JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

28 April 2010 *

In Case T-452/05,

Belgian Sewing Thread (BST) NV, established in Deerlijk (Belgium), represented by H. Gilliams and J. Bocken, lawyers,

applicant,

v

European Commission, represented by A. Bouquet and K. Mojzesowicz, acting as Agents,

defendant,

* Language of the case: Dutch.

APPLICATION for (i) partial annulment of Commission Decision C(2005) 3452 of 14 September 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.337 – PO/Thread), as amended by Commission Decision C(2005) 3765 of 13 October 2005, and, in the alternative, reduction of the fine imposed on the applicant by that decision and (ii) an order that the Commission pay compensation, on the basis of the non-contractual liability of the European Community, for the loss which the applicant has suffered,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V.M. Ciucă, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 18 December 2008,

gives the following

Judgment

Background to the dispute

1. *Subject-matter of the dispute*

1 By Decision C(2005) 3452 of 14 September 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.337 – PO/Thread) ('the contested decision'), as amended by Commission Decision C(2005) 3765 of 13 October 2005 and a summary of which was published in the *Official Journal of the European Union* of 26 January 2008 (OJ 2008 C 21, p. 10), the Commission of the European Communities found that the applicant – Belgian Sewing Thread (BST) NV ('BST') – had participated in a set of agreements and concerted practices on the market in thread for industrial customers other than automotive customers in Benelux, and in Denmark, Finland, Norway and Sweden (collectively, 'the Nordic countries') during the period from June 1991 to September 2001.

2 The Commission imposed a fine of EUR 0.979 million on BST for its participation in the cartel on the industrial thread market in Benelux and the Nordic countries.

2. *Administrative procedure*

3 On 7 and 8 November 2001, the Commission carried out inspections pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) at the premises of a number of sewing thread manufacturers. Those inspections were carried out as a result of information supplied in August 2000 by The English Needle & Tackle Company.

4 On 26 November 2001, Coats Viyella plc ('Coats') filed an application for leniency under the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), together with documents intended to show the existence of the following cartels: (i) a cartel on the market in thread for automotive customers in the European Economic Area (EEA); (ii) a cartel on the UK industrial thread market; and (iii) a cartel on the market for industrial thread, other than for automotive customers, in Benelux and the Nordic countries ('the industrial thread cartel in Benelux and the Nordic countries').

5 In March and August 2003, on the basis of the documents taken in the course of the inspections and those provided by Coats, the Commission sent the undertakings concerned requests for information pursuant to Article 11 of Regulation No 17.

6 On 15 March 2004, the Commission issued a statement of objections which it sent to a number of undertakings on account of their participation in one or more of the cartels referred to in paragraph 4 above, including the cartel on the industrial thread market in Benelux and the Nordic countries. All the undertakings were given access to the Commission's investigation file in the form of a copy on CD-ROM which was sent to them on 7 April 2004.

7 All the undertakings to which the statement of objections was addressed submitted written observations.

8 A hearing took place on 19 and 20 July 2004.

9 On 24 September 2004, the parties were granted access to the non-confidential version of the responses to the statement of objections, as well as to the comments made by the parties at the hearing, and were given a deadline by which to submit further comments.

10 On 14 September 2005, the Commission adopted the contested decision.

3. *The contested decision*

Definition of the relevant market

11 In the contested decision, the Commission draws a distinction between thread intended for the motor industry and thread intended for industries other than the motor industry. Also in the contested decision, the Commission stated that the product market in respect of which the infringement imputed to BST was examined is the industrial thread market.

12 The geographic market concerned by the infringement imputed to BST is Benelux and the Nordic countries.

Size and structure of the relevant market

13 In the contested decision, the Commission stated that sales on the industrial thread market in Benelux and the Nordic countries were approximately EUR 50 million in 2000 and approximately EUR 40 million in 2004.

14 The Commission also stated that, at the end of the 1990s, the main suppliers of industrial thread in Benelux and the Nordic countries included BST, Gütermann AG ('Gütermann'), Zwicky & Co. AG ('Zwicky'), Amann und Söhne GmbH & Co. KG ('Amann'), Barbour Threads Ltd ('Barbour') before it was taken over by Coats, and Coats.

Description of the unlawful conduct

15 The Commission stated in the contested decision that the infringement imputed to BST in relation to the industrial thread market in Benelux and the Nordic countries had been committed during the period from 1990 to 2001.

16 According to the Commission, the undertakings concerned met at least once a year and the meetings were split into two sessions, one for the Benelux market and the other for the market in the Nordic countries, the main objective of the meetings being the maintenance of high prices on each of those two markets.

17 The participants exchanged price lists and information on rebates, on the implementation of increases in list prices, on reductions in rebates and on increases in the special prices charged to certain customers. Agreements were also made concerning future price lists, maximum rates of rebate, reductions in rebates and increases in the

special prices charged to certain customers, as well as agreements to avoid undercutting, to the advantage of the incumbent supplier, and to arrange customer allocation (contested decision, recitals 99 to 125).

Enacting terms of the contested decision

18 By Article 1(1) of the contested decision, the Commission found that eight undertakings, including BST, had infringed Article 81 EC and Article 53(1) of the EEA Agreement by participating in a set of agreements and concerted practices on the industrial thread market in Benelux and the Nordic countries for the period – in the case of BST – from June 1991 to September 2001.

19 Under the first paragraph of Article 2 of the contested decision, the following fines were imposed, in respect of the industrial thread cartel in Benelux and the Nordic countries, on the following undertakings, among others:

— Coats: EUR 15.05 million;

— Amann: EUR 13.09 million;

— BST: EUR 0.979 million;

— Gütermann: EUR 4.021 million;

— Zwicky: EUR 0.174 million.

20 By Article 3 of the contested decision, the Commission ordered the undertakings covered by that decision to bring to an end immediately, if they had not already done so, the infringements which had been found to exist. It also ordered them to refrain from repeating any act or conduct referred to in Article 1 of the contested decision and from adopting any act or conduct having equivalent object or effect.

4. *Procedure and forms of order sought*

21 By application lodged at the Registry of the General Court on 27 December 2005, BST brought the present action.

22 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was attached to the Fifth Chamber, to which the present case was accordingly allocated.

23 BST claims that the General Court should:

— annul Article 1 of the contested decision in so far as it concerns BST;

— annul Article 2 of the contested decision in so far as the Commission thereby imposes on BST a fine of EUR 0.979 million or, in the alternative, substantially reduce that fine;

— order the Commission to pay compensation for the loss suffered, to the extent indicated in the application;

— appoint an expert to establish that part of the loss which is not yet quantifiable;

— order the Commission to pay the costs.

24 The Commission contends that the General Court should:

— dismiss the action for annulment;

— dismiss the claim for damages as unfounded;

— order BST to pay the costs.

Law

25 The present action is composed of (i) an application for partial annulment of the contested decision or, in the alternative, for a reduction of the fine imposed and (ii) a claim for damages.

1. *The application for annulment of Article 1 of the contested decision in so far as it concerns BST*

Preliminary observations

26 It should first be stated that, in the context of the first plea put forward in support of its application for annulment of Article 1 of the contested decision, BST claims that the facts constituting the infringement, which it does not deny having committed, cannot be assimilated to the 'very serious' infringement which it is found to have committed by Article 1 of the contested decision. BST argues that the infringement which it admits to having committed must be distinguished from the infringements committed by the other undertakings. Thus, it is arguing in substance that the infringement which it committed forms no part of the single and continuous infringement on the market for industrial thread in Benelux and the Nordic countries referred to in Article 1 of the contested decision. Consequently, it must be held that, by those arguments, BST is challenging the existence of the infringement imputed to it.

27 However, the line of argument expounded by BST in the context of that plea largely relates to the Commission's assessment of the gravity of the infringement and the associated calculation of the amount of the fine in the light of BST's individual role in the infringement. In consequence, that line of argument does not concern the question whether the infringement actually exists, but seeks to challenge the fine and the amount of that fine. Accordingly, that argument will be examined in the context of the pleas seeking cancellation or reduction of the fine.

Arguments of the parties

28 Although BST is not contesting the truth of the facts set out in the statement of objections of 15 March 2004, it challenges the idea that the facts complained of with regard to BST can be assimilated to the infringement committed by the undertakings which conceived and organised that infringement. It claims that the cartel was conceived and organised by other undertakings and that it, BST, was not involved in those operations.

29 The Commission contends that this plea should be rejected.

Findings of the Court

30 It is necessary to consider BST's argument by which, in essence, it maintains that the facts complained of with regard to BST cannot be regarded as forming part of the single and continuous infringement on the industrial thread market in Benelux and the Nordic countries, as found by Article 1 of the contested decision, and that those facts should have been assessed separately and specifically.

31 It is apparent, first of all, from the case-law that, given the nature of the infringements of the competition rules and the nature and degree of severity of the ensuing penalties, liability for those infringements is personal in nature. The agreements and concerted practices referred to in Article 81(1) EC are necessarily the result of collusion on the part of a number of undertakings, all of which are co-perpetrators of the infringement, but whose participation can take different forms, varying, in particular, according to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its liability for the entire infringement, including its liability for conduct which, in practical terms, is put into

effect by other participating undertakings, but which has the same anti-competitive object or effect (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 78 to 80).

32 Thus, an undertaking may be held liable for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements, if it knew, or must have known, that the collusion in which it participated, especially by means of regular meetings organised over several years, was part of an overall plan intended to distort competition and if that overall plan included all the constituent elements of the cartel (see, to that effect, Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 176). Similarly, the fact that the roles played by various undertakings in pursuit of a common objective were different does not cancel out the fact that the anti-competitive objective, hence the infringement, was the same, provided that each undertaking has contributed, at its own level, to the pursuit of the common objective (see, to that effect, 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 4123).

33 Lastly, since, by virtue of the fact that they shared the same object, the agreements and concerted practices found to exist formed part of systems of regular meetings, target-price fixing and quota fixing, schemes which in turn formed part of a series of attempts made by the undertakings concerned in pursuit of a single economic aim, namely to distort the normal movement of prices, it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as a number of separate infringements when, on the contrary, what was involved was a single infringement which progressively manifested itself both in the form of agreements and in the form of concerted practices. An undertaking which has taken part in such an infringement through conduct, particular to it, which was covered by the notion of an agreement or concerted practice having an anti-competitive object, for the purposes of Article 81(1) EC, and which was intended to help bring about the infringement as a whole, is also liable – throughout the entire period of its participation in that infringement – for conduct put into effect by other undertakings in the context of the

same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants, or could reasonably have foreseen it, and that it was prepared to take the risk. That conclusion is not inconsistent with the principle that liability for such infringements is personal in nature. It reflects a conceptual approach which is widely followed in the legal orders of the Member States concerning the attribution of liability for infringements committed by a number of perpetrators according to their participation in the infringement as a whole, which is not regarded in those legal systems as incompatible with the personal nature of liability (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 31 above, paragraphs 82 to 84).

34 It must therefore be determined whether the facts complained of with regard to BST form part of an overall plan intended to distort competition on the industrial thread market in Benelux and the Nordic countries and, accordingly, form part of the single and continuous infringement, as constituted by the cartel on that market.

35 In that regard, BST does not deny taking part in the meetings concerning the industrial thread market in Benelux and the Nordic countries. Nor does it dispute the fact that, during those meetings, the participants exchanged price lists and information on rebates, on the application of increases in list prices, on reductions in rebates and on increases in the special prices charged to certain customers; that they made agreements on future price lists, maximum rates of rebate, reductions in rebates and increases in the special prices charged to certain customers, with a view to avoiding undercutting, to the advantage of the incumbent supplier, and to the arrangement of customer allocation; or that they established contacts designed to encourage suppliers which had not taken part in the meetings to do so.

36 Moreover, BST admits that, when it took part in those meetings, it was aware that the intention of those who organised the meetings was to involve it in anti-competitive agreements. BST even stated that it expected the Commission to find that it had committed an infringement.

37 Furthermore, according to the case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention, by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and *Commission* v *Anic Partecipazioni*, paragraph 31 above, paragraph 96). The reason underlying that legal principle is that, having participated in the meetings without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it. That is also true of the participation of an undertaking in the implementation of a single agreement. In order to establish that an undertaking participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraph 31 above, paragraph 87).

38 However, BST has not shown that it indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

39 It follows from the above considerations that the Commission was correct in considering that BST was liable for the single infringement committed on the industrial thread market in Benelux and the Nordic countries, as referred to in Article 1 of the contested decision.

40 The plea by which BST denies having committed the infringement referred to in Article 1 of the contested decision must be rejected.

2. *The application for annulment of Article 2 of the contested decision in so far as it concerns BST or, in the alternative, for reduction of the fine*

41 BST puts forward, essentially, four pleas in law by which it challenges the fine and the amount of that fine. The first plea alleges incorrect categorisation of the infringement imputed to BST as 'very serious'. The second plea, which is composed of four complaints, alleges miscalculation of the starting amount for the fine and of the amount of the fine, and error in placing BST in the second category, because of failure to take account, respectively, of (i) the size of the relevant market, (ii) the effective economic capacity to cause significant damage to competition, (iii) BST's situation as compared with that of other traders and (iv) BST's precarious financial situation. The third plea alleges erroneous assessment of mitigating circumstances. The fourth plea alleges incorrect assessment of BST's cooperation.

The plea alleging incorrect categorisation of the infringement as 'very serious'

Arguments of the parties

42 BST claims that the Commission incorrectly categorised the infringement imputed to BST as 'very serious'. It complains that the Commission took the view that it did not have to take account of the specific circumstances concerning solely its personal role. The Commission did not take into account, therefore, BST's special role in the infringement or the specific circumstances in which BST took part in the meetings relating to the industrial thread market in Benelux and the Nordic countries. In that regard, BST claims that it played absolutely no role in the conception or organisation of the infringement; that, in taking part in the meetings, its purpose was not to conclude anti-competitive agreements; and it never implemented the agreements concluded at those meetings.

43 The Commission contends that this plea should be rejected as unfounded.

Findings of the Court

44 First of all, as was observed in the context of the plea challenging the categorisation of the infringement and, in particular, as was stated in paragraph 39 above, the Commission was correct in finding that BST had participated in the single and continuous infringement on the industrial thread market in Benelux and the Nordic countries, referred to in Article 1 of the contested decision.

45 Secondly, the single and continuous infringement on the industrial thread market in Benelux and the Nordic countries consisted essentially, as regards the undertakings concerned, in the exchange of sensitive information on price lists and/or the prices charged to individual customers; in agreements on price increases and/or on target prices; and in avoiding undercutting, to the advantage of the incumbent supplier and with a view to customer allocation (contested decision, recitals 99 to 125 and 345). Such practices amount to a horizontal restriction in the form of a 'price cartel' within the meaning of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines') and, in consequence, constitute by their very nature a 'very serious' infringement. Accordingly, the Commission did not err in categorising such an infringement as 'very serious'.

46 Lastly, the arguments put forward by BST in order to challenge the gravity of the facts imputed to it concern its individual role in the infringement and cannot therefore call into question the categorisation of that infringement as 'very serious'. Such arguments spring from a confusion between the assessment of the gravity of the infringement, which serves to determine the general starting amount for the fine, and the assessment of the relative gravity of the participation of each of the undertakings concerned, an issue which falls to be examined in the context of considering whether 'aggravating circumstances' or 'mitigating circumstances' apply.

47 It is also necessary to reject BST's argument that the general starting amount for the fine, determined according to the general gravity of the infringement, must be linked to its individual participation in that infringement.

48 Whereas the starting amount for the fine is set according to the infringement, the relative gravity of the infringement is determined by reference to numerous other factors, in respect of which the Commission has a broad discretion (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 71). In addition, it is apparent from Section 1A of the Guidelines that assessment of the gravity of the infringement is carried out in two stages. In the first, the general gravity is assessed solely by reference to factors relating to the infringement itself, such as its nature and its impact on the market; in the second, the assessment of the relative gravity is modified by reference to circumstances particular to the undertaking concerned, which, moreover, leads the Commission to take into account not only possible aggravating circumstances but also, in appropriate cases, mitigating circumstances. That step enables the Commission, particularly in the case of infringements involving a number of undertakings, to take account, in its assessment of the gravity of the infringement, of the different role played by each undertaking and of its attitude towards the Commission during the course of the procedure (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 109). Thus, even if the individual role of BST were negligible, that would not call into question the characterisation of the single infringement as 'very serious'.

49 BST's argument that it attended the meetings with a view to the sale of the undertaking and that, accordingly, it had no intention of concluding anti-competitive agreements at those meetings cannot succeed either. The possibility of a sale cannot justify participation in meetings which have an anti-competitive object. Moreover, it is also necessary to reject BST's argument that its participation in the meetings was also the result of strong pressure exerted by the other undertakings concerned. In the first place, the purported existence of such pressure does nothing to alter the gravity of the infringement in which BST participated. In the second place, even if it were to be accepted that BST was put under pressure, it cannot rely on that fact since, rather than take part in the activities in question, it could have reported that pressure to the competent authorities and made a complaint to the Commission under Article 3 of Regulation No 17 (see, to that effect, Case T-62/05 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 63).

50 In conclusion, the plea alleging incorrect characterisation of the infringement as 'very serious' must be rejected.

The plea alleging miscalculation of the starting amount for the fine and of the amount of the fine, as well as error in placing BST in the second category

Arguments of the parties

51 Four complaints are put forward in support of the plea alleging miscalculation of the starting amount for the fine and of the amount of the fine, as well as error in placing BST in the second category. Those complaints concern, respectively, failure to take account of the small size of the relevant market; incorrect assessment of BST's effective economic capacity to cause damage to competition; the disproportionate nature of the starting amount for the fine to be imposed on BST as compared with the amounts applied to other undertakings; and failure to take account of BST's financial losses.

52 First of all, BST complains that the Commission failed to take into account the small size of the relevant market and, as a consequence, set the starting amount for the fine at a level that was too high in relation to market size. According to BST, the Commission took into account the small size of the market for automotive thread in the EEA when it set the starting amount for the calculation of the fines at EUR 5 million in respect of a market estimated to be worth EUR 20 million in 1999. With regard to the industrial thread market in Benelux and the Nordic countries, on the other hand, the Commission set the starting amount for the calculation of the fines at EUR 14 million in respect of a market estimated to be worth EUR 40 million in 2004.

53 BST also claims that the Commission incorrectly valued the market for industrial thread in Benelux and the Nordic countries as being worth EUR 40 million in 2004 inasmuch as it did not take account of the fact that most industrial thread sold in the EEA is purchased by traders who export it to undertakings established outside the EEA. BST states that the turnover accounted for by exports of finished products should have been deducted from the EUR 40 million turnover, and the relevant market should have been valued at less than EUR 20 million. BST concludes that, by

failing to take into account the small size of that market when setting the starting amount for the calculation of the fines, the Commission acted in breach of the principles of equal treatment and proportionality. It also maintains that insufficient reasons are stated in the contested decision in that regard.

54 Secondly, BST complains that the Commission erred in its assessment of BST's effective economic capacity to cause significant damage to other traders and, in particular, to consumers. According to BST, the Commission was required to take account of its market share and of the 'overall turnover which it achieves with regard to the items concerned'.

55 First of all, BST claims that the Commission is incorrect in contending that the effective economic capacity of undertakings to cause significant damage to competition can be assessed on the basis of supplies made in the relevant market. According to BST, the Commission has not provided evidence in support of its allegation that BST's market power on the relevant market is consonant with its turnover in Benelux and the Nordic countries. BST argues that the influence exerted by the undertakings concerned on competition cannot be correctly assessed without account being taken of the four specific circumstances which characterise the market: (i) most of the thread sold in Benelux and the Nordic countries is intended for immediate export; (ii) industrial thread is traded intensively; (iii) there is no technical or regulatory hindrance to trade in thread; (iv) thread is easy to store and to transport. Moreover, according to BST, the Commission recognised the existence of those circumstances, but failed to draw the proper inferences when assessing BST's effective economic capacity to cause damage to competition. Secondly, BST maintains that the Commission did not take account of the market shares of the undertakings concerned. Thirdly, BST claims that the Commission also did not take account of the fact that BST was not 'vertically integrated' and did not therefore have production capacity outside the EEA. Fourthly, BST refers to Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 – Luxembourg

Brewers) (OJ 2002 L 253, p. 21), in which significantly lower amounts were applied by the Commission.

56 Thirdly, BST submits that the starting amount for the fine imposed on it is much too high when compared with the starting amounts for the fines applied to the other undertakings concerned, the reasons being the different role played by BST in the infringement, the size of the other undertakings concerned, and their market power, which was greater than BSTs. The method of calculation applied by the Commission is based on the false premiss that BST's market power is consonant with its turnover on the relevant market. Even supposing that the Commission could legitimately have focused solely on that turnover, that turnover was taken into account disproportionately as compared with other assessment factors (namely, vertical integration; production capacity in low-wage countries; and the volume of imports from those countries), which led to an excessive starting amount being set for the fine. Lastly, BST states that, even after application of the upper limit of 10% of the turnover achieved in the preceding business year for each of the undertakings involved in the infringement and after the reduction for cooperation, the fine imposed on BST represents 8% of its worldwide turnover in 2004, whereas the fine imposed on the 'market leader' represents only 1.1% of its worldwide turnover.

57 Fourthly, BST claims that the starting amount for the fine imposed on it is manifestly too high, in view of its precarious financial situation as reflected by its very low turnover.

58 The Commission disputes all of those arguments and contends that this plea should be rejected.

Findings of the Court

— The complaint alleging failure to take account of the small size of the relevant market

59 First of all, BST claims, essentially, that the Commission did not take account of the size of the relevant market and thus set a starting amount for the calculation of the fines which was disproportionate to that size.

60 It should first be noted that the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued. When it comes to the calculation of fines, the gravity of infringements has to be determined by reference to numerous factors and it is important not to confer on one or other of those factors an importance which is disproportionate in relation to other factors. In this context, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228).

61 With regard to the complaint that the Commission did not take account of the size of the relevant market, it should be borne in mind that, under Article 15(2) of Regulation No 17 and Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), the Commission may impose fines on undertakings but, for each undertaking participating in the infringement, the fine must not exceed 10% of its turnover in the preceding business year. Those provisions require that, for the purposes of determining the amount of the fine within that limit, regard be had to the gravity and to the duration of the infringement. Moreover, in accordance with the Guidelines, the Commission is to determine the starting amount for the fine on the basis of the gravity of the infringement, taking account of the intrinsic nature of the infringement, its actual impact on the market, if that is measurable, and the extent of the geographic market.

62 Thus, neither Regulation No 17, nor Regulation No 1/2003, nor the Guidelines provide that the amount of fines must be determined in direct relation to the size of the affected market, that being only one relevant factor among others. That legal framework does not therefore expressly require the Commission to take account of the limited size of the product market (Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 148).

63 However, according to the case-law, in assessing the gravity of an infringement the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120). It cannot be ruled out that cases may arise in which one of the factors indicative of the gravity of an infringement is the size of the market for the product in question.

64 Consequently, although market size may constitute a factor to be taken into account in establishing the gravity of the infringement, its importance varies according to the particular circumstances of the infringement concerned.

65 In the present case, the infringement consisted primarily in the exchange of sensitive information on price lists and/or prices charged to individual customers; in agreements on price increases and/or on target prices; and in agreements to avoid undercutting, to the advantage of the incumbent supplier, and to arrange customer allocation (contested decision, recitals 99 to 125 and 345). Such practices constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and, accordingly, are inherently 'very serious'. In that context, the small size of the relevant market – even if that were to be established – is of lesser importance than all the other factors indicative of the gravity of the infringement.

66 In any event, account should be taken of the fact that the Commission considered that the infringement had to be regarded as very serious within the meaning of the

Guidelines, which provide that the Commission may regard as 'likely' a starting amount in excess of EUR 20 million for such cases. In the present case, the Commission, in the contested decision, divided the undertakings concerned into a number of categories according to their relative importance on the relevant market. It emerges from recital 358 of the contested decision that the Commission fixed a starting amount of only EUR 14 million for undertakings in the first category, EUR 5.2 million for the undertaking in the second category (BST), EUR 2.2 million for those in the third category and EUR 0.1 million for those in the fourth category. This shows that the starting amount on the basis of which the fine imposed on BST was calculated was much lower than the amount which, under the Guidelines, the Commission could have regarded as 'likely' for very serious infringements. The fact that the starting amount for the fine was set in that way tends to confirm that the Commission did indeed take account of the size of the relevant product market.

67 BST's argument that the Commission did not take account of the size of the relevant market and thus set a starting amount for the fine which is disproportionate to that size must therefore be rejected.

68 Secondly, BST claims, incorrectly, that, in setting the starting amount for the fine, the Commission acted in breach of the principles of proportionality and equal treatment. BST argues in support of that claim that, by contrast with its calculation regarding the infringement imputed to BST, the Commission took account of the small size of the automotive thread market in the EEA and thus set a starting amount for the fine that was in proportion to the size of that market.

69 By virtue of the principle of equal treatment, comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified. In the present case, the cartel on the industrial thread market in Benelux and the Nordic countries is different from the cartel on the automotive thread market in the EEA: they are two different infringements which concern different product and geographic markets. As a consequence, BST is not in a situation which is identical to that of the undertakings involved in the cartel on the

automotive thread market in the EEA and cannot therefore validly rely on breach of the principle of equal treatment in that regard.

70 Thirdly, BST's argument that the size attributed to the relevant market should be reduced, after deduction of exports of finished products, to less than EUR 20 million cannot succeed. In the first place, the transactions involving the products concerned which were incorporated in finished products exported outside the relevant market took place on the relevant market and, for that reason, are an integral part of that market. In the second place, BST has not shown that the export, outside the relevant market, of finished products incorporating the products concerned, purchased on the relevant market, reduces the size of that market.

71 Furthermore, the argument alleging breach of the obligation to state reasons must be rejected. It necessarily follows from paragraphs 65 and 66 above that the contested decision contains sufficient information with regard to the setting of the starting amount for the fine.

72 It follows from all the above considerations that the complaint alleging failure to take account of the small size of the relevant market must be rejected.

— The complaint alleging incorrect assessment of BST's effective economic capacity to cause damage to competition

73 In substance, BST claims, incorrectly, that, contrary to the Guidelines, the Commission set the starting amount for the fine without reference to BST's overall turnover; that, accordingly, it failed to take into account the effective economic capacity of the undertakings concerned to cause damage to competition; and that it acted in breach of the principle of proportionality.

74 It is clear from the contested decision that, in order to set the starting amount for the fine, the Commission first took account of the nature of the infringement in itself, its actual impact on the market, and the size of the relevant geographical market. In the light of those factors, the Commission concluded that the infringement committed by the undertakings concerned was 'very serious' (contested decision, recitals 344 to 353).

75 Next, the Commission considered it necessary to treat the undertakings involved in the cartels differently, so as to take account of the effective economic capacity of each offender to cause significant damage to competition and so as to fix the fine at a level ensuring sufficient deterrent effect. The Commission added that account had to be taken of the specific weight of the unlawful conduct of each undertaking, hence of its actual impact on competition. The Commission stated that it had chosen to base its comparison of the relevant importance of the undertakings concerned on the turnover achieved by each undertaking on the relevant market for the product concerned. Consequently, the Commission divided the undertakings into four categories. In view of their turnover of between EUR 14 million and EUR 18 million, Amann and Coats were placed in the first category. BST, in view of its turnover of EUR 6 million, was placed in the second category. In view of their turnover of between EUR 2 million and EUR 4 million, Gütermann, Barbour and Bieze Stork BV ('Bieze Stork') were placed in the third category and Zwicky, in view of its turnover of between EUR 0 and EUR 1 million, was placed in the fourth category. On the basis of those considerations, the Commission fixed a starting amount for the fine, determined according to the gravity of the infringement, of EUR 14 million for Coats and Amann, EUR 5.2 million for BST, EUR 2.2 million for Gütermann, Barbour and Bieze Stork, and EUR 0.1 million for Zwicky (contested decision, recitals 356 to 358).

76 First of all, in so far as BST states that its turnover on the relevant market was not enough in itself to enable BST's effective economic capacity to cause damage to competition to be determined and that account should have been taken of its overall turnover, that is to say, the turnover it achieved from worldwide sales of all industrial threads, it should first be noted that the only express reference in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 to the overall turnover

of an undertaking which has participated in an infringement concerns the upper limit for fines. Provided that it complies with that upper limit, the Commission may in principle choose which turnover – in terms of territory and products – on the basis of which to set the fine, without being obliged to adhere precisely to the overall turnover or the turnover on the geographic market or the relevant product market. Moreover, although the Guidelines do not state that fines should be calculated according to a specific turnover, they do not preclude the Commission from taking into account, in determining the amount of the fine, the turnover generated by the undertakings concerned on the relevant market, in order to ensure compliance with the fundamental principles of the law of the European Union and where circumstances so require. Thus, turnover may be relevant for the purposes of taking into consideration the various factors referred to in paragraph 75 above, which are set out in the fourth and sixth paragraphs of Section 1A of the Guidelines (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 82, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 195).

77 It follows that, for the purposes of determining the amount of the fine, the Commission is free to take into account the turnover figure of its choice, provided that this does not appear unreasonable by reference to the circumstances of the case. Similarly, the Commission is under no obligation, when determining the amount of fines, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect every difference between the undertakings concerned in terms of their overall turnover or their relevant turnover (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 312; Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 166; and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 84).

78 With regard to the choice made by the Commission of one and/or the other turnover, the case-law states that, for the purposes of the analysis – undertaken with a view to setting the fine for an infringement of the competition rules – of the effective economic capacity of the offending undertakings to cause significant damage

to competition, which involves an assessment of the actual importance of those undertakings on the market affected, that is to say, of their influence on the market, their overall 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 on a specific product market. Similarly, the possibility cannot be ruled out that an undertaking occupying an important position on a geographical market outside the European Union occupies only a weak position on the EU market or the EEA market. In such circumstances, the mere fact that the undertaking concerned has a high overall turnover does not necessarily mean that it has a decisive influence on the market affected (*Cheil Jedang* v *Commission*, paragraph 76 above, paragraph 88, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 194). That is why, even though the turnover of an undertaking on the market affected cannot be a decisive factor in concluding that that undertaking belongs to a powerful economic entity, it is nevertheless relevant for the purposes of determining the influence which that undertaking may exert on the market (see, to that effect, Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 65, and *Union Pigments* v *Commission*, paragraph 49 above, paragraph 152).

79 Thus, the proportion of turnover derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the scale of the infringement on the relevant market (*Cheil Jedang* v *Commission*, paragraph 76 above, paragraph 91, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 78 above, paragraph 196). The turnover figure derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the liability on the relevant market of each of the undertakings concerned, since it constitutes an objective criterion which gives a proper measure of the harm which the offending conduct represents for normal competition and it is therefore a good indicator of the capacity of each undertaking to cause damage to competition. In the present case, the Commission's choice to base its considerations on the turnover on the relevant market in order to determine the capacity of each of the undertakings concerned to cause damage was therefore consistent and objectively justified.

80 The specific circumstances on which BST relies are not such as to call that finding into question. It should first be borne in mind that the geographic scope of the cartel

was not worldwide and that the competition hindered by the infringement is limited to the industrial thread market in Benelux and the Nordic countries. Secondly, BST has not shown that the Commission erred in considering that the turnovers achieved by the undertakings concerned on the relevant market included the turnovers in respect of industrial thread produced in countries other than Benelux and the Nordic countries, but sold on the relevant market, or turnovers in respect of industrial thread initially produced in Benelux or the Nordic countries and subsequently exported to other countries. Lastly, BST's reasoning is contradictory inasmuch as it presupposes that account is taken of the overall turnover of the undertakings concerned in order to divide them into various categories and that the turnover achieved by the undertakings concerned on the relevant market is chosen in order to determine the starting amount for the fine to be imposed on each of them.

81 Secondly, BST cannot complain that the Commission did not take account of the market shares of the undertakings concerned. It should first be noted that, in recital 356 of the contested decision, the Commission expresses the view that the information concerning market shares was generally not precise enough to be relied on. Even supposing that – as BST claims – the information provided with regard to its market share in Benelux and the Nordic countries was sufficiently precise to be relied on, such information could not have been used, given the inadequacy of the information concerning the market shares of the other cartel members. In those circumstances, the Commission was correct in relying on the turnover on the relevant market, which, when it came to determining the relative weight of the cartel members in order to divide them into different groups, best reflected the specific weight of those undertakings.

82 Thirdly, it is necessary to reject BST's argument that the Commission had to take into account the fact that, unlike the other undertakings concerned, BST was not vertically integrated. The Commission may, when assessing the gravity of the infringement

and setting the starting amount for the fine, base its assessment of the effective economic capacity of undertakings which infringe the competition rules to cause significant damage to competition on data relating to turnover and market shares in the relevant market. However, particular circumstances, such as the characteristics of that market, may be such as appreciably to diminish the significance of those data and to require, for the assessment of the influence of the undertakings on the market, other relevant factors to be taken into account, such as vertical integration or the extent of the product range (Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraphs 61 and 63). Although, depending on the circumstances, vertical integration and the extent of the product range may be relevant factors in the assessment of the influence which an undertaking may exercise on the market, and provide a further indication of that influence in addition to market shares and turnover in the relevant market (see, to that effect, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraphs 67 to 72 and 78 to 81), it must be held that, in the present case, BST's arguments concerning the vertical integration of the other undertakings concerned do not show that those undertakings enjoyed any particular and significant competitive advantages on the relevant market. Moreover, as was pointed out in paragraph 80 above, BST has not shown that the turnovers achieved by the other undertakings concerned in respect of industrial thread produced in countries other than Benelux and the Nordic countries, but sold on the relevant market, or turnovers in respect of industrial thread initially produced in Benelux or the Nordic countries and subsequently exported to other countries, were not included in their turnovers on the relevant market.

83 Fourthly, the comparison made by BST between the contested decision and the 'Luxembourg Brewers' decision (paragraph 55 above) is irrelevant. In setting the fine, the Commission used its discretion, in compliance with Regulation No 17 and Regulation No 1/2003 and the rules which it imposed on itself in the Guidelines. Moreover, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 234, and Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 275).

84 This complaint must therefore be rejected.

— The complaint alleging breach of the principle of proportionality by reason of the application of a starting amount which was manifestly too high as compared with the amounts applied to the other undertakings concerned

85 First of all, BST claims, incorrectly, that the starting amount for the fine to be imposed on it – EUR 5.2 million – is disproportionate to the starting amounts for the calculation of the fines to be imposed on the other undertakings concerned.

86 In the first place, as was stated in the context of the first complaint, the Commission was entitled, in the present case, to rely on the turnover achieved by the undertakings concerned on the relevant market in order to determine their relative importance on that market.

87 In the second place, it should be recalled that, according to the Guidelines, the starting amount likely for very serious offences is at least EUR 20 million. Since the starting amounts for the fine are proportionate to the differences between the undertakings concerned and, regard being had to the factors referred to in paragraph 74 above, the Commission has set the fines at a level well below the minimum laid down in the Guidelines, no breach of the principle of proportionality can be found to exist.

88 Secondly, BST's argument that the starting amount and the final amount of the fine imposed on it are unreasonably high as compared with the fines imposed on the other undertakings concerned must also be rejected. BST cannot legitimately claim that its treatment was discriminatory or disproportionate, given that the starting point for its fine is justified in the light of the criterion which the Commission used in assessing

the importance of each of the undertakings on the relevant market (see, to that effect, *LR AF 1998* v *Commission*, paragraph 83 above, paragraph 304), and also in view of the fact that the starting amount of EUR 5.2 million is much lower than the amount laid down in the Guidelines for 'very serious' infringements.

89 Moreover, as was pointed out in paragraph 77 above, the Commission is under no obligation to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect every difference between those undertakings in terms of their overall turnover or their relevant turnover.

90 It should be added that, likewise, Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 do not lay down any requirement that, where fines are imposed on a number of undertakings involved in the same infringement, the fine imposed on an undertaking which is small or medium-sized must be no higher, as a percentage of turnover, than the fines imposed on the larger undertakings. It is clear from those provisions 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 the undertakings, the fine is higher in relation to its turnover than that imposed on the others (Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 174).

91 In the light of the above, it cannot properly be concluded that the starting amount, the basic amount and the final amount of the fine imposed on BST are disproportionate.

92 This complaint must therefore be rejected.

— The complaint alleging that the starting amount set was excessive in view of BST's precarious financial situation

93 It is necessary to reject BST's complaint alleging that the starting amount for the fine to be imposed on it was excessive in view of its precarious financial situation and the risk that the fine might cause it to cease to exist.

94 The starting amount for the fine is merely an intermediate figure which, in accordance with the method laid down in the Guidelines, is then adapted to reflect the duration of the infringement and any aggravating or mitigating circumstances (see, to that effect, *Cheil Jedang* v *Commission*, paragraph 76 above, paragraph 95). It follows that the mere fact that the starting amount for the fine represents 32% of BST's overall turnover in 2001 does not support the conclusion that it is excessive.

95 In any event, it should be borne in mind that, according to settled case-law, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to conferring an unfair competitive advantage on the undertakings least well adapted to market conditions (*Dansk Rørindustri and Others* v *Commission*, paragraph 77 above, paragraph 327, and *SGL Carbon* v *Commission*, paragraph 48 above, paragraph 105; see also, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55).

96 Furthermore, even if a measure taken by a Community authority were to lead to the liquidation of an undertaking, such a liquidation of the undertaking in its existing legal form – although it may adversely affect the financial interests of the owners, investors or shareholders – does not mean that the personal, tangible and intangible

elements represented by the undertaking would also lose their value (*Tokai Carbon and Others* v *Commission*, paragraph 76 above, paragraph 372).

97 In the light of all the above, the plea alleging miscalculation of the starting amount for the fine and of the amount of the fine, as well as error in placing BST in the second category must be rejected.

The plea alleging erroneous assessment of mitigating circumstances

Arguments of the parties

98 In the first place, BST claims that it never implemented, or ever intended to implement, the agreements reached at the meetings.

99 First, BST states that the Commission did not assess its individual conduct in an effective manner.

100 Secondly, BST argues that the 'non-implementation in practice of the offending agreements or practices' is confirmed by the fact that it did not pass on lists of its 'actual rates' and did pass on lists of 'fictitious basic prices'. BST argues in that regard that it negotiates and concludes price agreements with its purchasers on an individual basis and, as a consequence, does not offer reductions on the list prices communicated to customers. BST claims that it applies and provides in-house price lists only in the context of its relations with its intermediaries (agents and distributors). A comparison between, on the one hand, the fictitious basic prices and, on the other

hand, the prices actually invoiced to its customers, as well as the price lists provided to its agents, shows clearly that there is no connection between those types of prices.

101 Thirdly, BST claims that it did not adapt its conduct with regard to market prices to the 'fictitious price lists' which it passed on. BST maintains that it has demonstrated, with figures in support, that – for the entire period between 1994 and 2001 – the movement of the prices which it actually charged was completely independent of the movement of the price lists distributed at the meetings. BST also states that the attempt to apply a 3.5% increase to prices for supplies to the Netherlands, of which the Commission complains, is the result, not of one of the agreements allegedly concluded at the meeting in Budapest on 19 September 2000, but of a ruling to that effect from the Belgian Textile Industry Federation (Febeltex). Similarly, the 6% price increase applied in Sweden covered only nylon yarn and came about solely because of an increase in the value of the British pound.

102 In the second place, BST argues that, by granting it a reduction of only 15% in the amount of the fine, the Commission did not take account of the fact that BST's role was much more limited in time, in that it did not begin to participate in the discussions concerning the Nordic countries until 1997. The Commission also did not take account of the fact that BST was the only one of the undertakings concerned which was not involved in either the conception or the organisation of the infringement and that it had not begun to take part in the meetings dealing with Benelux until 1991. BST is surprised, therefore, that the same percentage reduction in the fine was granted to Bieze Stork, which had nevertheless participated in the discussions concerning Benelux from the very beginning of the infringement. BST states that it attended only about 85% of the meetings concerning Benelux, and 35% of the meetings concerning the Nordic countries, for an average of 60% of the total duration of the infringement. The Commission was therefore in breach of the principle of equal treatment and the principle of proportionality.

103 The Commission disputes all of those arguments and contends that the plea should be rejected.

Findings of the Court

104 Section 3 of the Guidelines provides for a reduction in the basic amount where there are 'particular mitigating circumstances', such as an exclusively passive or 'follow-my-leader' role in the infringement, non-implementation in practice of the collusive agreements or practices, termination of the infringement as soon as the Commission intervenes or other circumstances which are not referred to explicitly.

105 First of all, it is necessary to consider BST's complaint alleging that account was not taken of the non-implementation in practice of the collusive agreements.

106 With regard, first, to BST's argument that it passed on only fictitious basic prices to the competing undertakings, it should be recalled that BST provided two series of price lists, claiming that the first series – namely, those transmitted to the cartel members at the meetings – contained fictitious basic prices and that the second series contained its actual price lists. It should also be pointed out that the actual price lists contain a number of prices for each type of thread, set out in eight columns, whereas the purportedly fictitious basic price lists display only one price for each type of thread, set out in the first column.

107 The amounts set out in the first column of the two series of lists containing, respectively, the actual prices and the fictitious basic prices are almost identical. BST states that only the actual price set out in the eighth column was relevant.

108 It should be pointed out that in the actual price lists, as the Commission has observed, there are a number of types of thread for which no price is indicated in the eighth

column, but only basic prices, set out in the first four columns. It is thus difficult to accept that only the prices set out in the eighth column were relevant. Moreover, it is apparent from the Commission's file that, depending on the quantities ordered, different prices applied. Thus, the prices varied according to the weight of the products (in the case of thread for polyester bags, for example, the prices in the first column corresponded to a weight of 10 kg; the prices in the second column corresponded to 25 kg; and so on) or according to the packaging unit (in the case of polyamide, for example, the prices in the first column corresponded to quantities ordered which were smaller than a packaging unit; the prices in the second column corresponded to quantities equal to the smallest packaging unit; and so on). It can be inferred from this that the price indicated in the first column is really the price offered for the 'small purchase' category and, accordingly, is not fictitious at all. Even supposing that – as BST maintains – the prices indicated in the first four columns appear on the actual price lists for 2001 solely by way of 'historical reference', the fact remains that those price lists were not purely fictitious and that the possibility cannot be excluded that, on the basis of the basic prices indicated in the first column, competing undertakings could get an idea of the prices charged for larger orders. Consequently, it is reasonable to conclude that the price lists passed on by BST to competing undertakings were not fictitious but merely imprecise or incomplete.

109 In conclusion, the Commission was correct in finding, in recital 170 of the contested decision, that BST had not shown that its basic prices, as set out in the first column, were fictitious.

110 In that regard, BST's argument – supported by studies appended to its pleadings – that the prices charged to its customers were lower than those discussed at the meetings is not sufficient to cast doubt on the above finding on the part of the Commission. The Commission never denied that there was a difference between the prices which BST actually charged to its customers and those discussed at the meetings, but it correctly pointed out that such a difference was not surprising since each supplier gave its customers discounts.

111 With regard, secondly, to BST's complaint based on the purported non-implementation of the agreements reached at the meetings, it must be considered whether the arguments put forward by BST are capable of showing that, during the period in which BST was party to the unlawful agreements, it actually avoided implementing those agreements by adopting competitive conduct on the market or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation (see, to that effect, *Daiichi Pharmaceutical* v *Commission*, paragraph 82 above, paragraph 113).

112 In the present case, it should be recalled, first, that the Commission has established to the requisite legal standard that BST had taken part in many meetings of the cartel and in bilateral contacts, and had repeatedly taken part in a number of the collusive practices referred to in the contested decision.

113 Secondly, with regard to BST's claim that it never engaged in any follow-up to the unlawful meetings, or in implementation of the agreements, it is apparent from point (b) of recital 139 and from recital 143 of the contested decision that BST announced on two occasions that it had increased its prices.

114 In the first place, the Commission states in point (b) of recital 139 of the contested decision that, at the meeting held in Prague on 8 September 1998, BST stated that it had increased its prices to its Swedish distributor by 6%. BST denies that it actually implemented that increase but seeks to explain its statement merely by referring to the fact that the price actually charged in Sweden remained unchanged throughout the period from 1997 to 1998. That explanation is unconvincing since BST itself confirmed both in its reply to the statement of objections and in its written pleadings that the general trend of the market was seriously downward from 1992 to 2002. The Commission did not therefore make an error of assessment in considering that, as a rule, prices should have dropped. It follows that the stability of the prices charged by BST in Sweden suggests rather that they were artificially maintained at a particular level

and invites the assumption that, in the absence of a convincing explanation on BST's part, the latter had implemented, at least in part, some of the agreements reached.

115 In the second place, it is apparent from recital 143 of the contested decision that, at the meeting held in Budapest on 19 September 2000, an agreement was reached to increase prices by 3.5% for supplies to the Netherlands in 2001, an increase which BST was first to implement. BST does not deny that it actually increased those prices by 3.5%.

116 However, BST maintains, incorrectly, that that increase was carried out following a request from Febeltex in October 2000 to increase prices by 5%. In recital 170 of the contested decision, the Commission correctly forms the view that that justification was irrelevant since there is a body of sufficiently consistent evidence to the contrary. First of all, the agreement called for a price increase of 3.5% between January and March 2001. BST does not deny that it applied such an increase from 1 January 2001. Secondly, the letter from Febeltex bears a date which is later than the date of the agreement. Lastly, the increase applied by BST was of 3.5%, not 5%.

117 Accordingly, BST is incorrect in claiming that the Commission should have accepted the 'non-implementation in practice of the agreements' as a mitigating circumstance in its favour.

118 Secondly, the argument that BST played only a passive or follow-my-leader role in the infringement is without foundation.

119 It should be recalled that a passive role implies that the undertaking adopted a 'low profile', that is to say, that it did not actively participate in the creation of any

anti-competitive agreements (*Cheil Jedang* v *Commission*, paragraph 76 above, paragraph 167).

120 It is clear from the case-law that one circumstance that may be taken into account as indicating the adoption by an undertaking of a passive role within a cartel is where the undertaking's attendance at cartel meetings is significantly more sporadic than that of the 'ordinary' cartel members; another is where it enters the market affected by the infringement late, regardless of the length of its involvement in the infringement; yet another is where express statements to that effect are made by representatives of other undertakings which participated in the infringement (*Cheil Jedang* v *Commission*, paragraph 76 above, paragraph 168; *Tokai Carbon and Others* v *Commission*, paragraph 76 above, paragraph 331; and *Union Pigments* v *Commission*, paragraph 49 above, paragraph 126).

121 In the present case, the Commission took account, precisely, of the more sporadic participation of BST and Bieze Stork in the meetings concerning the Nordic countries, by granting each of them a 15% reduction in the basic amount of the fine (contested decision, recital 372). BST and Bieze Stork did not participate in the discussions concerning the Nordic countries until 1997 and 1998 respectively.

122 First of all, BST relies, incorrectly, on breach of the principle of equal treatment on the ground that Bieze Stork was granted the same percentage reduction in the fine even though Bieze Stork had participated in the infringement from the very beginning. BST's reasoning is rooted in confusion between, on the one hand, the duration of the infringement and, on the other, the existence of mitigating circumstances. With regard to the duration of the infringement, the Commission applied to the starting amounts for the fines to be imposed on BST and on Bieze Stork percentages which were proportional in each case to the length of time that the undertaking had participated in the infringement, that is to say, 100% for BST and 115% for Bieze Stork. BST's allegation of breach of the principle of equal treatment is a fortiori unjustified in that BST was granted the same reduction as Bieze Stork even though Bieze Stork first took part in the discussions concerning the industrial thread market in the Nordic countries a year later than BST.

123 Secondly, BST cannot reasonably argue breach of the principle of the proportionality of the fine on the ground that the 15% reduction granted for mitigating circumstances was insufficient.

124 First of all, BST itself admitted in its written pleadings that it had attended approximately 85% of the meetings dealing with the Benelux countries. It was therefore present at the great majority of the collusive meetings and cannot rely, on that basis, on a mitigating circumstance arising from some sort of passive role. Moreover, the fact that BST participated in only 35% of the meetings dealing with the Nordic countries and that it was present at the meetings for only 60% of the total duration of the infringement changes nothing in that regard. Where the Commission grants a reduction for such a mitigating circumstance, it is not required to make a purely mathematical calculation consisting in the application of a percentage which is directly proportional to the rate of participation of each undertaking in the meetings held in the context of the cartel. In the light of the circumstances of the present case, the 15% rate granted to BST on account of its late participation in the meetings dealing with the Nordic countries appears reasonable.

125 Secondly, the fact that BST began to take part in the infringement after the series of meetings had been launched does not necessarily imply that it had no part in the conception or organisation of the infringement. As the Commission correctly points out, the functioning of the cartel was not crystallised and organised solely at the first meetings.

126 Lastly, it is clear both from point (e) of recital 139 of the contested decision and from BST's remarks in reply to the statement of objections that BST did not play an exclusively passive or follow-my-leader role. At the meeting in Prague on 8 September 1998, it was agreed, at Amann's request, that BST was to build up relations with Danfield so as to encourage it to bring influence to bear on Heinke, its sole importer and distributor for Germany and the Benelux countries, which was charging very low prices. BST admits that it did not openly refuse to meet that request and seeks to justify that conduct on the ground that it could not afford to refuse, given the weakness

of its position with regard to Coats and Amann. However, the constraint allegedly exercised over BST by Coats and Amann is no justification, since BST was perfectly free to complain to the competent authorities about the pressure brought to bear on it and could have lodged a complaint with the Commission under Article 3 of Regulation No 17.

127 Furthermore, in point (b) of recital 139 of the contested decision, the Commission stated that, at the meeting in Prague on 8 September 1998, BST had informed the participating undertakings that, in February 1998, it had increased the prices charged to its distributor by 6%. BST does not deny giving out that information. Moreover, it does not challenge the finding made by the Commission in recital 143 of the contested decision that BST was the first to increase prices by 3.5% in Denmark and Sweden.

128 It should be made clear that the question whether BST actually made contact with Danfield, or whether it actually increased its prices and was the first to do so, is irrelevant in the present case since the passive role, or otherwise, of an undertaking falls to be determined solely by reference to its own conduct during the collusive meetings.

129 The fact that an undertaking, whose participation in an unlawful concerted practice under Article 81(1) EC has been established, did not conduct itself on the market in the manner agreed with its competitors does not necessarily have to be taken into account. An undertaking which, despite colluding with its competitors, follows a policy which departs from the policy agreed on may simply be trying to exploit the cartel for its own benefit (see, to that effect, *Union Pigments* v *Commission*, paragraph 49 above, paragraph 130).

130 It follows that the Commission was fully entitled to conclude that BST had no grounds for claiming as a mitigating circumstance its passive or follow-my-leader role in the infringement.

131 In the light of all the above considerations, this plea must be rejected.

The plea alleging erroneous assessment of BST's cooperation

Arguments of the parties

132 In the first place, BST maintains that the 20% reduction in the fine, granted under Section D2 of the Leniency Notice, is insufficient in the light of the factors on which it considers itself entitled to rely and which are expressly made clear in the contested decision. BST claims that it never denied the truth of the facts; that it provided evidence which made it easier for the Commission to establish the infringement; that it was an important source (often the only source) of the factual information set out in the statement of objections; that it provided information establishing what took place at many meetings, such as the essential content of the agreement reached in Zurich on 9 September 1997; and, lastly, that it was the only one to provide the price lists which it had received from its competitors and that, in so doing, it had provided more information than had been asked for, as well as important evidence. BST also provided a great deal of data which incriminated BST itself and even submitted its annual account ledgers, the complete structure of its costs and its internal price lists. That extremely extensive cooperation should therefore have been rewarded by a reduction of at least 40%.

133 Secondly, BST argues breach of the principles of proportionality and equal treatment inasmuch as the 20% reduction granted to BST for its cooperation in the investigation is insufficient by far when compared with the 15% granted to Amann, Gütermann and Zwicky, even though the Commission described the information provided by those three undertakings as useless.

134 The Commission contends that it had already obtained a fairly large amount of important information through the investigations carried out and the cooperation lent by Coats. BST's contribution came about largely as a result of its obligation to produce documents requested of it in the framework of a valid request for information. Moreover, the Commission maintains that the fact – taken into account for the reduction of the fine – that BST had not denied the facts did not ultimately amount to much, since BST had played down its own role. Lastly, BST did not deny that the reduction had to be between 10% and 50%, pursuant to Section D of the Leniency Notice; or that the figure of 20% was within that range; or that, in view of the fact that its cooperation was limited to its replies to a valid request for information and to not denying the facts, the 20% reduction could be regarded as normal.

135 The Commission contends that the complaint alleging breach of the principles of proportionality and equal treatment is unfounded. According to the Commission, BST's arguments tend rather to show that the 15% reduction granted to Amann, Gütermann and Zwicky is unlawful, whereas no one can rely to his advantage on an unlawful act which benefits a third party. Lastly, the Commission states that BST does not go so far as to assimilate its cooperation to that of Coats, but asks none the less to be granted a comparable reduction.

Findings of the Court

136 In the Leniency Notice, the Commission sets out the conditions in accordance with which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them (Leniency Notice, Section A3).

137 Section D of the Leniency Notice provides:

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

2. Such cases may include the following:

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

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

138 In the present case, BST benefited from a reduction of 20% in its fine pursuant to Section D of the Leniency Notice.

139 To justify its assessment, the Commission states as follows in recital 393 of the contested decision:

'BST provided the Commission with evidence that substantially assisted the Commission in proving the infringements. BST is also cited in the [s]tatement of [o]bjections as an important source of the factual information on which the Commission based its conclusions. Annex 14 [to] BST's reply to the Commission's request for information helped the Commission to establish the content of numerous meetings such as the bulk of the contents of the agreements in the early 1990s, the contents of the Vienna meeting and the content of the Zurich agreement of 9 September 1997. BST was the only undertaking to supply the Commission with the price lists that it received at the time of the agreements with its competitors. In its letter of 23 April 2003, BST did not merely provide factual data but in point 4.3. "Contents/discussions during informal meetings" actually provided the Commission with important evidence.'

140 The Commission also stated that, after receiving the statement of objections, BST informed the Commission that it did not substantially contest the facts on which the Commission based its allegations (contested decision, recital 392).

141 It should also be noted that Amann, Gütermann and Zwicky were granted a reduction of 15% in the fine imposed on them. In recitals 395 and 396 of the contested decision, the Commission justified that reduction on two grounds. In the first place, those three undertakings had provided the Commission with information, documents and other evidence which materially contributed to establishing the existence of the infringement, even though the information provided by these undertakings could not be regarded as being as useful as that provided by BST. In the second place, they did not substantially contest the facts on which the Commission based its allegations.

142 Furthermore, in assessing the cooperation given by members of a cartel, only a manifest error of assessment on the part of the Commission is open to censure, since the

Commission enjoys a broad discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, especially in comparison with the contributions made by other undertakings (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88). In exercising that discretion, however, the Commission cannot disregard the principle of equal treatment.

143 It therefore needs to be determined, in the light of that case-law, whether the Commission was able, without disregarding the principle of equal treatment or overstepping the bounds of its discretion, to grant BST a 20% reduction in the fine in return for its cooperation.

144 First of all, it should be noted that the considerations set out by the Commission in recital 393 of the contested decision leave no room for confusion as to the very considerable extent of BST's cooperation during the administrative procedure. First of all, that cooperation 'substantially' assisted the Commission in proving the infringements. Secondly, the Commission unequivocally accepts that BST had been an 'important' source of the facts as found by the Commission and that it was 'the only' undertaking to provide the Commission with the price lists which were exchanged at the meetings. Such documents are obviously important for proving an infringement, such as the infringement at issue in the present case, which consists essentially in the exchange of sensitive information on price lists and/or prices charged to individual customers and in agreements on price increases and/or on target prices. Lastly, the Commission emphasised that BST 'not merely provided' factual data but also provided 'important evidence'.

145 The explanations put forward by the Commission in an attempt to diminish the scope of BST's cooperation as described in the contested decision are unconvincing. The argument that the Commission had already obtained a fairly large amount of important information through the investigations carried out and the cooperation lent by Coats cannot in itself diminish the importance of BST's role during the administrative procedure. Even supposing that, as the Commission contends, Coats had already kept the Commission informed of events at a number of the meetings mentioned by BST, the fact remains that it is clear from recitals 131, 133, 135, 137, 139 and 146 of the

contested decision that BST is frequently cited as the source, if not the only source, of information concerning those meetings.

146 In its written pleadings, the Commission also tries to play down BST's cooperation in the investigation by arguing that it is the frequent references to price lists which give the impression that the Commission is frequently referring to BST's documents. On the contrary, those frequent references to Annex 14, forwarded by BST, and the express reference to that annex in recital 393 of the contested decision tend to demonstrate the importance which the Commission attached to that evidence. As was pointed out in paragraph 144 above, the fact that the infringement takes the form of a price cartel makes that evidence all the more important.

147 It is also necessary to reject the Commission's contention that BST's contribution came about largely as a result of its obligation to produce documents requested of it in the framework of a valid request for information. It should be borne in mind that cooperation in an investigation that does not go further than what is required of undertakings under Article 11(4) and (5) of Regulation No 17 does not justify reduction of the fine (see, to that effect, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342). On the other hand, such a reduction is justified where the undertaking has provided information well in excess of that which the Commission may require under Article 11 of Regulation No 17 (see, to that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraphs 260 and 262, and Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 137). In the present case, the Commission expressly admitted that BST had not merely provided factual data but had actually provided important evidence of the infringement at issue.

148 Secondly, the Commission stated that BST did not substantially contest the facts on which it based its allegations.

149 Thirdly, it should be noted that the cooperation lent by Amann, Gütermann and Zwicky was described as useless when compared with that of BST. What is more, those three undertakings did not 'substantially' contest the facts.

150 It must be held that, in the light of the additional efforts made by BST, it was rewarded with a reduction in its fine which was only 5% higher than the reduction granted to Amann, Gütermann and Zwicky, even though they did not make any such efforts during the administrative procedure. The difference between the reduction granted to BST and the reduction granted to Amann, Gütermann and Zwicky is unreasonably narrow.

151 For all of those reasons, it must be held that the 20% reduction granted to BST for its cooperation is insufficient and that, accordingly, the Commission made a manifest error of assessment.

152 It follows that BST's plea alleging incorrect assessment of its cooperation must be upheld.

153 Accordingly, it is for the Court to set an appropriate rate of reduction. Pursuant to Article 31 of Regulation No 1/2003, the Court has unlimited jurisdiction within the meaning of Article 229 EC in relation to actions brought against decisions whereby the Commission has fixed a fine, and it may cancel, reduce or increase the fine imposed. In the exercise of its unlimited jurisdiction, the Court holds it appropriate to grant BST, for its cooperation, a 10% reduction in its fine, in addition to the 20% reduction already granted. Thus, a 30% reduction should be applied to the fine following application of the upper limit of 10% of turnover, namely EUR 1.224 million, which causes the final amount of the fine imposed to arrive at EUR 856 800.

3. The claim for damages

Arguments of the parties

154 BST states that the Commission erroneously disclosed internal price lists which it, BST, had forwarded in the context of the investigation into the cartel on the industrial thread market in Benelux and the Nordic countries. BST maintains that the European Community has incurred non-contractual liability, since the following three essential conditions are met.

155 According to BST, the first of the conditions for non-contractual liability to be incurred – namely, the existence of a non-contractual fault – is met. That condition entails that there must have been a sufficiently serious breach of a rule of law intended to confer rights on individuals, which is the position in the present case.

156 First of all, both the rule which, according to BST, has been infringed – namely, the obligation of confidentiality laid down in Article 287 EC and in Article 28 of Regulation No 1/2003 – and the principle of the protection of legitimate expectations are intended to confer rights on individuals.

157 Secondly, BST claims that such an infringement of that rule of law is, in itself, sufficiently serious. The rule in question is so undeniable and imperative that it leaves the institution concerned with only a very limited role, or even no discretion at all.

158 In so far as is relevant, BST carries out a specific analysis of the fault in order to show that it is 'serious'. It points out, first of all, that business secrets which were unrelated to the infringement (price lists for 2002 and 2003 regarding Ireland, Spain, Italy and the United Kingdom) or which were not relevant to it (price lists regarding the Netherlands and Sweden, except for 2000 and 2001) were disclosed. Secondly, BST maintains that the Commission cannot reasonably deny that it knew or ought to have known that the information concerning prices was extremely sensitive and confidential. BST refers, on that point, to paragraph 18 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7). BST maintains that it indicated clearly in its letter of 18 April 2004 that the information in question was confidential, which the Commission itself confirmed, moreover, in its letter of 15 January 2004. Thirdly, the Commission took no measure to limit the damage that it had caused to BST.

159 In addition, BST claims that the lists disclosed also concerned other countries not covered by the meetings concerning the relevant market and also concerned the years 2002 and 2003, and that those lists are much more detailed and much larger. BST disputes the Commission's argument that the lists in question could not be confidential. Even if it had been asked, BST would never have consented to having its complete and detailed price structure communicated to its competitors. Moreover, the hypothesis put forward by the Commission that it could have obtained a binding decision from the Hearing Officer is irrelevant since it is established that the Commission did not follow the 'Akzo' procedure and, accordingly, BST's rights and interests were not taken into consideration.

160 BST claims that its loss consists, on the one hand, in economic loss corresponding to the difference between the income which it would have earned if its price lists had not been disclosed and the income which it actually earned and, on the other hand, in the structural costs relating to the offsetting of the drop in turnover brought about by the loss of income. BST states that its loss has not yet fully materialised but that a

part of that loss can now be quantified and flows from the loss of its main customer, VF Europe.

161 According to BST, the causal link between the Commission's fault and the loss of BST's main customer is also established. American & Efird became aware (directly and via its subsidiary, Bieze Stork) of BST's price structure and was thus in a position to make VF Europe offers lower than those from BST. VF Europe has confirmed that it never transmitted BST's offers to other thread producers such as American & Efird.

162 The Commission contends that this head of claim should be dismissed.

Findings of the Court

163 It is settled case-law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct on the part of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-383/00 *Beamglow* v *Parliament and Others* [2005] ECR II-5459, paragraph 95).

164 Where one of the three conditions governing establishment of non-contractual liability on the part of the Community is not satisfied, the claims for damages must be dismissed without there being any need for the other two conditions to be examined (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37), the Community judicature not being required, moreover, to examine

the conditions in any particular order (see, to that effect, Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 13).

165 In that regard, it should first be recalled that, with regard, first, to the condition that damage must have been suffered, such damage must be actual and certain (Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 67), as well as quantifiable (Case T-108/94 *Candiotte* v *Council* [1996] ECR II-87, paragraph 54). By contrast, purely hypothetical and indeterminate damage does not give a right to compensation (see, to that effect, Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraphs 72 and 73).

166 Furthermore, as regards the condition requiring a causal link, it should be noted that the Community may be held responsible only for damage which is a sufficiently direct consequence of the misconduct of the institution concerned (see, to that effect, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21; Case T-333/01 *Meyer* v *Commission* [2003] ECR II-117, paragraph 32; and Joined Cases T-3/00 and T-337/04 *Pitsiorlas* v *Council and ECB* [2007] ECR II-4779, paragraph 292). The burden of proving the existence of that certain, direct causal nexus between the fault committed by the institution concerned and the injury pleaded rests with the claimant (see, to that effect, Case 253/84 *GAEC de la Ségaude* v *Council and Commission* [1987] ECR 123, paragraph 20; Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25; and Case T-149/96 *Coldiretti and Others* v *Council and Commission* [1998] ECR II-3841, paragraph 101).

167 Lastly, it is for the party seeking to establish the Community's liability to adduce proof as to the existence or extent of the damage alleged and to establish a sufficiently direct causal link between that damage and the conduct complained of on the part of the institution concerned (*Dumortier and Others* v *Council*, paragraph 166 above, paragraph 21, and Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 118).

168 Where it is necessary to determine the value of a lost opportunity to make money and therefore, of necessity, the value of hypothetical economic transactions, it can be difficult, even impossible, for the claimant to put an exact figure on the loss which it claims to have sustained. In such cases, the Court can rely on mean statistical values (see, to that effect, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203, paragraphs 63 to 65). However, that does not relieve the claimant entirely of the obligation to adduce evidence of the loss claimed. Although the value of a lost opportunity to make money is necessarily a hypothetical fact which must be estimated, since it cannot be calculated with certainty, the fact remains that the data on which that estimate is based can – and must, in so far as is possible – be proved by the party relying on it (order of 29 August 2007 in Case T-186/05 *SELEX Sistemi Integrati* v *Commission* (not published in the ECR), paragraph 27).

169 It is in the light of that case-law that it is necessary to consider whether the non-contractual liability of the Community could be incurred by virtue of the erroneous disclosure of BST's price lists, other than those in respect of which BST had waived confidentiality.

170 It should be noted at the outset that at least one of the conditions for the establishment of the non-contractual liability of the Community has not been met in the present case.

171 With regard to the loss relied upon by BST, it should be pointed out that, according to BST, that loss consists, not merely in a clear reduction of its income following the loss of its main customer, but also in other losses of income which it claims it must face on a daily basis, as well as structural costs relating to the need to offset the drop in turnover resulting from the loss of income.

172 On the one hand, with regard to the 'other losses of income' and the structural costs, BST adduces no evidence making it possible to determine whether those elements of the loss are actual and certain.

173 The only document produced by BST in that regard is a table which shows a significant drop in its turnover between May 2003 and January 2004, that is to say, before the purportedly confidential information was disclosed. If there was any loss, it cannot in any event include income lost during that period.

174 On the other hand, with regard to the drop in income following the loss of the main customer, it should first be pointed out that the contract between that customer and BST was signed only for a two-year period, that is to say, for the years 2005 and 2006. Accordingly, there was nothing to prevent BST from recovering, from the beginning of 2007, the customer it had lost. The loss cannot therefore be regarded as actual and certain beyond the years 2005 and 2006.

175 Secondly, the evidence adduced by BST to show that its loss is real is obscure. The table set out in the application, which is intended to show the reduction in BST's gross profits as a result of the loss of its main customer, contains data the reality of which is not proved by any document. In addition, the data contained in the table are difficult to interpret.

176 However, there is no need, in order to consider immediately the question of the causal link between that fault and the alleged loss, to go further into the question whether the evidence adduced by BST proves to the requisite legal standard the proportion of the damage resulting from the loss of its customer. Even supposing that the damage resulting from the loss of VF Europe was established for the years 2005 and 2006, it does not appear that the condition requiring a direct causal link between that event and the fault on the part of the Commission is met.

177 BST's loss of its main customer can be perfectly well explained by the decision of the VF Corporation USA Group to centralise its purchasing decisions. It should also be noted that, in a letter to the Commission dated 2 March 2005 – that is to say, after

the disclosure of the price lists – BST itself stated that it was no longer VF Europe but VF Corporation USA which decided on supply and on the distribution of orders. BST adds that its main customer is now entirely supplied by Anglo-American companies.

178 BST's statement in that letter to the effect that, at the end of 2004, it spontaneously offered its main customer a 10% reduction in its prices with effect from January 2005 tends also to confirm the lack of any causal link between the Commission's conduct of which BST complains and the loss of that customer. As the Commission correctly points out, if a competitor had wanted to offer prices below BST's earlier prices, the latter's offer would still have been considerably lower. The possible knowledge of BST's prices cannot therefore be the real reason for the loss of its main customer.

179 It follows that the condition requiring a causal link has not been met.

180 In the light of those findings, the claim for damages must be dismissed in its entirety.

Costs

181 Under Article 87(3) of its Rules of Procedure, the Court may, where each party succeeds on some heads and fails on others, order that the costs be shared or that each party bear its own costs.

182 As the action has been successful in part, the Court will make an equitable assessment of the circumstances of the case in holding that BST is to bear 90% of its own costs and to pay 90% of the costs incurred by the Commission, and that the Commission is to bear 10% of its own costs and to pay 10% of those incurred by BST.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Fixes at EUR 856 800 the fine imposed on Belgian Sewing Thread (BST) NV by Article 2 of Commission Decision C(2005) 3452 of 14 September 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.337 – PO/Thread);

2. For the rest, dismisses the application for annulment;

3. Dismisses the claim for damages;

4. Orders BST to bear 90% of its own costs and to pay 90% of the costs incurred by the European Commission, and the European Commission to bear 10% of its own costs and to pay 10% of the costs incurred by BST.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 28 April 2010.

[Signatures]

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