JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 September 2006 *

In Case T-314/01,

Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA, established in Veendam (Netherlands), represented by C. Dekker, lawyer,

applicant,

v

Commission of the European Communities, represented by A. Bouquet, A. Whelan and W. Wils, acting as Agents, assisted by M. van der Woude, lawyer,

defendant,

APPLICATION for annulment of Article 1 of Commission Decision C(2001) 2931 final of 2 October 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium Gluconate) in so far as it pertains to the applicant or, in the alternative, annulment of Article 3 of that decision in so far as it pertains to the applicant,

* Language of the case: Dutch.

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

composed of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 17 February 2004,

gives the following

Judgment

Facts

1 The Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA ('Avebe') is the parent company of a group of companies specialising in starch processing. At the material time and until December 1995, Avebe was active in the sodium gluconate market through its share in Glucona vof, a company it controlled jointly with Akzo Nobel Chemicals BV ('ANC'), a company controlled by Akzo Nobel NV ('Akzo'). In December 1995, Avebe acquired ANC's share in Glucona vof, which became a limited liability company and took the name

Glucona BV (hereinafter both Glucona vof and Glucona BV will be referred to without distinction as 'Glucona').

2 Sodium gluconate is a chelating agent, which are products which inactivate metal ions in industrial processes. Those processes are used, inter alia, in industrial cleaning (bottle washing, utensil cleaning), surface treatment (de-rusting, degreasing, aluminium etching) and water treatment. Chelating agents are thus used in the food industry, the cosmetics industry, the pharmaceutical industry, the paper industry, the concrete industry and in various other industries. Sodium gluconate is sold worldwide and competing undertakings have a worldwide presence.

3 In 1995, total sales of sodium gluconate on a worldwide level were around EUR 58.7 million and sales in the European Economic Area (EEA) around EUR 19.6 million. At the material time, almost all of the sodium gluconate produced worldwide was in the hands of five undertakings namely (i) Fujisawa Pharmaceutical Co. Ltd ('Fujisawa'), (ii) Jungbunzlauer AG, (iii) Roquette Frères SA ('Roquette'), (iv) Glucona and (v) Archer Daniels Midland Co. ('ADM').

4 In March 1997, the United States Department of Justice informed the Commission that following an investigation into the lysine and citric acid markets, an investigation had also been opened into the sodium gluconate market. In October and December 1997 and February 1998, the Commission was informed that Akzo, Avebe, Glucona, Roquette and Fujisawa acknowledged that they had participated in a cartel to fix the price of sodium gluconate and to allocate sales volumes of the product in the United States and elsewhere. Pursuant to agreements entered into with the United States Department of Justice, those undertakings were fined by the United States authorities.

5 On 18 February 1998, the Commission sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962 — First Regulation implementing Articles [81] and [82] of the Treaty (OJ English Special Edition 1959-1962, p. 87) to the main producers, traders and customers of sodium gluconate in Europe.

6 Following receipt of the request for information, Fujisawa approached the Commission and announced that it had cooperated with the United States authorities in the course of the investigation described above and that it wished to cooperate with the Commission under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). On 12 May 1998, following a meeting with the Commission on 1 April 1998, Fujisawa supplied a written statement and a file of documents providing a summary of the cartel's history and a number of documents.

7 On 16 and 17 September 1998, the Commission carried out inspections pursuant to Article 14(3) of Regulation No 17 at the premises of Avebe, Glucona, Jungbunzlauer and Roquette.

8 On 2 March 1999, the Commission sent detailed requests for information to Glucona, Roquette and Jungbunzlauer. By letters of 14, 19 and 20 April 1999, those undertakings made it known that they wished to cooperate with the Commission and provided it with certain information about the cartel. On 25 October 1999, the Commission sent additional requests for information to ADM, Fujisawa, Glucona, Roquette and Jungbunzlauer.

9 On 17 May 2000, the Commission, on the basis of the information supplied to it, sent a statement of objections to Avebe and the other undertakings concerned for

infringement of Article 81(1) EC and Article 53(1) of the Agreement on the EEA ('the EEA Agreement'). Avebe and all the other undertakings concerned submitted written observations in response to the Commission's objections. None of the parties requested an oral hearing, nor did they substantially contest the facts as set out in the statement of objections.

10 On 11 May 2001, the Commission sent additional requests for information to Avebe and the other undertakings concerned.

11 On 2 October 2001, the Commission adopted Decision C(2001) 2931 final relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/E-1/36.756 — Sodium Gluconate; 'the Decision'). The Decision was notified to Avebe by letter of 10 October 2001.

12 The Decision includes the following provisions:

'Article 1

[Akzo], [ADM], [Avebe], [Fujisawa], [Jungbunzlauer] and [Roquette] have infringed Article 81(1) EC and — from 1 January 1994 onwards — Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the sodium gluconate sector.

The duration of the infringement was as follows:

— in the case of [Akzo], [Avebe], [Fujisawa] and [Roquette], from February 1987 to June 1995,

— in the case of [Jungbunzlauer], from May 1988 to June 1995,

— in the case of [ADM], from June 1991 to June 1995.

...

Article 3

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

(a) [Akzo]	EUR 9 million
(b) [ADM]	EUR 10.13 million
(c) [Avebe]	EUR 3.6 million
(d) [Fujisawa]	EUR 3.6 million
(e) [Jungbunzlauer]	EUR 20.4 million
(f) [Roquette]	EUR 10.8 million.'

13 In recitals 296 to 309 of the Decision, the Commission analysed the links existing between Glucona and its parent companies, Avebe and Akzo, during the period concerned by the cartel. It noted in particular that, until 15 August 1993, Glucona had been managed jointly by representatives of Avebe and Akzo, but that, as from that date, due to a restructuring of Glucona, it had been managed solely by a representative of Avebe. The Commission nevertheless found that it was appropriate to hold Avebe and Akzo liable for the anti-competitive conduct of their subsidiary for the entire relevant period and therefore to address the Decision to them.

14 In calculating the amount of the fines, the Commission applied in the Decision the methods 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.

15 First, the Commission determined the basic amount of the fine by reference to the gravity and duration of the infringement.

16 In that context, as regards the gravity of the infringement, the Commission found, first, that, taking into account the nature of the infringement, its actual impact on the EEA sodium gluconate market and the scope of the relevant geographic market, the undertakings concerned had committed a very serious infringement (recital 371 of the Decision).

17 Next, the Commission considered that it was necessary to take account of the actual economic capacity of the offenders to cause significant damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, taking as its basis the relevant undertakings' worldwide turnover from the sale of sodium gluconate in 1995, the last year of the infringement, figures which were communicated by the parties to the Commission during the

administrative procedure, the Commission divided the undertakings into two categories. In the first category, it placed the undertakings which, according to the data in its possession, held worldwide shares in the sodium gluconate market above 20%, namely Fujisawa (35.54%), Jungbunzlauer (24.75%) and Roquette (20.96%). The Commission set a starting amount of EUR 10 million for those undertakings. In the second category, it placed the undertakings which, according the data in its possession, held worldwide shares in that market of below 10%, namely Glucona (approximately 9.5%) and ADM (9.35%). The Commission set the starting amount of the fine at EUR 5 million for those undertakings, that is to say, for Akzo and Avebe, which jointly owned Glucona, at EUR 2.5 million each (recital 385 of the Decision).

18 In order to ensure that the fine had a 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 also adjusted the starting amount. Consequently, taking account of the size and the worldwide resources of the undertakings concerned, the Commission applied a multiplier of 2.5 to the starting amount for ADM and Akzo and therefore increased that amount, so that it was set at EUR 12.5 million as regards ADM and EUR 6.25 million as regards Akzo (recital 388 of the Decision).

19 As regards the duration of the infringement committed by each undertaking, the starting amount was moreover increased by 10% per year, i.e. an increase of 80% for Fujisawa, Akzo, Avebe and Roquette, of 70% for Jungbunzlauer and of 35% for ADM (recitals 389 to 392 of the Decision).

20 Accordingly, the Commission set the basic amount of the fines at EUR 4.5 million as regards Avebe. As regards ADM, Akzo, Fujisawa, Jungbunzlauer and Roquette, the basic amount was set at EUR 16.88 million, EUR 11.25 million, EUR 18 million, EUR 17 million and EUR 18 million respectively (recital 396 of the Decision).

21 Second, on account of aggravating circumstances, the basic amount of the fine imposed on Jungbunzlauer was increased by 50% on the ground that the undertaking had acted as ringleader of the cartel (recital 403 of the Decision).

22 Third, the Commission examined and rejected the arguments of certain undertakings, including Avebe, that there were attenuating circumstances which should have applied in their case (recitals 404 to 410 of the Decision).

23 Fourth, under Section B of the Leniency Notice, the Commission allowed Fujisawa a 'very substantial reduction' (namely 80%) of the fine which would have been imposed if it had not cooperated. Finally, under Section D of that notice, the Commission allowed ADM and Roquette a 'significant reduction' (namely 40%) of the fine, and allowed Akzo, Avebe and Jungbunzlauer a 20% reduction (recitals 418, 423, 426 and 427 of the Decision).

Procedure and forms of order sought

24 Avebe brought the present action by application lodged at the Registry of the Court of First Instance on 17 December 2001.

25 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, put written questions to the parties to which they replied within the prescribed period.

26 The parties presented oral argument at the hearing on 17 February 2004.

27 Avebe claims that the Court should:

— annul Article 1 of the Decision in that it finds that it committed an infringement in the period between February 1987 and 15 August 1993;

— in the alternative, annul Article 1 of the Decision in that it finds that it committed an infringement in the period prior to 30 April 1990;

— in the alternative, annul Article 3 of the Decision in so far as it pertains to it;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application;

— order Avebe to pay the costs.

Law

A — *Introduction*

29 Avebe does not deny that the cartel infringed Article 81 EC. Nor does it deny that it must be held liable for the infringement for the period between 15 August 1993, the date from which it alone managed Glucona (see paragraph 13 above) and the end of the cartel. However, Avebe takes the view that the Commission could not validly make it liable for Glucona's infringement for the period prior to 15 August 1993.

30 In those circumstances, Avebe puts forward four pleas in law, alleging infringement, first, of the obligation to state reasons, second, of the rights of the defence, third, of Article 81(1) EC and Article 15(2) of Regulation No 17 and, fourth, of the principle of proportionality.

31 Before ruling on the merits of the various pleas put forward in this regard, the Court finds it appropriate to recall some of the points in the Commission's assessment, as is apparent from recitals 296 to 309 of the Decision.

32 In recital 296 of the Decision, the Commission began its analysis by stating that it '[was] obvious from the facts that Glucona did not decide independently upon its own conduct, but carried out the instruction given by its parent companies [ANC and Avebe]: all the executives of Glucona simultaneously held professional responsibilities in the parent companies'.

33 Then, in recitals 297 to 299 of the Decision, the Commission described Glucona's internal organisation as follows:

'(297) From 1 April 1972 until 15 August 1993, two Directors, respectively appointed by the parent companies, formed the Management Board of the partnership and were jointly responsible for Glucona's policy decisions and management. The representative of Akzo was responsible for sales and marketing, whereas the Avebe representative was in charge of production and R&D activities. Glucona also had a Supervisory Board made up of two representatives of each parent company. The position of Chairman of the Supervisory Board alternated between representatives of Akzo and Avebe.

(298) On 15 August 1993, a change occurred in the Glucona management structure, with the appointment of a single Managing Director. An executive from Avebe was appointed to this function.

(299) The documentary evidence shows that the Director appointed by Akzo played a prominent role in the management of Glucona until August 1993. During the relevant period, Glucona was located at Akzo's premises in Amersfoort (Netherlands). In all the contemporaneous documents in the possession of the Commission, the cartel participants refer to Glucona by the name "Akzo". Indeed, owing to their specific area of responsibility (marketing and sales), Akzo representatives were more directly involved in the cartel activities, at least until August 1993. From this date onwards, an Avebe executive was appointed Managing Director of Glucona, and there is evidence that he actively took part [in] the cartel after that date. To this end, he was briefed by his predecessor in the course of the summer 1993.'

34 In recital 300 of the Decision, the Commission summarised as follows its assessment in the statement of objections regarding the question of holding the undertakings in question liable for the infringement:

'In the statement of objections, the Commission announced its intention to hold Akzo and Avebe jointly responsible for the whole duration of the infringement. Given the dual management structure set up by the parent companies, with respect to their equal stake in the joint venture and to the joint liability of the two co-directors, the Commission held that it can be assumed that they had similar influence over the conduct of the joint venture and equal information about Glucona's involvement in the cartel.'

35 In recitals 301 to 305 of the Decision, the Commission summarised the comments submitted on this point by Akzo and Avebe in their reply to the statement of objections. In particular, in recital 301 of the Decision, the Commission noted the following:

'In its reply to the statement of objections, Akzo agreed with the Commission's approach and confirmed that Avebe was always kept informed of the involvement of Glucona in the sodium gluconate cartel: "while it is true that the Akzo representative on the Management Board was responsible [for] marketing and sales and the Avebe representative for production and research and development, Avebe was nevertheless kept constantly informed about the anti-competitive agreements entered into by Glucona and bore just as much responsibility for them". Akzo adds that "Avebe was fully aware of the anti-competitive agreements entered into by Glucona, even though it was not itself party to the cartel agreement before 1993".'

36 In recital 306 of the Decision, the Commission acknowledged 'that, to its knowledge, Avebe [had] itself never [taken] part in multilateral cartel meetings prior to October 1993' and that 'this [was] even conceded by Akzo, which acknowledge[d] that "[Avebe] was not itself party to the cartel agreement before 1993"'. The Commission added, however, 'that it [was] beyond reasonable doubt that the Avebe board members of Glucona were informed of the fact that Glucona was engaged in anti-competitive practices'.

37 In recitals 307 and 308 of the Decision, the Commission referred to the following matters in support of this finding:

— first, the Commission noted that, until August 1993, the two directors of Glucona, who had been appointed by Akzo and Avebe respectively, were jointly responsible for the management of Glucona and that, through those two directors, Akzo and Avebe participated on an equal footing in Glucona's Management and Supervisory Boards;

— second, the Commission relied on a note of 1 May 1990 from a Board Member of Avebe concerning a meeting held on 30 April 1990 with representatives of ANC and ADM ('the note of 1 May 1990'). That note bore the heading 'Discussion with ADM concerning sodium gluconate' and was addressed to a number of Avebe Board Members, including the one who, at the time, was the Glucona director appointed by Avebe. The Commission inferred from the content of that note 'that Avebe could not have been ignorant that Glucona was involved in attempts to curb competition on the market';

— third, the Commission noted that, when, on 15 August 1993, Avebe had taken over sole management of Glucona, 'Avebe's representative did not take any

initiative to put an end or at least to object to the anti-competitive practices of which they had by then been made fully aware', but that, on the contrary, 'Avebe ensured continuity and methodically took the lead from Akzo, asking for a thorough briefing on the state of art of the cartel'.

38 Lastly, recital 309 of the Decision reads as follows:

'On the basis of the above the Commission considers that for the entire relevant period the two parent companies must be held responsible for the anti-competitive conduct of their subsidiary, and therefore addresses the present Decision to both Avebe and Akzo.'

B — *Infringement of the obligation to state reasons*

39 Avebe claims first, that, in recital 306 of the Decision, the Commission stated that 'there [was] no doubt that the Avebe board members of Glucona were informed of the fact that Glucona was engaged in anti-competitive practices'. Second, it states that, in recital 308 of the Decision, the Commission noted that, when, on 15 August 1993, it appointed one of its staff as a the director taking on full responsibility for the management of Glucona, he had been informed of the existence of the cartel by the Akzo member who had hitherto been responsible for the management of Glucona. It follows, according to Avebe, that the statement of reasons in the Decision on the issue of whether it was informed of the cartel before 15 August 1993 is contradictory or, at the very least, incomplete.

40 The Commission denies that the statement of reasons in the Decision is contradictory or insufficient with respect to the issue of whether Avebe had been informed of the cartel before 15 August 1993.

41 The Court notes that it is settled case-law that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure challenged, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87; and Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 155).

42 The Court notes, first, that Avebe's complaint that there is a contradiction between recitals 306 and 308 of the Decision (see, on that point, paragraphs 36 and 37 above) is based on an incomplete reading of the Decision. In recital 308 of the Decision, the Commission did not state, despite what Avebe appears to suggest, that, on 15 August 1993, the new director of Glucona had been informed for the first time of the existence of the cartel, which would indeed have been in contradiction with recital 306 of the Decision, where the Commission stated that the Avebe board members of Glucona were informed of the fact that Glucona was engaged in anti-competitive practices. On the contrary, recital 308 of the Decision indicates that, on that date, Avebe's representative, as new director of Glucona, asked to be given 'a thorough briefing on the state of art of the cartel'.

43 Next, regarding Avebe's criticism that the Commission gave insufficient reasons in its decision regarding whether Avebe was informed of the cartel prior to 15 August 1993, recital 296 et seq. of the Decision (see also paragraphs 32 to 38 above) indicate that the Commission took the view that Avebe ought to have been aware of the anti-competitive conduct of its subsidiary, since, until August 1993, the two Glucona codirectors were jointly responsible for its management and that Akzo and Avebe participated strictly equally in Glucona's Management and Supervisory Boards (recital 307 of the Decision). The Commission further stated that it considered that its position was supported by the content of the note of 1 May 1990 and the fact that, after having reassumed full responsibility for the management of Glucona on 15 August 1993, Avebe's representative had not taken any initiative to put an end or

at least to object to the anti-competitive practices of which it had by then been made fully aware but, on the contrary, Avebe ensured continuity and methodically took the lead from Akzo, asking for a thorough briefing on the state of art of the cartel (recitals 307 et 308 of the Decision).

44 It follows that it is apparent to the requisite legal standard from the recitals of the Decision that, in order to find that Avebe was liable for the infringement, the Commission relied, first, on Glucona's legal structure and, second, on various facts concerning the relations between the parent companies, Akzo and Avebe, and their joint venture, Glucona.

45 Consequently, the plea alleging infringement of the obligation to state reasons must be rejected.

C — *Infringement of the rights of the defence*

1. *Preliminary remarks*

46 This plea comprises two parts. First, Avebe criticises the Commission for having taken into account a statement made by Akzo in its reply to the statement of objections ('Akzo's statement'), without allowing Avebe to state its position on that statement, thereby violating its rights of defence. Second, Avebe criticises the Commission for having failed to take the measures necessary to obtain a copy of a statement allegedly made by a representative of Akzo to the United States Department of Justice ('Akzo's alleged statement to the United States authorities').

2. *Akzo's statement*

47 Avebe observes that recitals 301 and 309 of the Decision (see paragraphs 35 and 38 above) indicate that the Commission relied on Akzo's statement in order to find that Avebe had been aware of the cartel before 1993. Avebe claims that the Commission did not afford it the opportunity to submit its comments on Akzo's statement during the administrative procedure. Accordingly, in Avebe's view, the Commission could not rely on that statement to establish that Avebe had been made aware of the cartel before 1993, without violating the rights of the defence.

48 The Commission contends that it never used Akzo's statement, reproduced in recital 301 of the Decision, as evidence against Avebe, but that it reproduced it merely as part of its summary of the parties' arguments.

49 The Court notes that the observance of the rights of the defence constitutes a fundamental principle of Community law which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure. It requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39, upheld on appeal in Case C-234/92 P *Shell* v *Commission* [1999] ECR I-4501).

50 Next, it should be borne in mind that, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1)

EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes incriminating evidence against the various parties alleged to have participated in the infringement (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 386, and case-law cited).

51 Those principles also apply when the Commission relies on a passage from a reply to a statement of objections to hold an undertaking liable for an infringement.

52 It is for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 71 to 73).

53 In the present case, it is apparent from recitals 296 to 309 of the Decision that the Commission structured its analysis as follows: in recitals 297 to 299, it described Glucona's organisation; in recital 300, it reiterated its preliminary findings, referred to in the statement of objections, regarding the question of holding the undertakings concerned liable for the infringement; in recitals 301 to 305, it summarised the observations submitted on that point by the undertakings concerned; lastly, in recitals 306 to 309, it conducted its own legal assessment (see, by way of summary, paragraphs 32 to 38 above).

54 The Commission noted Akzo's statement, relied on by Avebe, in recital 301 of the Decision, that is, in the part of the Decision summarising the observations of those undertakings on its preliminary finding in the statement of objections relating to the question of holding the undertakings concerned liable for the infringement.

55 Avebe does not even allege that the Commission referred to Akzo's statement in the part of its analysis concerning the legal assessment of the links between Glucona and its parent companies, Avebe and Akzo.

56 It follows that, contrary to Avebe's assertions, the Commission did not rely on Akzo's statement. In recitals 307 and 308 of the Decision (see paragraphs 36 and 37 above), the Commission referred to Glucona's legal structure and also to various factual aspects concerning the relationship between the parent companies, Akzo and Avebe, and their joint venture, Glucona. Avebe does not deny that it had access to the documents relied on by the Commission on that point. In formulating, in recital 309 of the Decision, the conclusion of its legal assessment using the words 'on the basis of the above', the Commission thus referred only to recitals 307 and 308 of the Decision and not to recital 301 thereof, in so far as Avebe's participation is concerned.

57 For the sake of completeness, the Court finds that, even if the Commission did rely on Akzo's statement, quod non, Avebe has not demonstrated, in accordance with the case-law cited in paragraph 52 above, that the result at which the Commission arrived in the Decision would have been different if that statement by Akzo were to be disallowed as evidence against Avebe.

58 Accordingly, the first part of the plea relating to Akzo's statement is based on an incorrect premise and therefore cannot be accepted.

3. *Akzo's alleged statement to the United States authorities*

(a) Arguments of the parties

59 In its reply, Avebe claims that, when Akzo was questioned by the United States Department of Justice as part of the proceedings brought in the United States undertaken in relation to the cartel, a representative of Akzo stated that Avebe had not been informed of the cartel prior to 15 August 1993. Avebe states that it informed the Commission of that alleged statement during the administrative procedure. According to Avebe, given that it could not itself obtain a copy of that statement in order to be able to submit it to the Commission, and since that statement could have been exculpatory evidence for Avebe, the Commission should have obtained a copy of it from the United States authorities. Following written questions from the Court, Avebe explained that it had not expressly asked the Commission to obtain that document because it did not yet know at that time that the Commission would rely on Akzo's statement, considered in paragraphs 49 to 58 above. It was only in the Decision that it was confronted with Akzo's statement, which contradicted the statement allegedly made by Akzo to the United States authorities.

60 According to the Commission, this part of the plea was not raised in the application and must therefore be dismissed as inadmissible. The Commission contends that this part of the plea is, in any event, unfounded.

(b) Findings of the Court

Admissibility

61 Under Article 48(2) of the Rules of Procedure, the introduction of a new plea in law in the course of proceedings is not allowed unless it is based on matters of law or of

fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a submission previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. The same applies to a submission made in support of a plea in law (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156).

62 In the present case, Avebe raised the issue of an alleged statement by Akzo to the United States authorities, by way of plea alleging infringement of the rights of the defence, only at the stage of the reply.

63 Avebe had, however, already raised essentially the same complaint as part of another plea in its application (see paragraph 59 above). In its application, it had put forward that line of argument, even though, formally speaking, it did so only in the part of its observations relating to the plea alleging infringement of Article 81 EC and of Article 15(2) of Regulation No 17.

64 Accordingly, and contrary to the Commission's assertions, it did not raise a new plea at the reply stage, but rather relied on the same plea, this time formally presented in the part of the observations concerning infringement of the rights of the defence.

65 Accordingly, the merits of this part of the plea must be examined.

Substance

66 It must be borne in mind that, regarding exculpatory documents, the case-law states that, in adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 81). In particular, having regard to the general principle of equality of arms, it is not acceptable for the Commission to be able to decide on its own whether or not to use them against the applicant, when the applicant had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence (*Solvay* v *Commission*, paragraph 83, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 111).

67 According to the case-law, where it is established that during the administrative procedure the Commission did not disclose to the applicants documents which might have contained exculpatory evidence, there will be an infringement of the rights of the defence only if it is shown that the administrative procedure might have had a different outcome if the applicant had had access to the documents in question during that procedure (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 56, and *Solvay* v *Commission*, paragraph 66 above, paragraph 98). Where those documents are in the Commission's investigation file, such an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure (*Solvay* v *Commission*, paragraph 66 above, paragraph 96). By contrast, where the exculpatory documents in question are not in the Commission's investigation file, an infringement of the rights of the defence may be found only if the applicant expressly asked the Commission for access to those documents during the administrative procedure, failing which the applicant's right to put forward that plea is barred in any action for annulment brought against the final decision (*Cimenteries CBR and Others* v *Commission*, paragraph 50 above, paragraph 383, 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 340).

68 In the present case, it is common ground that, as is apparent from recital 300 of the Decision (see paragraph 34 above), in the statement of objections the Commission declared its intention to find Akzo and Avebe jointly liable for the entire duration of the infringement.

69 Likewise, it is apparent from the answers from the parties to some of the written questions from the Court that, in its reply to the statement of objections, Avebe denied that it was aware of the cartel before August 1993, stating that, in the proceedings in the United States, it had been found guilty only of an infringement for the period after August 1993. In a footnote in the reply to the statement of objections, Avebe stated that 'as far as it is aware ... the Akzo representative [had] also stated at the hearings held in those proceedings that Avebe [had] not [been] aware of the cartel prior to August 1993'.

70 Moreover, further to written questions from the Court, Avebe submitted an exchange of correspondence between its counsel and the United States Department of Justice, from which it is apparent that, as from July 2000, Avebe had made a number of attempts to obtain from them a copy of Akzo's alleged statement to the United States authorities. Avebe wished to lodge it with the Commission as part of the administrative procedure. However, according to that exchange of correspondence, the United States authorities rejected those requests, stating that, if necessary, they would be prepared to supply them to the Commission if the Commission requested them to do so.

71 In such a situation, without its being necessary to examine the issue of whether the Commission had to take appropriate measures to obtain a copy of Akzo's alleged statement to the United States authorities and even supposing that it was able to do so, the fact remains that Avebe cannot criticise the Commission for having failed to so act in order to obtain a document which might possibly have constituted exculpatory evidence for Avebe.

72 As stated in paragraph 67 above, following the answers given by the United States authorities, Avebe should have at least made an express request to the Commission to obtain that document. As is apparent from paragraph 69 above, however, Avebe merely made a simple and vague reference to that alleged statement in a footnote; this cannot be regarded as being an express request as contemplated in the case-law referred to above.

73 Avebe is incorrect in justifying the lack of express request during the administrative procedure by claiming that it was only in the Decision that it had been confronted with Akzo's statement contradicting Akzo's alleged statement to the United States authorities. Avebe does not deny that it was already clear from the statement of objections that the Commission intended to find Akzo and Avebe jointly liable for the entire duration of the infringement. Avebe should have known then that it was for it, in its reply to the statement of objections, to adduce all relevant evidence to demonstrate that it was not aware of the cartel before August 1993. Likewise, it is apparent from the exchange of correspondence between its counsel and the United States Department of Justice, submitted to the Court by Avebe, that its counsel were well aware that, during the administrative procedure before the Commission, Akzo might have claimed that Avebe had been informed of the cartel throughout its existence. Moreover, as has already been held in paragraph 56 above, the Commission did not rely on Akzo's statement, but only referred to it in the part of its Decision relating to the summary of the parties' arguments.

74 In the light of the foregoing, the second part of this plea, relating to Akzo's alleged statement to the United States authorities, must also be rejected.

75 Consequently, the plea alleging infringement of the rights of the defence must be rejected.

D — *Infringement of Article 81(1) EC and Article 15(2) of Regulation No 17*

1. *Introduction*

76 Avebe claims, principally, that the Commission committed errors of law in holding Glucona and not Akzo liable for the infringement for the period prior to 15 August 1993. In the alternative, Avebe claims that, even if Glucona could validly be held liable for that period, Avebe cannot be held liable for Glucona's unlawful conduct.

2. *The Commission could not hold Glucona liable for the infringement committed before 15 August 1993*

(a) Preliminary considerations

77 It is appropriate to consider whether, as Avebe claims, regarding the period prior to 15 August 1993, the infringement was committed not by Glucona, the joint venture of the parent companies Akzo and Avebe, but only by Akzo.

78 Avebe does not deny that Glucona was an undertaking for the purposes of Community competition law, even though its legal form did not give it its own legal personality. According to settled case-law, in competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991]

ECR I-1979, paragraph 21, and Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission* [2000] ECR II-1807, paragraph 36).

79 Avebe considers, however, that, in the specific circumstances of the present case, the infringement, for the period prior to 15 August 1993, was committed by Akzo and not by Glucona. In support of this point Avebe relies on the provisions of the joint venture agreement concluded by Akzo and Avebe in 1972 relating to the creation of Glucona ('the joint venture agreement of 1972') and on various facts concerning the relationship between it, Akzo and Glucona.

(b) The joint venture agreement of 1972

Arguments of the parties

80 Avebe begins by stating that, under a cooperation agreement concluded in 1966 with the company Noury & van der Lande relating to the production and sale of various products, including sodium gluconate, it had already been responsible for, inter alia, the production of that product, whereas the other company had dealt with, inter alia, the sale of that product and was therefore responsible for conduct on the market.

81 Avebe states that, after the takeover of Noury & van der Lande by Akzo, the distribution of tasks remained essentially unchanged until 15 August 1993, when Avebe took over the management of Glucona. According to Avebe, the relevant provisions of the joint venture agreement of 1972 indicate that it was charged with production whilst Akzo was in charge of sales of sodium gluconate.

82 First, according to Avebe, it is apparent from the joint venture agreement of 1972 that Glucona was managed by two directors, one from Akzo and the other from Avebe, so that the two directors were in charge of matters which related most to their respective partners, that they maintained separate contacts with them and that each paid little if any attention to the matters falling within the sphere of competence of the other. Moreover, under the joint venture agreement of 1972, the sale of sodium gluconate was entrusted to Akzo, which defined and carried out Glucona's sales policy, so that Akzo itself had no decisive influence over Glucona's conduct on the market. Quite the contrary, Akzo's sales activities for Glucona were an integral part of Akzo's sales organisation, as Glucona did not have a sales organisation itself.

83 Second, according to Avebe, the fact that, under the joint venture agreement of 1972, Akzo received a payment for sales of sodium gluconate indicates that sales of the product were, in reality, done by Akzo without involvement by Glucona.

84 Third, Avebe claims that, contrary to the Commission's assertions, Akzo cannot, on the basis of the joint venture agreement of 1972, be regarded as being a mere agent having acted solely on behalf of Glucona. It states that the joint venture agreement of 1972 provided that a division of tasks could be established between the partners, which did take place in the present case. According to Avebe, Akzo took charge — albeit, on behalf and at the risk of Glucona but, for the remainder, independently and on its own behalf — of the marketing and sales activities for sodium gluconate and that those activities were part of Akzo's organisation.

85 Avebe maintains, against that background, that the fact that Akzo took care of sales on behalf and at Glucona's risk and peril does not necessarily mean that Glucona had to be regarded as being the undertaking which committed the infringement provided for in Article 81(1) EC. In order to establish who infringed Article 81(1) EC

in the present case, the question is not to determine on whose behalf and at whose risk and peril those activities were carried out, but rather — essentially — to identify which party actually carried out the activities by which the infringement was committed.

86 The position advocated by the Commission would lead to a situation where principals of an agent operating for a number of undertakings who infringes Article 81(1) EC would be held liable for the infringement committed by that agent in the course of his activities. According to Avebe, such is the case when the principal has instructed the agent to commit the infringement or when the principal is aware of the conduct of his agent and does not instruct him to end the infringement. However, when the agent commits the infringement without his principal's knowledge, the latter cannot be held liable for the infringement. Avebe further states that the Commission has not established that Glucona gave Akzo a mandate to take part in the cartel or that Glucona as such was aware of Akzo's participation in the cartel. Avebe adds that the fact that one of Glucona's directors — the one from Akzo — was aware of the infringement is not sufficient to hold Glucona liable for it, as that director was performing his duties in his capacity as an Akzo representative charged with the sale of Glucona's products.

87 Avebe acknowledges that it cannot be submitted, as a general rule, that a principal cannot be held liable for the conduct of an agent who is also a director of that principal or who performs another management function in that principal's organisation. In the present case, however, there are reasons to distinguish between the function of agent, on the one hand, and that of director in the principal's organisation, on the other. First, the reasons for finding that Akzo is an agent are not based on considerations of avoiding any liability for infringements of Article 81(1) EC, but relate to the fact that Akzo already had a sales organisation for sodium gluconate, as evidenced by the joint venture agreement of 1972. Second, in the present case, the agent, Akzo, is a major corporation, one representative of which held part-time the post of director with Glucona, but who otherwise carried on business within his own company's organisation.

88 The Commission contends that Avebe's line of argument cannot be accepted.

Findings of the Court

89 First, Article 1 of the joint venture agreement of 1972 indicates that Avebe and Akzo created the joint venture Glucona for the purpose of 'the manufacture, sale and marketing for joint account' of certain products, including sodium gluconate.

90 Moreover, under Article 5(1) of the joint venture agreement of 1972, the 'partners of Glucona were empowered only jointly to act and sign on behalf of the company, to bind the company towards third parties and to receive and spend funds on behalf of the company'. Under Article 5(2) of the same agreement, the two partners, Akzo and Avebe, were each to appoint representatives who 'were to exercise jointly the powers referred to in paragraph 1 for the partner concerned, without prejudice to the right of each partner to exercise those powers itself'. Those representatives were to maintain 'regular contact with each other and discuss with [Glucona's] directors any matters of interest to the company'. Under Article 5(3) of the joint venture agreement of 1972, two managers, appointed by Akzo and Avebe, were entrusted with the day-to-day management. Those directors were to devote a considerable part of their time to Glucona matters. They were to 'work in close collaboration and were jointly responsible for the policy followed' and had to 'report regularly to their representatives on the policy followed and provide them with all relevant information on that matter'.

91 Lastly, Article 13(2) of the agreement provided that 'unless both partners prefer to opt for another scheme, [Glucona] entrusted [Akzo] with the sale of its products' and was to reimburse Akzo for a proportionate part of the costs of the latter's sales structure on a pro rata basis for the time devoted to the sale of Glucona's products.

92 It is apparent from those clauses of the joint venture agreement of 1972 that, although Akzo was 'entrusted' with day-to-day matters relating to the sale of sodium gluconate on behalf of Glucona, Avebe cannot validly claim that, solely by virtue of the provisions of the joint venture agreement of 1972, Akzo alone was liable for the infringement on the ground that it alone was responsible for Glucona's marketing.

93 Given Glucona's legal structure, Akzo and Avebe defined Glucona's policy jointly. That meant that, through their representatives and Glucona's directors, Akzo and Avebe had to collaborate on a regular basis. Accordingly, the Court finds that, under the joint venture agreement of 1972, Avebe was not uninvolved in the drawing-up and implementation of the marketing policy for sodium gluconate.

94 Avebe's statements that the two directors concentrated mostly, if not exclusively, on matters relating primarily to the sphere of competence allocated to the partner which had appointed them, maintained separate contact with them and paid little or no attention to the matters falling within the sphere of competence of the other director, are not reflected in the provisions of the joint venture agreement and are even partly contradicted by them. As has just been pointed out, under the joint venture agreement of 1972 Akzo and Avebe were jointly responsible for drawing up Glucona's policy, on which they were to collaborate regularly through their representatives and Glucona's directors.

95 Moreover, even if, as maintained by Avebe, the provisions of the joint venture agreement of 1972, in particular Article 13(2) and Article 14(1), were to be interpreted as meaning that the director appointed by Akzo was to take care of marketing sodium gluconate in his capacity as representative of Akzo, charged with the sale of Glucona's products, the fact remains that, given the legal situation created

by the joint venture agreement of 1972, the actions of that director, appointed by Akzo, could be attributed to Glucona.

96 Accordingly, solely on the basis of the provisions of the joint venture agreement of 1972, for the purposes of application of Article 81 EC, the Commission could consider, without committing a manifest error, that all of the members of the Board of Glucona were aware of that company's anti-competitive practices.

97 In such a situation, it was for Avebe to prove, in the administrative procedure and using a body of convergent and convincing evidence, that, despite that legal situation, only Akzo was aware of and decided on Glucona's unlawful conduct.

(c) Different factual items

98 Avebe puts forward six factual items in support of its contention that it was not informed of the existence of the cartel.

99 First, Avebe claims that its representatives never participated in meetings of the cartel before October 1993.

100 The Commission has not put forward any specific arguments on this point.

101 The Court notes that the Commission does not deny this point and indeed acknowledged it in recital 306 of the Decision. However, given the distribution of tasks provided for in the joint venture agreement of 1972, together with the clauses of that agreement providing for joint empowerment of the partners and guaranteeing each partner of Glucona participation and information on the activities undertaken by the other party (see paragraph 90 above), this does not lead to the conclusion that the representatives of Avebe in Glucona and, therefore, of Avebe itself, could not have been aware of the unlawful conduct.

102 Second, Avebe contends that the Commission could not validly rely on the note of 1 May 1990 in recital 307 of the Decision. It refers to the fact that it had already stated in its reply to the statement of objections that the meeting to which that note pertained was wholly unrelated to the multilateral meetings of the cartel and was held as part of structural cooperation envisaged with ADM. Those discussions were not part of Glucona's regular sales operations, but concerned a structural change in Glucona's production in the United States. This explains why the director of Glucona appointed by Avebe was present there and why Avebe was also informed of the progress of the discussions with ADM, in its capacity as partner in Glucona.

103 The Commission contends that the note of 1 May 1990 makes it clear that it was Glucona — and not just Akzo — which was selling sodium gluconate, which engaged in conduct on that market, which took part in negotiations and which was considered a player in that market by the other members of the cartel.

104 The Court observes that the note of 1 May 1990 was drawn up by a member of the Board of Avebe concerning a meeting which had been held on 30 April 1990 with representatives of ANC and ADM. That note indicates that, at that meeting, the participants discussed the renewal of certain sodium gluconate supply contracts concluded by ADM.

105 Even if that meeting was unrelated to the multialteral meetings of the cartel, but was held, as maintained by Avebe, as part of structural cooperation envisaged with ADM, the fact remains, as rightly pointed out by the Commission, that that note shows that Avebe was not unaware of the issue of Glucona's marketing sodium gluconate. This finding is, moreover, supported by the fact that there was a draft agreement between Akzo, Avebe and ADM, which Avebe itself submitted to the Court, and from which it is apparent that Avebe and Akzo were to market sodium gluconate jointly in the United States. Nowhere in that document does it state that Avebe's role was limited to the production of sodium gluconate and that Akzo alone was to market that product.

106 Consequently, Avebe is incorrect in criticising the Commission for having relied on that note as factual evidence supporting the proposition that Avebe could not be unaware that Glucona was engaged in anti-competitive conduct.

107 Third, Avebe contends that the Commission was incorrect, in recital 308 of the Decision, to refer to unlawful conduct by Avebe when, on 15 August 1993, it took over full responsibility for the management of Glucona, and to infer therefrom that Avebe was liable for the infringement committed before that date. Such reasoning was rejected by the Court in Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 400 et seq.

108 According to the Commission, Avebe incorrectly relies on *Mayr-Melnhof* v *Commission*, paragraph 107 above, as that judgment concerned a situation which is different from the one at issue in the present case. In the present case, it referred to this fact, among others, merely to illustrate that, even before 15 August 1993, Avebe must have known that Glucona was participating in the cartel.

109 The Court notes, as rightly pointed out by the Commission, that in *Mayr-Melnhof* v *Commission*, paragraph 107 above, it was held that Mayr-Melnhof could be held liable for the conduct of one of its subsidiaries only as from the date it had taken over control of that subsidiary. In the present case, given the links of legal ownership and control established from the time Glucona was created, the issue was not whether Avebe was to be held liable for the conduct engaged in by a company at a time when it did not control that company. Consequently, Avebe cannot rely on that judgment in support of its line of argument.

110 That being so, even if, taken individually, Avebe's conduct does not suffice to demonstrate that when it took over the sole management of Glucona on 15 August 1993, it was already aware that Glucona was party to the cartel, the fact remains that the Commission cannot be criticised for having taken that element into account, in the light of other particularly plausible elements, including the joint liability of two co-directors of Glucona (see recital 307 of the Decision and paragraphs 90 to 96 above), in order to support its position.

111 Fourth, Avebe claims that, in the minutes of the meetings held within Glucona, no reference is made to the existence of the cartel. It follows that Glucona's organs did not approve Akzo's conduct, either expressly or tacitly, because they were not aware of it.

112 According to the Commission, the minutes indicate that the topics discussed during the meetings concerned the entire range of Glucona's operations.

113 The Court observes that, given the secret nature of the cartel, the fact that no written reference is made to the existence of the cartel in the minutes of the meetings held within Glucona is not a relevant argument for establishing that Avebe

was not or could not have been informed of that cartel or even less that Glucona's organs had not expressly or tacitly approved the anti-competitive conduct.

114 That being so, as correctly pointed out by the Commission, it is apparent from a number of the minutes that Avebe was kept informed of the commercial side of Glucona's operations, sometimes in detail, as evidenced by the reports of the meetings of 8 October 1991, 14 April and 10 December 1992 and 2 September 1993. By way of example, in the minutes of the meeting of 10 December 1992, the following is to be found in paragraph 8:

'The budget volume of sodium gluconate for 1993 is much lower than previously, given the market forces (ADM). Although volume is down, better prices are expected. Moreover, higher export refunds will be requested. This is due to the diluted nature of our raw materials. The emphasis will be on exports to countries outside the EC. For the first time in a number of years, the gross margin for sodium gluconate could reach the threshold of profitability. That is, however, partly due to a restructuring of fixed costs ...'

115 It is apparent from this that the topics discussed during those meetings concerned the entire range of Glucona's operations, including topics such as marketing strategy, market trends, and pricing and market share policy. Given that the cartel was an essential factor in shaping possible actions on the sodium gluconate market, it is completely out of the question that these topics could have been discussed without mentioning the existence of the cartel and the parameters resulting therefrom.

116 Accordingly, Avebe cannot rely on the minutes of Glucona meetings in support of its line of argument, either.

117 Fifth, Avebe refers to the fact that Glucona's commercial partners and competitors always identified Glucona with Akzo and never with Avebe, that Akzo used Akzo letterhead and not Glucona letterhead in its written correspondence with clients and that billing and collection took place through Akzo.

118 The Commission rejects this line of argument.

119 The Court finds, first, that Avebe's line of argument is contradicted by the draft agreement, referred to in paragraph 105 above, which mentions, as potential commercial partners of ADM for the marketing of sodium gluconate in the United States, not only Akzo, but also Avebe. In any event, even if it were established that Glucona's partners and competitors always identified that company with Akzo, the fact remains that this relates only to Glucona's external relations and the perception of the company by third parties. It does not, however, relate in any way to the question of whether, given the internal structure of Glucona's organisation, Avebe was or must have been informed of Glucona's anti-competitive conduct in the sodium gluconate market.

120 Accordingly, Avebe cannot rely on the above facts in support of its line of argument, either.

121 Sixth and lastly, Avebe claims that the director appointed by Akzo had his office in Amersfoort (Netherlands), in Akzo's building, whereas the director appointed by Avebe managed Avebe's plants on site in Ter Apelkanaal (Netherlands) and that those premises were situated approximately 200 kilometres from each other. It adds that the production and sale of sodium gluconate accounted for only a very small portion of both Avebe's and Akzo's operations.

122 The Commission did not put forward any specific arguments on this point.

123 The Court notes in this regard that the joint venture agreement of 1972 provided explicitly for close cooperation between the directors on all questions relating to the joint venture. Moreover, as stated in paragraph 115 above, the minutes of Glucona's meetings indicate that the topics discussed during those meetings concerned the entire range of Glucona's operations, including topics such as marketing strategy, market trends, and pricing and market share policy. Accordingly, the geographical distance between Akzo and Avebe is not a convincing argument for maintaining that the director appointed by Avebe was not aware of the anti-competitive conduct.

124 Nor is it relevant, as Avebe contends, that the production and sale of sodium gluconate accounted for only a very small portion of both Avebe's and Akzo's operations. Glucona was created for the purposes of the joint manufacture, sale and marketing of certain common products, including sodium gluconate, operations to which Glucona's directors were to devote a substantial portion of their time, pursuant to the joint venture agreement of 1972.

125 Consequently, Avebe is incorrect in putting forward these facts in support of its line of argument.

126 In the light of all the foregoing, the Commission correctly found that the various factual items put forward by Avebe did not lead to a finding that, despite the clarity of the legal framework governing the structure of the joint venture and the sharing of responsibilities among the partners, Avebe was not involved in the drawing-up and implementation of the marketing policy for sodium gluconate and, therefore, was not, or could not be, informed of Glucona's anti-competitive actions.

127 Accordingly, the Commission could validly find that the infringement had been committed by Glucona.

3. *The Commission could not have held Avebe liable for the infringement committed by Glucona*

(a) Arguments of the parties

128 Avebe claims essentially that, even if it is found that the anti-competitive conduct was committed by Glucona and not by Akzo, the Commission could not, in any event, hold Avebe liable for that conduct.

129 Avebe maintains that, according to settled case-law, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 26, and case-law cited). It follows that it is necessary to take into account not the formal legal structure of an undertaking, but rather its actual decision-making structure. In reiterating essentially the same arguments as those already put forward as part of the first part of this plea, Avebe considers that Glucona was not carrying out the instructions it gave to it, but that, on the contrary, it was Akzo which marketed sodium gluconate.

130 Moreover, in a situation where the unlawful conduct has been committed by an association without legal personality, the formal criterion that there be legal ties

between it and its parent company is not relevant. The only issue that matters in such a situation is whether Glucona and Avebe formed an economic unit, which was not the case because Glucona did not have a sales organisation; rather, most of its representatives performed their work as part of tasks they were performing for their other employer. Only where the parent company holds 100% of the shares in the subsidiary can the Commission assume that that subsidiary carries out, in all material respects, the instructions given to it by its parent company. Only in such a context is the Commission not required to check whether the parent company has actually exercised that power. In the present case, Avebe held only 50% of the shares in Glucona, whilst the other 50% were held by Akzo.

131 Avebe further relies on the judgment of this Court in Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, paragraphs 51 to 58. It observes that, in that case, the Court took account of the fact that an association of undertakings had received authority from its members to make all their sales of cartonboard and fixed uniform prices, whilst it was acting in the name of and on behalf of each of its members. Accordingly, in that case, the Court took into account the conduct which constituted the infringement and the direct relationship between that conduct and the undertaking which must be held liable for the infringement.

132 Avebe also claims that it is improbable that, on 15 August 1993, when the director appointed by Akzo informed the director appointed by Avebe of the existence of the structure of the cartel, Avebe was aware of that cartel. Avebe states that the Commission was informed of it by letter of 23 April 1999, but that it misinterpreted that information in stating, in the Decision, that Avebe had asked to be kept informed in detail about the situation concerning the cartel. Likewise, the Commission did not take account of the fact that, as indicated in paragraph 26 of the reply to the statement of objections, Avebe's representative in Glucona had informed Avebe's president at a later time, which refutes the assertion that Avebe was already aware of the cartel.

133 In its reply, Avebe adds that its position is supported by Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as interpreted by the European Court of Human Rights.

134 The Commission acknowledges that the case-law referred to by it did not concern a case such as the present one, where the infringement was committed by a cooperative association between two independent undertakings. However, referring essentially to the arguments put forward previously as part of the first part of this plea, the Commission submits that, in the present case, Avebe was able to have a decisive influence on Glucona's conduct on the market and, in particular, at any time terminate its participation in the cartel. In the light of the case-law (Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 80), that suffices for a finding that Avebe was jointly liable for the infringement and it is not necessary to prove whether it actually exerted such an influence over Glucona.

(b) Findings of the Court

135 First, it should be recalled that it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 117, and Case C-294/98 P *Metsä-Serla Oyj and Others* v *Commission* [2000] ECR I-10065, paragraph 27).

136 It must be pointed out in that regard that, according to that case-law and contrary to the Commission's assertions in paragraphs 48 to 52 of its statement in defence, the

Commission cannot merely find that an undertaking 'was able to' exert such a decisive influence over the other undertaking, without checking whether that influence actually was exerted. On the contrary, it follows from that case-law that it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraphs 118 to 122; Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraphs 95 to 99; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 527). In the case giving rise to the judgment in *Stora Kopparbergs Bergslags* v *Commission*, paragraph 129 above, relied on by the Commission, the Court of Justice recognised that when a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary's conduct. In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent (see, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 129 above, paragraphs 28 to 29, and Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission*, paragraph 134 above, paragraph 80).

137 Next, it must be borne in mind that, under the joint venture agreement of 1972, Glucona was created in the legal form of a 'vennootschap onder firma' (vof). It is common ground that, under Netherlands law, Glucona thus constituted a purely contractual entity without separate legal personality from its partners Akzo and Avebe, with each partner holding 50% of that entity. Moreover, under Article 5(1) of that agreement, both partners were empowered only jointly to act and sign on behalf of Glucona, to bind it towards third parties, to bind third parties to it, and to receive and spend funds on its behalf. According to Article 5(2), the two partners were each to appoint two representatives who 'were to exercise jointly the powers referred to in paragraph 1 for the partner concerned, without prejudice to the right of each partner to exercise those powers itself'. Those representatives were to maintain 'regular contact amongst themselves and discuss with [Glucona's] directors any matters of interest to the company'. Under Article 5(3) of that agreement, two managers, appointed by Akzo and Avebe, were entrusted with the day-to-day management. Those directors were to devote a considerable part of their time to Glucona matters.

They were to 'work in close collaboration and were jointly responsible for the policy followed' and had to 'report regularly to their representatives on the policy followed and provide them with all relevant information on that matter'. Lastly, given Glucona's legal structure, Akzo and Avebe assumed Glucona's commitments jointly and without limitation.

138 It is apparent from all of the foregoing that the joint venture agreement of 1972 established joint management power for Akzo and Avebe with respect to the commercial management of Glucona, with that power being exercised jointly and in permanent close collaboration, in all matters pertaining to Glucona, by two directors appointed by Akzo and Avebe respectively and controlled inter alia through the two representatives of those two partners. Given that joint management power and the fact that Akzo and Avebe each held a 50% stake in Glucona and, therefore, controlled all of its shares jointly, the Court finds that the situation is analogous to that in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission*, in which a single parent company held 100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary's conduct.

139 The Court finds that, taken together, the factual evidence referred to in paragraph 137 above provides a sufficient basis for the presumption that Akzo and Avebe determined jointly Glucona's course of action on the market to the point where Glucona was deemed not to have any real aunotomy in the matter. Moreover, as is apparent from the findings in paragraphs 92 to 126 above relating to the applicant's knowledge of Glucona's actions, the applicant has not adduced any evidence to rebut that presumption.

140 Lastly, the fact that the two partners, Akzo and Avebe, were jointly liable for Glucona's conduct, irrespective of its exact scope under Netherlands law, strengthens the presumption that the partners in fact determined Glucona's

marketing policy jointly. In those circumstances, it is definitely in the partners' interest to prevent their subsidiary from acting independently of their instructions, given the risk of legal proceedings or claims for damages from third parties in the event of unlawful conduct by their subsidiary.

141 It follows from the foregoing that, in the light of the close economic and legal links between Glucona, on the one hand, and Akzo and Avebe, on the other, which exercised actual joint control over Glucona, the Commission did not commit an error in finding that Avebe could be held liable for Glucona's unlawful conduct. It also follows therefrom that, contrary to the applicant's contentions, Glucona, on the one hand, and Akzo and Avebe, on the other, do form an economic unit as contemplated by the case-law referred to in paragraph 78 above, in the context of which the unlawful conduct of the subsidiary may be imputed to the parent companies, who become liable by virtue of the fact that they in reality control its marketing policy (see, to that effect, Case T-66/99 *Minoan Lines* v *Commission* [2003] ECR II-5515, paragraph 122).

142 Accordingly, the plea alleging infringement of Article 81(1) EC and Article 15(2) of Regulation No 17 must be rejected in its entirety.

E — *Infringement of the principle of proportionality*

143 Avebe claims that, even if it can be held liable for the infringement, when setting the basic amount of the fine relating to it, the Commission should have considered the role played in the cartel by Avebe prior to 15 August 1993 to be a mitigating circumstance.

144 The Commission contends that the fine imposed on Avebe was determined because of Glucona's conduct in the cartel and that, in that context, it took account of the specificities of its conduct. According to the Commission, there is no reason to reduce the liability of a parent company because of the conduct of its subsidiary. This is all the more so because Glucona did not have a legal personality distinct from Avebe and Akzo. Avebe is therefore in no way being held liable for the conduct of another party but rather for the actions of a purely contractual entity which is part of its own legal personality and for which it is jointly and severally liable.

145 The Court finds, as pointed out by the Commission, that, because of Glucona's conduct, for which both Avebe and Akzo can be held liable, the Commission could validly impose a fine on Avebe without infringing the principle of proportionality. More specifically, in the light of the provisions of the joint venture agreement of 1972 creating the joint venture Glucona (see paragraphs 90 to 91 above), the Court finds that the role played by Avebe in the cartel prior to 15 August 1993 cannot be a mitigating circumstance which might affect the issue of whether the fine imposed on it was proportionate or not.

146 Accordingly, the plea alleging infringement of the principle of proportionality is unfounded.

147 As none of the pleas put forward against the Decision have been upheld, the action must be dismissed in its entirety.

Costs

148 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby

1. **Dismisses the action;**

2. **Orders the Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA to pay the costs.**

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon J. Azizi

Registrar President

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