the infringements concerned were committed.

389 In that regard, the principal innovation under the Guidelines consists in taking as a starting point for the calculation of the basic amount of the fine, determined on the basis of ranges provided for in that regard, those ranges reflecting the different degrees of gravity of the infringements, but which, as such, bear no relation to the relevant turnover. That method is thus based essentially on a standard scale of fines, albeit a relative and flexible one.

390 It is therefore important to consider whether that new method of calculating fines, even if it had an aggravating effect on the level of the fines imposed, was reasonably foreseeable at the time when the infringements concerned were committed.

391 It is clear from the case-law of the Court of Justice that the fact that the Commission has, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community

competition policy, but that, on the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraph 109, and Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005).

392 It follows that the undertakings involved in an administrative procedure which may give rise to a fine cannot acquire a legitimate expectation that the Commission will not exceed the level of fines imposed previously or that a particular method will be used to calculate such fines.

393 Consequently, those undertakings must take account of the possibility that the Commission may, at any time, decide, in compliance with the rules governing its action, to raise the level of the amount of the fines compared with that applied in the past.

394 That is true not only when the Commission raises the level of the amounts of fines which it imposes in individual decisions, but also when it raises them by the application, to particular cases, of rules of conduct having general application, such as the Guidelines.

395 It is moreover clear from the case-law of the European Court of Human Rights that a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (Eur. Court HR, *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 35).

396 It must therefore be concluded that the Guidelines and, in particular, the new method of calculating fines which they contain, even if it had an aggravating effect on the level of the fines imposed, were reasonably foreseeable for undertakings such as the applicant at the time when the infringement concerned was committed.

397 Accordingly, by applying in essence, in the Decision, the Guidelines to an infringement committed before their adoption, the Commission did not infringe the principle of non-retroactivity.

398 It follows that the applicant's complaint alleging breach of the principle of non-retroactivity of penalties must be rejected as unfounded.

IV — *The fourth plea, alleging breach of the obligation of professional secrecy, the principle of good administration and the presumption of innocence*

A — *Arguments of the parties*

399 The applicant claims that, even before the Decision was adopted, the Commission provided the press with confidential information, thus infringing the obligation of professional secrecy under Article 287 EC, the principle of good administration and the presumption of innocence.

400 It points out that on Tuesday 2 July 2002, the *Handelsblatt* newspaper published an article headed 'Degussa must pay over 100 million'. The article stated that the

newspaper had been informed by sources close to the Commission in Brussels, and in particular reported that 'Mr Monti [had] acknowledged that the Düsseldorf chemical group was the driving force behind a cartel on amino acids which, for a decade, [had] shared the market in animal feed additives through systematic price-fixing agreements'.

401 The information published could not have been obtained without the collaboration of a Commission official, which constitutes a breach of the obligation to respect professional secrecy laid down in Article 287 EC. The Court has held that, in *inter partes* procedures which are liable to result in the imposition of a penalty, the nature and amount of the penalty proposed are by their very nature covered by business secrecy until the penalty has been finally approved and announced. That principle follows, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person (*Volkswagen* v *Commission*, cited in paragraph 153 above, paragraph 281).

402 The applicant submits that the manner in which the Commission informed the press is immaterial, since importance attaches only to the fact that the Commission caused a situation to arise in which the undertaking was informed by the press of the exact nature of the penalty which, in all probability, was to be imposed on it (*Volkswagen* v *Commission*, cited in paragraph 153 above, paragraph 281). The Commission has not expressly disputed the fact that one of its officials disclosed the confidential information in question. In any case, only the Commission could have been the source of that disclosure. In those circumstances, it is for the Commission to prove the contrary, particularly since the article in question mentioned that the information came from 'sources close to the Commission in Brussels'.

403 The applicant further submits that the Commission infringed the principle of good administration enshrined in Article 41(1) of the Charter, under which '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'. The disclosure of which the Commission was the source reveals its bias against the applicant.

404 Finally, the Commission committed a breach of the principle of the presumption of innocence laid down in Article 6(2) of the ECHR and in Article 48(1) of the Charter, which is one of the fundamental rights of the Community legal order (*Hüls* v *Commission*, cited in paragraph 115 above, paragraph 149). Under the case-law of the European Court of Human Rights, the Court of Justice and the Court of First Instance, that principle applies to the procedures relating to infringements of the competition rules (Eur. Court HR, *Öztürk v. Germany*, cited in paragraph 38 above, § 46; *Hüls* v *Commission*, cited in paragraph 115 above, paragraph 150; and *Volkswagen* v *Commission*, cited in paragraph 153 above, paragraph 281). By revealing to the press the content of the decision before it was submitted to the College of Commissioners for deliberation, and therefore before the undertaking was found guilty, the Commission manifestly infringed the principle of the presumption of innocence.

405 The applicant rejects the Commission's argument that the disclosure to the press of the information in question is not imputable to it. In the applicant's view, it matters little whether the information was sent officially. Under Article 288 EC, the Commission is liable for an infringement committed by one of its officials where that infringement is directly connected with the performance of his duties (Case C-9/69 *Sayag and Others* [1969] ECR 329), which is the situation in this case. Whether or not the infringement was authorised by the Commission is therefore irrelevant, by analogy with holding an undertaking responsible for competition infringements committed by its staff (*Musique Diffusion française and Others* v *Commission*, cited in paragraph 58 above, paragraphs 37 to 70 and 112).

406 The applicant therefore concludes that the effectiveness of the protection of fundamental rights requires that the Decision be annulled on that basis (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 19). That is made necessary by the fact that this type of infringement by the Commission is common (*Suiker Unie and Others* v *Commission*, cited in paragraph 101 above, paragraph 90; *Dunlop Slazenger* v *Commission*, cited in paragraph 114 above, paragraph 27; and *Volkswagen* v *Commission*, cited in paragraph 153 above). Moreover, the case-law according to which such an irregularity justifies annulment of the decision only if it is established

that, had that irregularity not occurred, the decision in question would have had a different content has manifestly had no deterrent effect and requires of the undertaking proof which it is unable to provide. That case-law therefore fails to satisfy the requirement of effective protection of the rights in question and puts the undertaking concerned in a disadvantageous position vis-à-vis its customers, staff and shareholders and the media, in disregard of the principle of 'equality of arms'.

407 The applicant is thus of the opinion that it is sufficient to demonstrate that it is possible that the Decision might have had a different content had it not been for the premature disclosure of the information in question, as has been held with regard to procedural irregularities (Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 49, and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 58). That is the situation in this case, given that the disclosure of the content of the Decision before its adoption made it impossible for the Commission to adopt a decision differing from the announcement made to the press, which would have constituted a disavowal of the member of the Commission responsible for competition, which is hardly conceivable.

408 The Commission contends that this plea is unfounded.

B — *Findings of the Court*

409 It must be recalled that Article 287 EC requires the members, officials and other servants of the institutions of the Community 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'. Although that provision refers primarily to information gathered from undertakings, the

adverbial phrase 'in particular' shows that the principle in question is a general one which applies equally to other confidential information (Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 34, and Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 86).

410 It must be pointed out that, in *inter partes* procedures which are liable to result in the imposition of a penalty, the nature and amount of the penalty proposed are by their very nature covered by business secrecy until the penalty has been finally approved and announced. That principle follows, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person (*Volkswagen* v *Commission*, cited in paragraph 153 above, paragraph 281).

411 Consequently, the Commission's duty not to disclose to the press information on the specific penalty envisaged is coterminous not only with its obligation to respect professional secrecy, but also with its duty of good administration. Finally, it must be recalled that the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hüls* v *Commission*, cited in paragraph 115 above, paragraph 150; Eur. Court HR, *Öztürk v. Germany*, cited in paragraph 38 above; and *Lutz v. Germany*, cited in paragraph 115 above). That presumption is clearly not respected by the Commission where, prior to formally imposing a penalty on the undertaking charged, it informs the press of the proposed finding which has been submitted to the Advisory Committee and the College of Commissioners for deliberation (*Volkswagen* v *Commission*, cited in paragraph 153 above, paragraph 281).

412 However, in this case, it must be observed that, contrary to the situation which gave rise to the judgment in *Volkswagen* v *Commission*, cited in paragraph 153 above, it is not established that the Commission was behind the disclosure by the press of the content of the Decision. Whereas, in the aforementioned case, it was common ground that the member of the Commission responsible for competition at the material time had announced to the press, even before the Commission's decision,

the amount of the fine which would be imposed on Volkswagen, in the present case, the applicant itself states that the article in question merely mentions that the information came from sources close to the Commission ('Kommissionskreisen'). Moreover, contrary to the applicant's assertions, it must be observed that the Commission has not admitted any responsibility in that regard. Although it is likely that the Commission may have been the source of that leak, that mere possibility is not sufficient, as the applicant claims, to place on the Commission the burden of proving the contrary.

413 In any event, even if it may be accepted that Commission staff are indeed responsible for the disclosure reported by the press article to which the applicant refers, that circumstance has no bearing on the lawfulness of the Decision.

414 First, as regards the applicant's argument that the disclosure in question demonstrates the Commission's bias against it, it must be observed that the reality of an infringement which has actually been proved at the end of an administrative procedure cannot be called into question by evidence of the Commission's premature display of its belief as to the existence of that infringement and of the amount of the fine which it therefore envisages imposing on an undertaking. Indeed, it has been stated, during the examination of the various pleas put forward by the applicant, that the Decision is properly founded in fact and in law as regards the existence of the constituent elements of the infringement.

415 Nor can it be claimed that disclosure by the Commission of the content of a decision at the end of the administrative procedure and just prior to its formal adoption is, on its own, sufficient to show that the Commission prejudged the case or lacked objectivity in its investigation (see, to that effect, *Volkswagen* v *Commission*, cited in paragraph 153 above, paragraphs 270 to 272).

416 It is settled case-law that an irregularity such as that alleged by the applicant may lead to annulment of the decision in question if it is established that the content of that decision would have differed if that irregularity had not occurred (*Suiker Unie and Others* v *Commission*, cited in paragraph 101 above, paragraph 91; *Dunlop Slazenger* v *Commission*, cited in paragraph 114 above, paragraph 29; and *Volkswagen* v *Commission*, cited in paragraph 153 above, paragraph 283).

417 In this case, however, the applicant has furnished no such proof. There are no grounds for believing that, if the information in question had not been disclosed, the College of Commissioners would have altered the proposed amount of the fine or the proposed content of the decision. Moreover, contrary to the applicant's purely hypothetical allegations, having regard to the principle of collegiate responsibility with which the Commission's decisions must comply, it cannot be presumed that the members of the Commission were influenced by a feeling of solidarity towards their colleague responsible for competition, or that they were in fact prevented from imposing a fine of a lower amount.

418 It follows that this plea must be rejected.

419 None of the applicant's arguments can call that conclusion into question.

420 The applicant claims that the case-law cited above does not satisfy the requirements arising from the principle of effective judicial protection. In order to comply with that principle, it is necessary to regard as evidence sufficient to justify annulment of the Decision the existence of a possibility that the content of the Decision might have been different if the revelation in question had not occurred.

421 In that regard, it should be recalled that, according to settled case-law, individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, inter alia, *Johnston*, cited in paragraph 406 above, paragraph 18; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39).

422 However, that principle must be reconciled with the principle of legal certainty and the presumption that acts of the Community institutions are lawful (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48), which implies that it is for the person relying on the unlawfulness of such an act to adduce the necessary proof.

423 As has been stated above, the alleged disclosure by the Commission of the content of a decision before its formal adoption cannot, in itself, unlike non-compliance with essential procedural requirements, have any bearing whatsoever on the lawfulness of the decision in question.

424 Moreover, it must be observed, first, that the approach adopted by the case-law cited in paragraph 416 above neither precludes the applicant from proving that the Decision is unlawful on account of the irregularity found nor renders such proof excessively difficult, and, second, that, even if the applicant does not succeed in demonstrating that the Decision would have been different had that irregularity not occurred, the action provided for in the second paragraph of Article 288 EC enables the applicant, where appropriate, to claim compensation for the damage caused by the Community as a result of it.

425 Consequently, there is no reason to consider that the principle of effective judicial protection precludes the requirement that, where there is an irregularity of the type alleged in this case, it is for the applicant, in order to justify annulment of the Decision, to demonstrate that its content would have been different had that irregularity not occurred.

426 It follows from the foregoing that the plea alleging breach of professional secrecy, of the principle of good administration and of the presumption of innocence must be rejected.

Conclusion

427 In accordance with paragraph 254 above, the Court considers that the basic amount of the fine calculated according to the gravity of the applicant's infringement must be reduced from EUR 35 million to EUR 30 million. In accordance with paragraph 342 above, that amount must be increased, in the applicant's case, by 80%, to EUR 54 million in order to ensure that the fine has a sufficient deterrent effect.

428 In addition, it has been found that the Commission correctly established the duration of the infringement, which justifies a 125% increase in that amount. Finally, account must be taken of the 25% reduction in the fine which the Commission granted to the applicant under the first indent of Section D(2) of the Leniency Notice.

429 It follows from all the foregoing that the amount of the fine imposed on the applicant must be reduced to EUR 91 125 000.

Costs

430 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads of claim, the Court of First Instance may order that the costs be shared or that each party bear its own costs, it being understood that, under Article 87(4) of those Rules of Procedure, the Member States and institutions which intervened in the proceedings are to bear their own costs. Since the action has been upheld only in part, the Court considers that, on a fair assessment of the circumstances of the case, the applicant must be ordered to bear its own costs and 75% of those incurred by the Commission, and that the Commission must be ordered to bear 25% of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Reduces the amount of the fine imposed on the applicant in Article 3 of Commission Decision 2003/674/EC of 2 July 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case C.37.519 — Methionine) to EUR 91 125 000;

2. **Dismisses the remainder of the application;**

3. **Orders the applicant to bear its own costs and to pay 75% of those incurred by the Commission;**

4. **Orders the Commission to bear 25% of its own costs;**

5. **Orders the Council to bear its own costs.**

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 5 April 2006.

E. Coulon M. Jaeger

Registrar President

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