JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

29 November 2005 *

In Case T-52/02,

Société nouvelle des couleurs zinciques SA (SNCZ), established in Bouchain (France), represented by R. Saint-Esteben and H. Calvet, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for the annulment of Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA

* Language of the case: French.

Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1) and, in the alternative, for reduction of the amount of the fine imposed on the applicant,

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

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2004,

gives the following

Judgment

Facts

1 Société nouvelle des couleurs zinciques SA ('the applicant' or 'SNCZ') is a French undertaking which produces zinc phosphate and zinc chromates and strontium and barium chromates. All those products are mineral, anti-corrosive pigments used in the paint and coatings industry. In 2000, SNCZ's worldwide turnover was EUR 17.08 million.

2 Although they may have slightly differing chemical formulae, zinc orthophosphates form a homogeneous chemical product, generically referred to as 'zinc phosphate'. Zinc phosphate, which is derived from zinc oxide and phosphoric acid, is widely used as an anti-corrosion mineral pigment in the paint industry. It is marketed either as standard zinc phosphate or as modified (or activated) zinc phosphate.

3 In 2001, virtually all of the world zinc production was controlled by the following five European producers: Dr Hans Heubach GmbH & Co. KG ('Heubach'), James M. Brown Limited ('James Brown'), SNCZ, Trident Alloys Ltd ('Trident') (formerly Britannia Alloys and Chemicals Ltd, hereinafter 'Britannia') and Union Pigments AS (formerly Waardals AS) ('Union Pigments'). Between 1994 and 1998, the annual value of standard zinc phosphate on the world market was approximately EUR 22 million and in the European Economic Area (EEA) market approximately EUR 15 to 16 million. In the EEA, Heubach, SNCZ, Trident (formerly Britannia) and Union Pigments had rather similar shares in the standard zinc phosphate market, of approximately 20%. James Brown had a significantly lower market share. Customers for zinc phosphate are the main paint manufacturers. The paint market is dominated by a few multinational chemical groups.

4 On 13 and 14 May 1998, the Commission carried out simultaneous and unannounced investigations under Article 14(2) 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), at the premises of Heubach, SNCZ and Trident. From 13 to 15 May 1998, acting at the request of the Commission under Article 8(3) of Protocol 23 to the Agreement on the European Economic Area (EEA), the Surveillance Authority of the European Free Trade Association (EFTA) carried out simultaneous and unannounced investigations at the premises of Union Pigments under Article 14(2) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

5 In the administrative procedure, Union Pigments and Trident informed the Commission of their intention to cooperate fully with it in accordance with the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice') and each made a statement concerning the cartel ('the Union Pigments statement' and 'the Trident statement').

6 On 2 August 2000, the Commission adopted a statement of objections addressed to the addressees of the decision being challenged in these proceedings (see paragraph 7 below), including the applicant. In its response of 1 December 2000 to the statement of objections, the applicant stated that it did not substantially contest the facts set out in it.

7 On 11 December 2001, the Commission adopted Decision 2003/437/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1). The decision which is the subject of the present judgment is the one that was notified to the undertakings concerned and is annexed to the application (hereinafter 'the contested decision'). That decision differs in certain respects from the one published in the *Official Journal of the European Union*.

8 In the contested decision, the Commission states that a cartel, consisting of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Union Pigments, existed between 24 March 1994 and 13 May 1998. The cartel was limited to standard zinc phosphate. The members of the cartel first adopted a market sharing agreement with sales quotas for the producers. Subsequently, they agreed on 'bottom' or 'recommended' prices at each meeting, which they generally followed. There was also a certain amount of customer allocation.

9 The operative part of the contested decision reads as follows:

'*Article 1*

Britannia ..., Heubach ..., James ... Brown ..., [SNCZ], Trident ... and [Union Pigments] have infringed the provisions of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement by participating in continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

(a) in the case of ... Heubach ..., James ... Brown ..., [SNCZ], ... and [Union Pigments]: from 24 March 1994 until 13 May 1998;

...

Article 3

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

(a) Britannia ...: EUR 3.37 million,

(b) ... Heubach ...: EUR 3.78 million,

(c) ... James ... Brown ...: EUR 940 000,

(d) ... [SNCZ]: EUR 1.53 million,

(e) ... Trident ...: EUR 1.98 million,

(f) [Union Pigments] ...: EUR 350 000.

...'

10 In calculating the fines, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines') and the Leniency Notice.

11 Thus, the Commission first set a 'basic amount' by reference to the gravity and duration of the infringement (see recitals 261 to 313 to the contested decision).

12 As regards the first factor, it considered that the infringement should be classified as 'very serious', having regard to the nature of the behaviour at issue, its actual impact on the zinc phosphate market and the fact that it had covered the whole of the common market and, following its creation, the whole EEA (recital 300 to the contest decision). Regardless of the very serious nature the infringement, the Commission explained that it would take into consideration the limited size of the product market (recital 303 to the contested decision).

13 The Commission applied 'differential treatment' to the undertakings concerned in order to take account of their effective economic capacity to cause significant damage to competition, and set the fine at a level ensuring that it had sufficient deterrent effect (recital 304 to the contested decision). For that purpose, it divided the undertakings concerned into two categories, according to their 'relative importance in the market concerned'. It thus relied on EEA-wide product turnover in the last year of the infringement achieved by each of those undertakings and took account of the fact that the applicant, Britannia (Trident as from 15 March 1997), Heubach and Union Pigments were 'the major producers of zinc phosphate in the EEA, with rather similar market shares above or around 20%' (recitals 307 and 308 to the contested decision). The applicant, together with Britannia, Heubach, Trident and Union Pigments, was placed in the first category ('starting point' of EUR 3 million). James Brown, whose market share was 'significantly lower', was placed in the second category ('starting point' of EUR 750 000) (recitals 308 and 309 to the contested decision).

14 As regards duration, the Commission considered that the infringement attributable to the applicant was of 'medium' duration, having lasted from 24 March 1994 to 13 May 1998 (recital 310 to the contested decision). It therefore increased the applicant's starting point by 40%, thus arriving at a 'basic amount' of EUR 4.2 million (recitals 310 and 313 to the contested decision).

15 The Commission then considered that it was inappropriate to conclude that there were any aggravating or attenuating circumstances (recitals 314 to 336 to the contested decision). It also rejected arguments concerning the 'poor economic context' in which the infringement took place and the specific characteristics of the undertakings concerned (recitals 337 to 343 to the contested decision). The Commission therefore set the amount of the fine at EUR 4.2 million 'prior to any application of the Leniency Notice' as regards the applicant (recital 344 to the contested decision).

16 The Commission also referred to the limit which, under Article 15(2) of Regulation No 17, the fine to be imposed on each of the undertakings concerned may not exceed. Thus, the amount of the fine prior to application of the Leniency Notice was reduced to EUR 1.7 million for the applicant and to EUR 700 000 for Union Pigments. The amounts of the fines of the other undertakings, prior to application of the Leniency Notice, were not affected by that limit (recital 345 to the contested decision).

17 Finally, the Commission granted the applicant a reduction of 10% under the Leniency Notice in view of the fact that it stated, in its response to the statement of objections, that it did not substantially contest the facts as set out in the latter (recitals 360, 363 and 366 to the contested decision). The final amount of the fine imposed on the applicant was thus EUR 1.53 million (recital 370 to the contested decision).

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 27 February 2002, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the Commission to produce a document and to answer a written question. The Commission complied.

20 The parties presented oral argument and answered questions put to them by the Court at the hearing on 2 July 2004.

21 The applicant claims that the Court of First Instance should:

— annul Article 3 of the contested decision;

— in the alternative, reduce the fine;

— order the Commission to pay the costs.

22 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Law

23 The applicant puts forward three pleas in support of its action. The first alleges infringement of Article 15(2) of Regulation No 17, the second alleges breach of the principle of proportionality and the third alleges breach of the principle of non-discrimination.

The first plea: infringement of Article 15(2) of Regulation No 17

Arguments of the parties

24 According to the applicant, by setting the starting point for its fine at EUR 3 million, representing 17% of its worldwide turnover, the Commission infringed Article 15(2) of Regulation No 17. That amount exceeds the maximum limit for fines laid envisaged by that provision.

25 First, the applicant claims that such arbitrary fixing of the starting point is contrary to the express terms of Article 15(2) of Regulation No 17. That provision allows the Commission to exceed the first threshold of one million units of account by setting a figure which may be as high as 10% of turnover, but it certainly does not allow a method which involves setting at the outset a starting point in excess of the upper limit of 10%, then reducing the amount of the fine in order to comply with that provision. The calculation method used in this case, whereby the starting point was set at EUR 3 million for the applicant, representing 17% of its worldwide turnover, is therefore illegal.

26 The applicant maintains that the Commission is distorting the terms of Article 15(2) of Regulation No 17 when it claims that that provision requires the fine eventually imposed on an undertaking to be 'reduced' in the event of its amount 'exceeding' the limit of 10% of turnover. In reality, that provision does not provide for reduction of that 10% limit but expressly envisages only cases where the fine, being initially fixed below the 10% limit, that is to say between EUR 1 000 and EUR 1 million, is increased to be 'brought up to 10%'.

27 The applicant does not agree that the judgment of the Court of First Instance in Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487 supports the Commission's thesis that the starting point may be set above the limit of 10% of the turnover of the undertaking concerned. In that judgment, the Court was concerned with the taking into account by the Commission of an 'intermediate amount' above the 10% limit 'during its calculation' and not with the 'starting point' thereof. Accordingly, it did not envisage that the starting point could be set above the 10% ceiling. That interpretation is confirmed by the fact that the Court held that only 'certain factors taken into consideration in its calculation ... do not affect the final amount of the fine' (paragraph 452). However, the method applied by the Commission involved all the 'factors' which, in principle, do not have repercussions on the final amount, the only exception being the reduction for 'cooperation', since the Commission made such a reduction only after reducing the intermediate amount in order to bring it within the 10% ceiling. Moreover, the applicant states that the judgment in *HFB and Others* v *Commission*, cited above, like all the other judgments cited by the Commission in connection with this plea, was published only in part in the Reports of Cases before the Court, the unpublished passages of the judgments in question having doubtless been regarded by the Community Court as not dealing with issues of principle.

28 Second, the applicant claims that the way in which the starting point was set in this case infringes Article 15(2) of Regulation No 17 in that the duration of the infringement cannot be taken into account in setting the amount of the fine imposed. It states that that provision requires the Commission to set the fine having regard 'both to the gravity and to the duration of the infringement'. In this case, after setting the starting point at EUR 3 million, which by far exceeded the upper limit of 10%, the Commission increased that amount by 40% to take account of the 'medium' duration of the infringement and thus raised it to EUR 4.2 million. However, as the

starting point set by reference to the gravity of the infringement far exceeded the upper limit of 10% of turnover, further adjustment by reference to duration is entirely impossible and is a just theoretical exercise merely feigning compliance with Article 15(2) of Regulation No 17.

29 As the Commission considered that the infringement imputed to the applicant was of medium duration, it should have taken account of that somewhat moderating factor, since a heavier fine would normally have had to be imposed if it had committed an infringement that was not only 'very serious' but also of 'long' or of 'very long' duration. The fact of imposing a penalty without taking account of the duration of the infringement is 'deeply detrimental' to competition policy, since undertakings, in particular small or medium-size undertakings (SMEs), would have no incentive to limit the duration of their participation in an infringement.

30 As regards the relevance of the *HFB and Others* v *Commission* judgment, cited in paragraph 27 above, to the taking account of the duration of an infringement, the applicant observes first of all that, in that judgment, the Court of First Instance was giving a decision on an objection that the Guidelines were illegal and therefore examined criticisms of a general nature directed against them. In contrast, in the present case the issue is whether the actual calculation made specifically in relation to the applicant is in conformity with Article 15(2) of Regulation No 17. Next, the applicant points out that, in that same judgment, the Court merely considered the hypothesis in which 'certain factors' taken into account did not have any repercussion on the final fine (paragraph 453). No decision was given on the factor of duration. As that factor is one of the two covered by Article 15(2) Regulation No 17, it should without fail be taken into account and should have an impact on the final amount of the fine, otherwise Regulation No 17 would be deprived of all binding force and useful effect (Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 203).

31 Finally, the applicant criticises the fact that the Commission took account of the factor of cooperation after applying the upper limit of 10%, whereas it increased the basic amount by reference to the duration of the infringement before applying that upper limit. The result of that approach is that the cooperation factor, provided for by the Guidelines, has a direct impact on the actual fine and therefore encourages undertakings to cooperate with the Commission. On the other hand, undertakings obtain only a theoretical advantage from the duration factor, provided for by a Council regulation, and consequently are not encouraged to bring an infringement to an end as early as possible.

32 Third, the applicant maintains that the way in which the starting point was fixed, namely well above the upper limit of 10%, infringes Article 15(2) of Regulation No 17 in that it means that aggravating and attenuating circumstances are not taken into account in the amount of the fine imposed. Having regard to the case-law and to its own Guidelines, the Commission was not entitled to use a method which made impossible any actual consideration of such circumstances, since the latter form part of the assessment of the gravity of the infringement, the criterion laid down in Article 15(2) of Regulation No 17 (Case T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 109).

33 Fourth, the method adopted by the Commission to determine the amount of the fines gives no indication of the elements relied on by it in setting the starting point. Although the Guidelines refer to a 'likely' amount of EUR 20 million for very serious infringements, the Commission perceived the inappropriateness of such amounts when, as in this case, for all the undertakings involved, of small or medium size, that 'minimum' considerably exceeded the upper limit of 10% of their turnover. The applicant states that such 'absolute vagueness which is, to say the least, unusual in the context of a measure designed to ensure the "transparency and objectivity of decisions" would become entirely arbitrary if it also enabled the Commission to disregard the criteria imposed on it by Article 15(2)'.

34 The Commission, for its part, contends, relying in particular on the case-law of the Court of First Instance as embodied in the 'Pre-insulated pipes' judgments (*HFB and Others* v *Commission*, cited in paragraph 27 above; *Dansk Rørindustri* v *Commission*, cited in paragraph 30 above; Case T-15/99 *Brugg Rohrsyterne* v *Commission* [2002] ECR II-1613, paragraph 150; and Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 292), that the applicant is misinterpreting the provisions of Article 15(2) of Regulation No 17 and that, therefore, the first plea must be rejected.

35 As regards the argument put forward by the applicant in its reply to the effect that there is no general indication in the Guidelines enabling the level at which the starting point should be set to be predicted, the Commission considers that it is inadmissible in that it constitutes a new plea. That argument has nothing to do with a possible infringement of Article 15(2) of Regulation No 17, alleged in the first plea, and cannot therefore be regarded as a development of that plea. In any event, that argument is irrelevant because the Guidelines do give indications regarding the starting point.

Findings of the Court

36 The applicant claims that the Commission infringed Article 15(2) of Regulation No 17 in that the starting point used for calculating the fine, namely EUR 3 million, representing 17% of its turnover, exceeds the upper limit of 10% laid down by that provision. That argument cannot be upheld.

37 According to Article 15(2) of Regulation No 17, '[t]he Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, 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 where, either intentionally or negligently ... they infringe Article [81](1) ... of the Treaty'. The same provision indicates that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

38 By providing that the Commission may impose fines of a sum not exceeding 10% of the turnover in the preceding business year, Article 15(2) of Regulation No 17 requires that the fine ultimately imposed on an undertaking be reduced in the event that its amount exceeds 10% of its turnover, regardless of the intermediate calculation operations designed to take account of the duration and gravity of the infringement. It follows that the maximum limit of 10% laid down by that provision applies only to the amount of the fine ultimately imposed by the Commission (*HFB and Others* v *Commission*, cited in paragraph 27 above, paragraph 451; 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, paragraphs 367 and 368).

39 Contrary to the applicant's assertion, the 'intermediate amounts' within the meaning of the case-law cited in paragraph 38 above include the starting point (see, to that effect, *HFB and Others* v *Commission*, cited in paragraph 27 above, paragraph 450, and, *Dansk Rørindustri* v *Commission*, cited in paragraph 30 above, paragraphs 183, 184 and 205; see, by analogy, Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 56).

40 Moreover, if in its calculation the Commission uses an intermediate amount, including a starting point, which exceeds the upper limit of 10% of the turnover of the undertaking concerned, the fact that certain factors taken into consideration in

the calculation do not affect the final amount of the fine is not open to criticism. This follows from the prohibition laid down in Article 15(2) of Regulation No 17 of exceeding the maximum limit of 10% of the turnover of the undertaking concerned (*HFB and Others* v *Commission*, cited in paragraph 27 above, paragraph 453). One of the 'factors' which may fail to have an impact on the ultimate amount of the fine is duration (*HFB and Others* v *Commission*, paragraphs 450 to 453, and *Dansk Rørindustri* v *Commission*, cited in paragraph 30 above, paragraph 251).

41 So far as concerns the applicant's argument that the cooperation factor is taken into consideration after application of the 10% ceiling and therefore has a direct impact on the amount of the fine, it need merely be pointed out that that approach ensures that the Leniency Notice is fully effective: if the basic amount was significantly in excess of the 10% limit before the application of the Leniency Notice and that limit could not be applied immediately, the incentive for the undertaking concerned to cooperate with the Commission would be much less, since the final fine would be reduced to 10% in any event, with or without the undertaking's cooperation (*Tokai Carbon and Others* v *Commission*, cited in paragraph 38 above, paragraphs 352 to 354).

42 The applicant's argument that there is no general indication in the Guidelines enabling the level at which the starting point should normally be set to be predicted, must be rejected, without there being any need to examine its admissibility (see paragraph 35 above). The Court considers that it is enough to point out that the Guidelines provide that, for very serious infringements, the amount of the 'likely' fines exceeds EUR 20 million (Section 1A, third paragraph, second indent). It is not possible to give precise indications concerning the starting points for all possible infringements. Moreover, it is clear from Section 1A, third paragraph, second indent, that the amount of fines may be less than EUR 20 million, so that the applicant's argument that the Guidelines are not intended for SMEs must be rejected. Moreover, the same Guidelines enable the Commission to take into account, where the circumstances so require, the particular circumstances in which SMEs find themselves (*Lögstör Rör* v *Commission*, cited in paragraph 34 above, paragraph 295).

43 It is clear from the Guidelines that fines imposed on SMEs that have participated in very serious infringements may not only fall short of EUR 20 million but may also be raised to the upper limit of 10% provided for by Article 15(2) of Regulation No 17. The applicant's complaint that there is no general indication in that respect must therefore be rejected.

44 It follows that the first plea must be rejected in its entirety.

The second plea: breach of the principle of proportionality

45 The applicant states first that, having regard to the reduction of 10% under the Leniency Notice, the fine imposed on it is the highest that could legally have been adopted, as it represents 9% of its worldwide turnover. To its knowledge, never in 40 years has the Commission adopted such a severe decision. It claims that the Commission thereby infringed the principle of proportionality.

46 The second plea comprises three parts, in which the applicant claims that the principle of proportionality has been breached for the following reasons:

— the fine imposed on it is totally disproportionate, in particular in relation to those imposed on other undertakings, both in this case and in other recent cases;

— the Commission relied on its worldwide turnover in order to determine the upper limit of its fine;

— the Commission did not take account of the ratio between its global turnover and its turnover from sales of the product at issue.

The first part: the fine imposed on the applicant is totally disproportionate

— Arguments of the parties

47 The applicant states that the fact of arbitrarily fixing the starting point in this case at a level considerably above the 10% upper limit resulted in a manifestly disproportionate penalty. It explains that, as the starting point in its case represents 17% of its worldwide turnover, that is to say 170% of the legal maximum, it was 'certain' to have a fine of the maximum amount imposed on it, even though there was no reason for such severity. In particular, it observes that there is no relationship between the amount of the fine, on the one hand, and, on the other, the gravity of the infringement, its size and its responsibility. The penalty imposed is based on an approach that does not reflect any consideration of its actual situation. It observes that the Commission itself admits that the duration of the infringement it committed is 'medium' and certainly not 'long'.

48 According to the applicant, the fact of imposing a maximum fine on an SME is contrary to the principles laid down by the case-law and the Commission's Guidelines. The Court of First Instance has endorsed the latter, stating that it may be appropriate to apply weightings 'especially where there is considerable disparity in the sizes of the undertakings that have committed an infringement of the same

nature and to make consequential adjustments to the basic amount depending on the specific characteristics of each undertaking' (Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 80). In *Acerinox*, the Court also rejected the argument put forward by one of the applicants, based on the smallness of its market shares on the ground that essentially account should be taken of its 'size' and its 'economic strength' (paragraphs 89 and 90). Thus, the Court emphasised that it was essential to take account of the size of the undertaking, regardless of its market shares. In the present case, the Commission failed totally to take account of the fact that the applicant is a particularly modest SME and that there is a 'considerable disparity' between the sizes of the various undertakings involved.

49 The applicant considers that the Guidelines were certainly not designed for SMEs. Thus, in the case of very serious infringements, they provide for a 'likely' fine of more than EUR 20 million. However, a fine of such an amount would call for a minimum turnover of EUR 200 million, that is to say a turnover 11 times higher than that of the applicant.

50 The applicant claims that one of the consequences of the arbitrary method of fixing fines adopted by the Commission is that large undertakings are less heavily penalised than SMEs. It considers, first, as far as the present case is concerned, that it is manifestly disproportionate for large undertakings to receive fines of less than half the amount of those imposed on SMEs for wholly identical infringements. The applicant refers in that connection to a table contained in its application, giving the amount of the fines imposed on each of the undertakings involved. It asserts that the fine imposed on it is the maximum fine and that it represents practically double the fine imposed on Heubach, even though the infringements attributed to them are of exactly the same gravity and duration. In that connection, it makes it clear that its reasoning is based on percentage of turnover and not absolute amounts. Second, the disproportion is particularly clear if the fine imposed on the applicant is compared with those imposed on other undertakings in similar cases. Thus, in Commission Decision 2001/716/EC of 18 July 2001 relating to proceedings pursuant to Article 81

of the EC Treaty and Article 53 of the Agreement on the European Economic Area (Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) (OJ 2001 L 265, p. 15, 'the SAS decision'), the company SAS was fined an amount corresponding to 0.79% of its worldwide turnover after being granted a reduction of 10% under the Leniency Notice, that is to say a fine 11 times lower, as a proportion of turnover, than that imposed on the applicant. The applicant emphasises that, for an undertaking with a worldwide turnover of almost EUR 5 000 million, a fine corresponding to 0.79% of its turnover is anodyne, whereas for the applicant, which has a turnover of EUR 17 million, a fine of EUR 1.53 million is a colossal penalty (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraphs 336 and 347).

51 As regards the Commission's contention that the applicant's size was taken into account, since the starting point was set at EUR 3 million, and not the EUR 20 million provided for by the Guidelines, the applicant claims, in its reply, that the Commission failed to carry out an assessment of the size of the fine as compared with the size of the undertaking. The Commission's reasoning is based only on absolute amounts, thereby rendering devoid of meaning the reference to turnover for assessment of the size of a fine for a given undertaking. However, the Guidelines 'do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it' (*HFB and Others* v *Commission*, cited in paragraph 27 above, paragraph 447). In this case, the Commission should have taken its turnover into consideration in setting the amount of the fine to avoid infringing the principle of proportionality. A number of important measures, including Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, and corrected version in OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) and the measures governing SMEs show that the criterion of turnover is of essential importance.

52 As regards the Commission's argument that it cannot be criticised on the ground that the amount of the fine imposed on certain undertakings is higher, in terms of turnover, than the fine imposed on other undertakings involved in the same

infringement, the applicant claims that the case-law in question applies only to undertakings which are in a different situation as regards the factors of 'gravity' and 'duration'. However, the case-law gives no answer to the question raised in the present case, in which the penalty imposed on the applicant is, in terms of its turnover, nearly twice as high as that imposed on Heubach, even though those two undertakings were in the same situation.

53 The applicant argues that the breach of the principle of proportionality is particularly clear in this case because the Commission made errors of assessment in setting the amount of the fine. In particular, it took no account of the principles formulated by it in its Guidelines or of its earlier practice. First, the fact that the applicant, an SME, did not even have a legal department was not taken into account in the present case. The applicant points out, in that connection, that the Commission declined in certain cases to impose fines on small undertakings which were not sufficiently familiar with Community law and national law (Commission Decision 82/897/EEC of 15 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/C-30.128 — Toltecs/Dorcet) (OJ 1982 L 379, page 19). It adds, referring to the fact that the undertakings concerned left a note of all meetings in their diaries, that the Commission did not establish to a sufficient standard that those undertakings were genuinely aware of the illegal nature of the practices at issue.

54 Second, the applicant submit that, generally, the Commission imposes more moderate fines when it applies the competition rules for the first time in a new context (Commission Decision 92/521/EEC of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 — Distribution of package tours during the 1990 World Cup) (OJ 1992 L 326, p. 31, paragraph 125). It observes that the Commission's press release in the present case gives the impression that this is the first time that the Commission has made such a severe attack on illegal practices in which SMEs had taken part and concludes from this that the maximum fine should not have been imposed on it.

55 Third, the applicant asserts that the Commission did not establish the existence of exceptional harm suffered by consumers. In that connection, the applicant relies on the size of the zinc phosphate market, judged by the Commission to be 'limited' (recital 303 to the contested decision), the existence of substitute products (recital 45 to the contested decision) and the size of the purchasers (recital 51 to the contested decision).

56 Finally, the applicant states that, according to the Guidelines, 'any economic or financial benefit derived by the offenders' is an important factor in the assessment of the amount of the fine. However, the Commission has never contended that the applicant derived any benefit from the infringement.

57 The Commission contests the applicant's argument. It contends that the fine imposed on the applicant represents 9% of its turnover during the previous business year. Accordingly, the applicant's assertion that the fine is 'the highest fine that could legally be imposed on it' is incorrect since it represents less than 10% of its turnover. It also states that, contrary to the applicant's assertion, not only has it imposed more severe penalties than that imposed on the applicant but, in addition, it has on several occasions reduced the fine imposed on an undertaking in order to comply with the 10% upper limit (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, hereinafter the 'Pre-insulated pipes decision'), recital 176 (concerning the undertaking Lögstör) and Commission Decision 2002/271/EC of 12 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.490 — Graphite electrodes) (OJ 2002 L 100, p. 1), recital 199 (concerning the undertaking UCAR)). Moreover, the Commission rejects the applicant's arguments concerning the disproportional nature of the fine as unfounded.

— Findings of the Court

58 Under Article 15(2) Regulation No 17, in order to determine the amount of the fine it is necessary to take into consideration the duration and gravity of the infringement. The proportionality of the fine must therefore be assessed in the light of all of the circumstances of the infringement (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 1215).

59 In this case, it is important to emphasise that the applicant does not deny having participated in a very serious infringement within the meaning of the Guidelines, extending from 24 March 1994 to 13 May 1998, that is to say, for more than four years.

60 Moreover, it must be pointed out that the starting point of EUR 3 million set by the Commission is well below the minimum threshold of EUR 20 million generally provided for by the Guidelines for infringements of that kind (see Section 1A, second paragraph, third indent). The fine ultimately imposed on the applicant amounts to only EUR 1.53 million. The Court considers, having regard both to the gravity of the infringement, its duration and the applicant's role in it, together with the information produced by the applicant in the present case, that the amount of the fine imposed on it is not disproportionate.

61 The applicant's claim that the fine imposed on it is disproportionate to its size must also be rejected. First, its assertion that it was 'certain' to have the maximum fine imposed on it because the starting point corresponded to 17% of its worldwide

turnover cannot be accepted. If the applicant's conduct had justified it, the fine would in fact have been considerably reduced by virtue of attenuating circumstances and the Leniency Notice. In this case, the fine imposed does not represent the maximum fine that the Commission could have imposed, since it reduced it by 10% in accordance with the Leniency Notice.

62 Next, it must be borne in mind, first, that the only express reference to turnover in Article 15(2) of Regulation No 17 concerns the upper limit which a fine may not exceed and, second, that that limit is deemed to relate to the total turnover (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 119). Provided it conforms to that limit, the Commission may, in principle, fix the fine on the basis of the turnover of its choice, in terms of geographical area and products (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 5023) without being obliged to choose specifically the total turnover or the turnover in the market of the products concerned. Finally, if the Guidelines do not provide for calculation of fines by reference to a specific turnover, nor do they prevent such a turnover being taken into account, provided that the choice made is not vitiated by a manifest error of assessment (*Tokai Carbon and Others* v *Commission*, cited in paragraph 38 above, paragraph 195).

63 In this case, it must be borne in mind that the contested decision makes it clear that the Commission considered it appropriate to apply differential treatment to the undertakings in order to take account of the 'effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures it has sufficient deterrent effect' (recital 304 to the contested decision). It added that it was necessary to 'to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition'. In assessing those factors, the Commission chose to rely on the

turnover in standard zinc phosphate sales in the EEA during the last year of the infringement. It points out that the applicant was one of the main zinc phosphate producers in the EEA, where it held a market share of about 20% and thus placed it in the first category (recital 308 to the contested decision). The starting point for the fine was fixed for all the undertakings in the first category at EUR 3 million. The starting point for James Brown, which had a market share of about 5%, was fixed at EUR 750 000.

64 Although the Commission compared the relative size of the undertakings concerned on the basis of the turnover achieved in zinc phosphate sales in the EEA, it also referred to the market shares of the undertakings in the relevant market when placing them in two different categories. The Commission calculated the market shares of the undertakings concerned by relying, first, on their turnover in the relevant market, as set out in the table in recital 50 to the contested decision, and, second, on information contained in the file. The correctness of that approach has not been contested by the applicant.

65 In analysing the 'effective economic capacity of the offenders to cause significant damage to competition', which involves an assessment of the actual importance of those undertakings in the market affected, that is to say, their influence on the market, their total turnover gives only an incomplete picture. The possibility cannot be ruled out that a powerful undertaking with many different activities may have only a limited presence in a specific product market. Similarly, the possibility cannot be ruled out that an undertaking occupying an important position in a geographical market outside the Community occupies only a weak position in the Community or EEA market. In such circumstances, the mere fact that the undertaking concerned has a high total turnover does not necessarily mean that it has a decisive influence on the market affected. That is why the Court of Justice emphasised, in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139, that although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 193). In this case, the Commission took

into account both the market share and the turnover of the undertakings concerned in the market affected, which enabled it to determine the relevant importance of each undertaking in the relevant market.

66 It follows that the Commission did not commit a manifest error of assessment in its analysis of the 'effective economic capacity of offenders' within the meaning of Section 1A, fourth paragraph, of the Guidelines.

67 Furthermore, it is clear from a comparison of the turnovers in the market of the undertakings in the first category, as set out in the table in recital 50 to the contested decision, that those undertakings were properly placed together and had assigned to them a single starting point. Thus, in 1998 the applicant's turnover in the relevant market in the EEA was EUR 3.9 million. Heubach, Trident and Union Pigments had turnovers of EUR 3.7, 3.69 and 3.2 million respectively. Britannia, which had ceased all economic activity in 1998, achieved a turnover in 1996 in the relevant market in the EEA of EUR 2.78 million.

68 It must also be observed that, as the applicant correctly states, Section 1A, sixth paragraph, of the Guidelines indicates that a 'considerable' disparity in the size of undertakings committing an infringement of the same kind is, in particular, such as to render differentiation necessary in the appraisal of the gravity of the infringement (*Acerinox* v *Commission*, cited in paragraph 48 above, paragraph 90). Moreover, according to the case-law, whilst the Commission has a margin of discretion in determining the amount of fines and although the calculation of the fine is not required to follow a simple mathematical formula (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59), the amount 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 32 above, paragraph 106). Consequently, when the Commission divides the undertakings concerned into groups for the purposes of setting the amount of the fines,

the thresholds for each of the groups thus identified must be coherent and objectively justified (see, to that effect, Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 298, and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, hereinafter '*FETTCSA*', paragraph 416).

69 Admittedly, in this case, the applicant, although having a total turnover of only EUR 17 million in 2000, was placed in the same group as Britannia, Heubach, Trident and Union Pigments, which had turnovers of about EUR 55.7, 71, 76 and 7 million respectively. Nevertheless, no breach of the principle of proportionality can be inferred from that fact. As explained in paragraphs 63 and 64 above, those various undertakings were grouped together because they had turnovers in the relevant market and market shares which were very similar. It was coherent and objectively justified to group the undertakings together on that basis. Moreover, the Court considers that the difference between the size of the applicant and that of the other undertakings involved was not so great that it should have been placed in a different group (see, to that effect, *Daesang and Sewon Europe* v *Commission*, cited in paragraph 39 above, paragraphs 69 to 77).

70 It must be observed, for the sake of completeness, that, in the circumstances of the present case, sufficient account was taken of the applicant's total turnover when the upper limit of 10% laid down in Article 15(2) of Regulation No 17 was applied. As stated in paragraphs 16 and 17 above, the applicant's fine was reduced to EUR 1.7 million in order to comply with that upper limit, before being further reduced to EUR 1.53 million in respect of cooperation. The purpose of the 10% upper limit is to ensure that fines are not disproportionate in relation to the size of the undertaking (*Musique diffusion française and Others* v *Commission*, cited in paragraph 62 above, paragraph 119). The application of that maximum limit in this case ensured that the fine imposed on the applicant was proportionate to its size. In view of the very serious nature of the infringement and the fact that it lasted for more than four years, the amount of the fine might have been much higher if the applicant had not been a small undertaking and if it had not benefited from the upper limit of 10%.

71 The applicant claims that it is manifestly disproportionate for the large undertakings to have received fines that were lower by half than those imposed on the SMEs for identical infringements. It refers to the fact that, having a turnover of EUR 17.08 million, it received a fine corresponding to about 9% of its turnover, whilst the fine imposed on Heubach, which had a turnover of EUR 71.018 million, corresponded to only 5.3% of its turnover.

72 In response to those assertions, the Court would point out, first, that the Commission imposed a fine of EUR 3.78 million on Heubach and a fine of EUR 1.53 million on the applicant. Therefore, despite the fact that those two undertakings participated in a very serious infringement for more than four years and were of the same importance in the market (see paragraph 67 above), Heubach's fine represents more than double that imposed on the applicant.

73 As the Commission is not obliged to calculate the fine by reference to amounts based on the turnover of the undertakings concerned, it is likewise not required to ensure, where fines are imposed on several undertakings involved in the same infringement, that the final amount of the fines produced by the calculation for the undertakings concerned, reflects any distinction between them regarding their total turnover or their turnover in the relevant product market (*Dansk Rørindustri* v *Commission*, cited in paragraph 30 above, paragraph 202).

74 In that connection, it must be pointed out that Article 15(2) of Regulation No 17 likewise does not require that, where fines are imposed on several undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than those imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified, for each of them, by reference to the gravity and duration of

the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than that imposed on other undertakings (*Dansk Rørindustri* v *Commission*, paragraph 203).

75 The applicant claims that the principles laid down by the Court of First Instance in *Dansk Rørindustri* v *Commission*, cited in paragraph 30 above, apply only in the case of undertakings which are in different circumstances as regards the gravity and the duration of the infringement. It goes without saying that, if the undertakings concerned are in different circumstances, the Commission is not obliged to ensure that the amount of the fine reflects any distinction between them regarding their turnover or their turnover on the relevant product market. Those principles apply even if the undertakings concerned are in the same situation.

76 The applicant's argument that the disproportionate nature of the fine imposed is obvious when its fine is compared with those imposed on other undertakings in similar cases must also be rejected. The Commission cannot be compelled to set fines that are proportionate to turnover and also display perfect coherence with those imposed in the earlier cases.

77 It must be emphasised, in that connection, that the Commission's practice in earlier decisions does not in itself serve as a legal framework for fines in competition matters. The fact that in the past the Commission may have applied fines of a particular level for certain types of infringements does not mean that it is estopped

from raising that level within the limits indicated by Regulation No 17 if that is necessary to ensure implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, cited in paragraph 62 above, paragraph 109, and *Tokai Carbon and Others* v *Commission*, cited in paragraph 38 above, paragraph 243).

78 Moreover, in so far as the Commission imposes on undertakings involved in the same infringement fines that are justified, for each of them, by reference to the gravity and the duration of the infringement, it cannot be criticised on the ground that, for some of those undertakings, the amount of the fine is higher, in terms of turnover, than those imposed on other undertakings in earlier cases (see, to that effect, *LR AF 1998* v *Commission*, cited in paragraph 68 above, paragraph 278).

79 Furthermore, the gravity of infringements must be established by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33, and *LR AF 1998* v *Commission*, cited in paragraph 68 above, paragraph 236). The relevant data, such as the markets, the products, the countries, the undertakings and the periods concerned differ in each case. It follows that the Commission cannot be compelled to impose fines representing the same proportion of turnover in all cases that are comparable as regards gravity (Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraphs 187 to 189).

80 The Court also observes that, even if the fine imposed by the Commission in the SAS decision referred to by the applicant (see paragraph 50 above) did not represent a very large proportion of the turnover of the undertaking concerned, it was nevertheless very large, since it amounted to almost EUR 40 million. On the other hand, if the Commission had been compelled to impose on the applicant a fine corresponding to 0.79% of its turnover, as was done in the SAS decision, such a fine, which would have amounted to EUR 134 939, would clearly not have been dissuasive.

81 The applicant's allegations concerning errors of assessment must also be rejected.

82 In the first place, the Commission was entitled not to take account of the fact that the applicant had no legal department. According to the Guidelines, 'account may also be taken of the fact that large undertakings usually 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' (Section 1A, fifth paragraph). As the Commission has rightly pointed out, that paragraph entitles it to increase the fines of large undertakings, but does not require it to reduce those imposed on undertakings of modest size. Moreover, given that the incompatibility of the cartel at issue with the competition rules is clear from the express provisions of Article 81(1)(a) to (c) EC and from settled case-law, the applicant cannot claim that it was not sufficiently familiar with the relevant law. Furthermore, it is apparent from the contested decision that the impugned undertakings were well aware of the illegality of a cartel that was concerned with the fixing of recommended prices, market sharing and customer allocation (recitals 99, 100, 125 and 253).

83 In any event, for an infringement of the competition rules to be regarded as having been committed deliberately, it is not necessary for the undertaking to have been aware that it was infringing those rules: it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2003] ECR II-5761, paragraphs 396 and 397).

84 Second, the Court also rejects the applicant's argument that the Commission should have imposed less severe fines on the ground that this is the first time that it has

taken such a severe approach to penalising unlawful practices involving the participation of SMEs. The Commission is not required to moderate the fines it imposes when taking action for the first time in a particular sector. Moreover, there is nothing to compel the Commission to moderate fines where the undertakings concerned are SMEs. The size of the undertaking is taken into consideration by virtue of the upper limit laid down in Article 15(2) of Regulation No 17 and the provisions of the Guidelines. Apart from those considerations concerning size, there is no reason to treat SMEs differently from other undertakings. The fact that the undertakings concerned are SMEs does not exempt them from their duty to comply with the competition rules, as the Commission has rightly affirmed (see recital 343 to the contested decision).

85 Moreover, it cannot be claimed that, in this case, the Commission was acting in a new context in that respect. In its Pre-insulated pipes decision (see paragraph 57 above), it had already imposed high fines on SMEs which had engaged in illegal practices.

86 Third, the applicant invokes the fact that the Commission did not refer to the existence of exceptional harm suffered by consumers. It need merely be pointed out in that connection that it cannot be concluded from the absence of exceptional harm of that kind that the fine in question was disproportionate. Moreover, the Commission took account, indirectly, of the fact that the infringement did not cause such harm. First, it took into consideration the limited size of the relevant market in fixing the starting point of EUR 3 million (recital 303 to the contested decision). Second, it recognised that the economic context in which the infringement took place was difficult in that, in particular, the customers of the undertakings concerned enjoyed great buying power (recital 339 to the contested decision).

87 The applicant claims that the Commission could not allege that exceptional harm had been suffered by consumers in view of the 'existence of substitute products'. That argument cannot undermine the conclusion arrived at in paragraph 86 above.

Moreover, at the hearing, the applicant stated, when referring to the existence of substitute products, that it meant that the Commission had not made a sufficiently detailed analysis of the market and that the infringement had not had any real impact. In that connection, it must be pointed out that, in its pleadings, the applicant made brief mention of substitute products as part of a subsidiary argument concerning the proportionality of the fine and, in particular, the absence of exceptional harm suffered by consumers. It is clear that it did not generally call in question the effects of the infringement and that it did not contest the market definition.

88 In any event, as has been held in the judgment of the Court of First Instance of today's date in Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, the Commission was entitled to conclude that the infringement at issue had real effects. In particular, the Commission sufficiently demonstrated that the agreement on sales quotas, the 'cornerstone' of the cartel (recital 66 to the contested decision), had been implemented scrupulously and that, on an annual basis, 'the real market shares of the five producers closely followed their allocated share' (recital 72 to the contested decision). Moreover, the Commission has produced evidence to show that the price agreement had a specific impact on the market. It must be emphasised, in that connection, that, according to statements made by Union Pigments and Trident, the main undertakings that cooperated with the Commission, the price initiatives had an effect on the level of market prices. More generally, in view of the fact that one of the purposes of the cartel was to bring a price war to an end and that the offending practices were engaged in for more than four years, the Court considers that the undertakings concerned succeeded, in effect, in bringing that price war to an end and that they therefore adjusted their prices in order to secure a transaction price of a higher level than that which would have prevailed in the absence of a cartel.

89 Finally, with regard to the applicant's argument that the Commission did not take account of the fact that it had achieved virtually no profit on sales of the product at issue, it must be borne in mind that, whilst the amount of the fine imposed must be proportionate to the duration of the infringement and the other factors capable of

affecting the assessment of the gravity of the infringement, including the profit that it was able to derive from those practices (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127), the fact that an undertaking did not benefit from an infringement cannot, according to the case-law, preclude the imposition of a fine since otherwise it would cease to have a deterrent effect (*Ferriere Nord* v *Commission*, cited in paragraph 83 above, paragraph 53, and, *FETTCSA*, paragraph 340).

90 It follows that the Commission is not required, in fixing the amount of fines, to take into consideration any lack of benefit from the infringement (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 62 above, paragraph 4881, and *FETTCSA*, paragraph 341).

91 Although, under its Guidelines (Section 2, first paragraph, fifth indent), the Commission may, in respect of aggravating circumstances, increase a fine in order to exceed the amount of gains improperly made as a result of the infringement, that possibility does not mean that the Commission is then under an obligation to establish in every case, for the purpose of determining the amount of the fine, the financial advantage linked to the infringement found to have been committed (*FETTCSA*, paragraphs 342 and 343). In other words, the absence of such an advantage cannot be regarded as an attenuating circumstance.

92 In this case, the Commission did not base the contested decision on the profits that the offenders had obtained from the infringement. In the light of the case-law referred to in paragraphs 89 to 91 above, it did not commit any manifest error of assessment in that regard.

93 In view of all the foregoing, the first part of the second plea cannot be upheld.

The second part of the plea: the Commission relied on the applicant's worldwide turnover in determining the 10% upper limit

— Arguments of the parties

94 The applicant claims that Commission infringed the principle of proportionality by taking account of the worldwide turnover of the undertakings when determining the 10% upper limit laid down by Article 15(2) of Regulation No 17. It submits that, according to the case-law, the Commission must take care not to attribute to the applicable turnover in determining the amount of fines 'an importance disproportionate in relation to the other factors' (*Musique diffusion française and Others* v *Commission*, cited in paragraph 62 above, paragraph 121). According to the legal literature, that passage contains 'a warning against purely mathematical application of the 10% rule, which is liable to conflict with ... the "principle of proportionality"' (I. Van Bael and J.F. Bellis, *Droit de la concurrence de la Communauté économique européenne*, Bruylant, Brussels, 1991, p. 648). The Commission acknowledges in the contested decision that, in order to determine the basic amount of a fine, it is necessary to take account of the real impact of the offending conduct on competition (recital 305 to the contested decision). In that connection, it considered it sufficient to use the turnover in the product in question in the EEA as a basis for comparing the relative importance of the undertakings concerned in the market concerned (recital 307 to the contested decision). Accordingly, the Commission should have taken its reasoning further and calculated the 10% upper limit for the applicant by reference to its European turnover, which represents less than one quarter of its worldwide turnover.

95 The Commission contends that it took account of the respective market shares of the cartel members in the EEA in determining the starting point for the fines. That method has no bearing on the fact that, under Article 15(2) of Regulation No 17, the amount of the fine that may be imposed on an undertaking may not exceed 10% of its worldwide turnover.

— Findings of the Court

96 The second part of the second plea cannot be upheld. First, it is clear from Article 15 (2) Regulation No 17, and from the case-law, that the maximum limit of 10% is designed to ensure that fines are not disproportionate in relation to the size of the undertaking in question (see paragraph 70 above). It is therefore appropriate to use the total turnover in determining that upper limit (*Musique diffusion française and Others* v *Commission*, cited in paragraph 62 above, paragraph 119, and *HFB and Others* v *Commission*, cited in paragraph 27 above, paragraph 541). Second, the reason for taking account of the turnover in sales of the product involved in the infringement in the relevant geographical market is to determine, in assessing the gravity of the infringement, the extent of the conduct of each of the undertakings in that market. Contrary to the applicant's assertion, there is nothing to prevent different turnover figures from being used for different purposes. Therefore, the second part of the second plea must be rejected.

The third part of the plea: the Commission took no account of the relationship between the applicant's total turnover and its turnover in the product concerned

— Arguments of the parties

97 The applicant maintains that the Commission must take account, in assessing the gravity of the infringement, of the fact that its sales turnover for the product concerned was low compared with its total turnover in respect of all products (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94).

98 The Commission points out that the *Parker Pen* judgment, cited in paragraph 97 above, was delivered at a time when the basic amounts of fines were fixed as a proportion of the undertakings' turnover. At present, total turnover is one of the many factors that the Commission may take into account, subject to review by the Court, but it is not a factor which it must necessarily take into consideration. It states, more particularly, that, as the Court held in its judgment in Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 184, '[it] is not obliged to take into account the relationship between the total turnover of an undertaking and the turnover produced by the goods which are the subject-matter of the infringement'.

— Findings of the Court

99 The Court would point out, first of all, that well established case-law prevents the attribution to one or another of the various kinds of turnover, significance that is disproportionate in relation to the other factors to be taken into account, so that an appropriate fine cannot be fixed merely by a simple calculation based on total turnover, particularly where the goods concerned account for only a small part of that figure (*Musique diffusion française and Others* v *Commission*, cited in paragraph 62 above, paragraphs 120 and 121, and *Parker Pen* v *Commission*, paragraph 94). Thus, in the *Parker Pen* judgment, the Court upheld the plea alleging breach of the principle of proportionality on the ground that the Commission had not taken into consideration the fact that the turnover in the products involved in the infringement was relatively small as compared with that undertaking's total sales.

100 In this case, as the Commission did not calculate the fine to be imposed on the applicant on the basis of its total turnover, the applicant is also unable to rely on *Parker Pen* (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 156).

101 It is clear from the contested decision (see recitals 262 to 309) that, in accordance with the case-law, the Commission took account of a whole series of factors other than total turnover in fixing the fine, including the nature of the infringement, its real effects, the importance of the undertakings concerned in the market, the deterrent effect of the fines and the limited size of the relevant market (see, to that effect, *ABB Asea Brown Boveri* v *Commission*, cited in paragraph 100 above, paragraph 157, *Tokai Carbon and Others* v *Commission*, cited in paragraph 38 above, paragraph 202, and *Daesang Sewon Europe* v *Commission*, cited in paragraph 39 above, paragraph 60).

102 In any event, as the Commission rightly points out, it must be noted that the applicant's sales turnover in zinc phosphate — more than 22.83% — represents a relatively large proportion of its total turnover. Consequently, it cannot be claimed that the applicant received only a small part of its total turnover from the market concerned.

103 For those reasons, the third part of the second plea must be rejected. The second plea must therefore be rejected in its entirety.

The third plea: breach of the principle of non-discrimination

Arguments of the parties

104 The applicant claims that the method of determining fines used in this case is discriminatory in that, for certain undertakings, the Commission set a starting point in excess of the legal maximum.

105 First, the applicant states that, by taking that course, the Commission, on its own initiative, imposed on it the maximum fine allowed by law. In contrast, the undertakings with a larger turnover than it, but in an absolutely identical situation as regards the gravity and duration of the infringement, were bound to receive a fine lower than the legal maximum since, in their case, the starting point was lower than the legal maximum. The applicant considers that the breach of the principle of non-discrimination is particularly clear if its situation is compared with that of Heubach. Despite the fact that the Commission observed no difference between those two undertakings in determining the amount of the fines, the fine imposed on Heubach represents 5.3% of its turnover and that imposed on the applicant 9% of its turnover. The applicant thus received a fine representing a percentage of turnover equal to 170% of Heubach's fine. Such different and totally unjustified treatment as between the two undertakings constitutes blatant discrimination. That breach of the principle of non-discrimination is explained by the Commission's refusal to take any account of turnover in determining the fine imposed.

106 In its reply, the applicant rejects the Commission's interpretation of the judgment in *Dansk Rørindustri* v *Commission*, cited in paragraph 30 above.

107 Secondly, it claims that the method used by the Commission led to the same penalty, namely the legal maximum, for both undertakings even though the duration of their participation in the infringement differed. It states that two undertakings that had the same starting point, in excess of a 10% upper limit, but of which one had participated in the infringement for one year and the other for five years, were ultimately both given the same fine, corresponding to 10% of their worldwide turnover. That provides a particularly clear illustration of the breach of the principle of equal treatment in this case.

108 The Commission denies that the applicant has suffered unequal treatment. Even though its capacity to cause damage to competition was the same as that of Heubach, the fine imposed on the applicant was reduced from EUR 4.2 to 1.5 million specifically as a result of application of the maximum limit of 10% of turnover imposed by Article 15(2) of Regulation No 17. The Commission considers that the difference of treatment, in favour of the applicant, cannot be regarded as discrimination and that it is, according to the case-law of the Court of First Instance (*Brugg Rohrsyterne* v *Commission*, cited in paragraph 34 above, paragraph 155, and *LR AF 1998* v *Commission*, cited in paragraph 68 about, paragraph 300), the direct consequence of the maximum limit for fines imposed by Regulation No 17.

Findings of the Court

109 According to settled case-law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 65 above, paragraph 69, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

110 Contrary to the applicant's assertion, the fact that, in its case, the starting point exceeded the upper limit of 10% did not mean that the maximum fine was automatically imposed on it (see paragraph 61 above).

111 It must be borne in mind that, in order to take account of the economic capacity of the undertakings concerned and to fix the fines at a level guaranteeing a sufficient deterrent effect, the Commission placed the applicant, together with Heubach, Trident, Britannia and Union Pigments, in the first category (recital 304 to the contested decision). It cannot be inferred from the fact that the applicant's total turnover was lower than that achieved by Heubach, Trident and Britannia that the principle of equal treatment was infringed.

112 As indicated in paragraph 69 above, the comparison of turnover from sales of the product at issue in the EEA shows that it was correct for those undertakings to be placed in the same group and for them to be given the same starting point.

113 Moreover, even though the applicant and Heubach both participated in a very serious infringement for more than four years, the fine ultimately imposed on the applicant, namely EUR 1.53 million, represents less than half the fine of EUR 3.78 million imposed on Heubach. That difference of treatment, which is favourable to the applicant, is objectively justified in view of the different size of the two undertakings, which means that the applicant benefited from the maximum limit provided for by Regulation No 17.

114 Moreover, as the Commission was not required to ensure that the final amount of the fines calculated by it for the undertakings concerned reflected any distinction between them as regards their turnover (see paragraph 74 above), the applicant cannot criticise it for imposing a higher fine, in terms of total turnover, on it than that imposed on Heubach (*Dansk Rørindustri* v *Commission*, cited in paragraph 30 above, paragraph 210).

115 As regards the applicant's argument that the method used by the Commission led to the same penalty for two undertakings whose participation in the infringement lasted for different periods, it need merely be pointed out that it is not based on the facts in question and is therefore purely hypothetical.

116 Finally, the Court would note, with regard to the principle of equal treatment and in the light of the foregoing, that the application of the Guidelines in this case made it possible to ensure that both aspects of that principle were complied with. First, the undertakings concerned all bore shared and comparable responsibility in that they all participated in a very serious infringement. Thus, that responsibility was assessed first by reference to characteristics of the infringement itself, such as its nature and its impact on the market. Then, the Commission adjusted that assessment by having regard to the specific circumstances of each of the undertakings, including its size and capacities, the duration of its participation in the infringement and its cooperation.

117 The third plea must therefore be rejected as unfounded.

118 It follows from all the foregoing that the application must be rejected in its entirety.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 29 November 2005.

E. Coulon P. Lindh

Registrar President