JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

8 July 2008 *

In Case T-53/03,

BPB plc, established in Slough (United Kingdom), represented by T. Sharpe QC, and A. Nourry, Solicitor,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre, acting as Agent, J. Flynn QC, and C. Kilroy, Barrister,

defendant,

APPLICATION for the annulment in part of Commission Decision 2005/471/EC of 27 November 2002 relating to a proceeding under Article 81 [EC] against BPB plc, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard) (OJ 2005 L 166, p. 8), or, in the alternative, annulment or reduction of the fine imposed on the applicant,

* Language of the case: English.

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

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

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2007,

gives the following

Judgment

Facts

1 BPB plc manufactures and markets plasterboard-based building materials.

2 On the basis of information received, on 25 November 1998 the Commission carried out unannounced inspections at the premises of eight undertakings operating in the

plasterboard sector, including the applicant. On 1 July 1999, it pursued its investigations at the premises of two other undertakings.

3 The Commission then sent requests for information under Article 11 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) to the various undertakings concerned. It sent four such requests to the applicant. BPB replied to them on 17 March 1999, 28 October 1999, 18 May 2000 and 6 September 2002.

4 On 18 April 2001, the Commission initiated the procedure in this case and adopted a statement of objections which it addressed to the applicant and to Gebrüder Knauf Westdeutsche Gipswerke KG ('Knauf'), Société Lafarge SA ('Lafarge'), Etex SA and Gyproc Benelux NV ('Gyproc'). The undertakings concerned submitted their written observations and were given access to the Commission's investigation file in the form of a copy on CD-Rom which was sent to them on 17 May 2001.

5 The applicant replied to the statement of objections on 8 July 2001.

6 On 27 November 2002, the Commission adopted Decision 2005/471/EC relating to a proceeding under Article 81 [EC] against BPB, Knauf, Lafarge and Gyproc (Case No COMP/E-1/37.152 — Plasterboard) (OJ 2005 L 166, p. 8; 'the contested decision').

7 The operative part of the contested decision states:

'*Article 1*

BPB …, the Knauf Group, … Lafarge … and Gyproc … have infringed Article 81(1) [EC] by participating in a set of agreements and concerted practices in the plasterboard business.

The duration of the infringement was as follows:

(a) BPB …: from 31 March 1992, at the latest, to 25 November 1998

(b) [the] Knauf [Group]: from 31 March 1992, at the latest, to 25 November 1998

(c) … Lafarge …: from 31 August 1992, at the latest, to 25 November 1998

(d) Gyproc …: from 6 June 1996, at the latest, to 25 November 1998

…

Article 3

In respect of the infringement referred to in Article 1, the following fines are imposed on the following undertakings:

(a) BPB …: EUR 138.6 million

(b) … Knauf …: EUR 85.8 million

(c) … Lafarge …: EUR 249.6 million

(d) Gyproc …: EUR 4.32 million …

…'

8 The Commission found in the contested decision that the undertakings concerned participated in a single and continuous agreement which was manifested in the following conduct constituting agreements or concerted practices:

— the representatives of BPB and Knauf met in London (United Kingdom) in 1992 and expressed the common desire to stabilise the plasterboard markets in Germany, the United Kingdom, France and the Benelux;

— the representatives of BPB and Knauf established, as from 1992, information exchange arrangements, to which Lafarge and subsequently Gyproc acceded, relating to their sales volumes on the German, French, United Kingdom and Benelux plasterboard markets;

— the representatives of BPB, Knauf and Lafarge exchanged information, on various occasions, prior to price increases on the United Kingdom market;

— in view of particular developments on the German market, the representatives of BPB, Knauf, Lafarge and Gyproc met at Versailles (France) in 1996, Brussels (Belgium) in 1997 and The Hague (Netherlands) in 1998 with a view to sharing out or at least stabilising the German market;

— the representatives of BPB, Knauf, Lafarge and Gyproc exchanged information on various occasions and concerted their action on the application of price increases on the German market between 1996 and 1998.

9 For the purpose of calculating the amount of the fine, the Commission applied the methods set out in its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines').

10 In fixing the starting amount of the fines, determined according to the gravity of the infringement, the Commission initially considered that the undertakings concerned

had committed an infringement which was very serious by its very nature in so far as the aim of the practices at issue was to put an end to the price war and to stabilise the market through exchanges of confidential information. The Commission also considered that the practices at issue had had an impact on the market, since the undertakings concerned represented almost all plasterboard supply and the various manifestations of the cartel had been put into practice in a highly concentrated and oligopolistic market. As regards the geographic extent of the relevant market, the Commission considered that the cartel had covered the four main European Community markets, namely Germany, the United Kingdom, France and the Benelux.

11 Considering, next, that there was a considerable disparity between the undertakings concerned, the Commission took a differentiated approach, relying for that purpose on the sales turnover for the product concerned on the relevant markets during the last complete year of the infringement. On that basis, the starting amount of the fines was set at EUR 80 million for BPB, EUR 52 million for Knauf and Lafarge and EUR 8 million for Gyproc.

12 In order to ensure that the fine had an adequate deterrent effect having regard to the size and aggregate resources of the undertakings, the starting amount of the fine imposed on Lafarge was increased by 100%, becoming EUR 104 million.

13 In order to take account of the duration of the infringement, the starting amount was then increased by 65% for BPB and Knauf, by 60% for Lafarge and by 20% for Gyproc, the infringement being classified by the Commission as of long duration in the case of Knauf, Lafarge and BPB and of medium duration in the case of Gyproc.

14 In respect of aggravating circumstances, the basic amount of the fines imposed on BPB and Lafarge was increased by 50% on account of recidivism.

15 Next, the Commission reduced by 25% the fine imposed on Gyproc on account of attenuating circumstances, in that it had acted as a destabilising element helping to limit the impact of the cartel on the German market and it was absent from the United Kingdom market.

16 Finally, the Commission reduced the amount of the fines by 30% for BPB and by 40% for Gyproc, pursuant to Section D.2 of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). Accordingly, the final amount of the fines imposed was EUR 138.6 million for BPB, EUR 85.8 million for Knauf, EUR 249.6 million for Lafarge and EUR 4.32 million for Gyproc.

Procedure and forms of order sought

17 By application lodged at the Registry of the Court of First Instance on 14 February 2003, the applicant brought the present action.

18 Following a change in the composition of the Chambers of the Court at the beginning of the new judicial year, the Judge-Rapporteur was assigned to the Third Chamber, and this case was therefore also assigned to it.

19 On hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, requested the parties to lodge certain documents, and put questions in writing to which they replied within the prescribed period.

20 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 24 January 2007.

21 At the hearing, the Court requested the applicant to clarify its request for confidentiality before 7 February 2007. A period of time was also granted to the Commission for any observations it might have on the applicant's reply concerning the confidential information.

22 The oral procedure was closed on 27 March 2007.

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

— annul Articles 1 and 2 of the contested decision in so far as they relate to it;

— in the alternative, annul Article 3 of the contested decision in so far as it relates to it, or, in the further alternative, reduce appropriately the amount of the fine imposed on it by the Commission in the contested decision;

— subject to the annulment of Article 3 of the contested decision or reduction of the amount of the fine, order repayment of the principal sum paid by the applicant, together with such interest as the Court may determine in accordance with law;

— order the Commission to pay the costs.

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

— dismiss the application;

— order the applicant to pay the costs.

Law

1. *The first plea: breach of the rights of the defence*

Arguments of the parties

25 The applicant considers that the Commission has infringed the rights of the defence and the general principal of equality of arms by relying on evidence not provided to the applicant.

26 First, the applicant submits that the Commission did not grant it access to information provided by an anonymous informant. According to the applicant, that information was used by the Commission on 19 November 1998 in order to obtain a search warrant from a United Kingdom court. The applicant also considers that it appears from the affidavit attached as an annex to the application for a search warrant that the Commission considered that information to be convincing. The applicant maintains that the Commission's conviction that there was a complex cartel influenced its interpretation of all the facts and evidence.

27 Second, the applicant submits that the Commission should have granted access to the replies of the other addressees of the statement of objections. The Commission relied on those replies on several occasions in the contested decision for the factual and evidential findings.

28 The Commission considers that the obligation to observe the rights of the defence does not require it to disclose the entire contents of the file to the undertakings

concerned and thereby compromise any confidentiality of elements of the file. It is under no obligation to disclose to an addressee of a statement of objections inculpatory documents on which the Commission does not propose to rely. In this case, the Commission drew its inferences only from the evidence before it which is described in the statement of objections and in the contested decision.

29 The Commission denies that the applicant's rights of defence have been infringed by its having been unable to examine the replies of the other addressees of the statement of objections. The Commission states that if, after adoption of the statement of objections, new matters come to light which it intends to use and regarding which the undertakings have not had the opportunity to submit their views, it must send a supplementary statement of objections or a letter asking the undertakings concerned for further observations on that new evidence. Its failure to do so would prevent it from relying on those matters as against the addressees of the initial statement of objections.

30 In this case, all the examples given by the applicant concerned admissions or denials of allegations which already appear in the statement of objections, on which therefore the applicant had the opportunity to comment. None of those statements introduces any new objection or new piece of factual information on which the Commission relied for its conclusions.

Findings of the Court

31 It must first be recalled that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves

with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (see Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 334 and the case-law cited).

32 With regard to inculpatory evidence, the obligation to allow access to the file relates merely to the evidence ultimately relied on in the decision and not to all the complaints which the Commission may have expressed at any stage of the administrative procedure (*Atlantic Container Line and Others* v *Commission*, paragraph 31 above, paragraph 337). A document can be regarded as a document that incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated (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 *Cementeries CBR and Others* v *Commission* [2000] ECR II-491, '*Cement*', paragraph 284).

33 Further, the applicant may not demand access, in a general and abstract way, to documents or information which have not been communicated to it without stating how the inculpatory evidence relied upon by the Commission in the contested decision was determined by those documents or that information. According to the case-law, an infringement of the rights of the defence cannot be founded on a general argument but must be examined in relation to the specific circumstances of each particular case (*Atlantic Container Line and Others* v *Commission*, paragraph 31 above, paragraphs 353 and 354).

34 In the present case, as regards the information provided by the anonymous informant, the Commission does not dispute that that information was a factor in triggering the

investigations. However, as is apparent from the contested decision, that information was ultimately not referred to as such by the Commission and the objections upheld were proved by other evidence.

35 Similarly, the applicant has not indicated any objection maintained either in the statement of objections or in the contested decision which is based solely on the information provided by the anonymous informant and to which it did not have access.

36 Further, even if the Commission has an obligation to make available to the undertakings involved in proceedings under Article 81(1) EC all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, that obligation does not extend to business secrets of other undertakings, the internal documents of the Commission or other confidential information (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 68 and *Atlantic Container Line and Others* v *Commission*, paragraph 31 above, paragraph 335). Thus, as the Commission asserts, in the case of information supplied on a purely voluntary basis, accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition (Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 34). The Commission's ability to guarantee the anonymity of certain of its sources of information is of crucial importance with a view to ensuring the effective prevention of prohibited anti-competitive practices (Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 64).

37 Consequently, proceedings initiated on the basis of information from an undisclosed source are lawful, provided that this does not affect the opportunity for the person concerned to make known his views on the truth or implication of the facts, on the documents communicated or on the conclusions drawn by the Commission from them (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 14).

38 In the light of the obligation to ensure the confidentiality of the information, and of the fact that the applicant has not referred to any objection maintained either in the statement of objections or in the contested decision which is based on evidence to which it did not have access, it cannot complain that the Commission infringed the rights of the defence and the general principle of equality of arms on the ground that the Commission did not give it access to the information provided by the anonymous informant.

39 As regards access to the replies of the other addressees of the statement of objections, it is common ground that the applicant did not have access to those replies during the administrative procedure.

40 As regards, first, the failure to communicate the alleged inculpatory evidence which was not in the investigation file, the Court notes that the observance of the rights of the defence constitutes a fundamental principle of Community law which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure. It requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (*Hoffmann-La Roche* v *Commission*, paragraph 37 above, paragraph 11, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39).

41 Next, it should be borne in mind that, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document

annexed thereto constitutes evidence against the various parties alleged to have participated in the infringement (see *Cement*, paragraph 32 above, paragraph 386, and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 50 and the case-law cited).

42 A document cannot be regarded as an inculpatory document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of the rights of the defence, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as evidence of an infringement in which the undertaking participated (Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraph 158).

43 Since documents that have not been communicated to the undertakings concerned during the administrative procedure are not admissible evidence, it will be necessary to exclude those documents as evidence if it should prove that the Commission relied in the Decision on documents that were not in the investigation file and were not communicated to the applicants (*Cement*, paragraph 32 above, paragraph 382).

44 If there is other documentary evidence of which the undertakings concerned were aware during the administrative procedure that specifically supports the Commission's findings, the fact that an incriminating document not communicated to the person concerned is inadmissible as evidence does not affect the validity of the objections upheld in the contested decision (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 72).

45 It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 73).

46 In the present case, BPB refers only to recitals 130, 232, 393 and 524 of the contested decision in order to illustrate that the Commission relied on the replies of the other addresses of the statement of objections as inculpatory evidence.

47 Concerning those examples, it should be observed that, at recital 524 of the contested decision, the Commission merely cites Gyproc's statement, in its reply to the statement of objections, that its participation was of a different intensity. Thus, that evidence was in no way used against BPB.

48 As regards recital 130 of the contested decision, it is an extract from Lafarge's reply to the statement of objections claiming that BPB was the instigator of the information exchange system. However, at no point in the contested decision does the Commission use that statement of Lafarge in order to prove that BPB was the instigator of that system. Similarly, BPB's fine was not increased on the ground that it was the instigator of the cartel. Further, as is apparent from an examination of the second plea below, BPB admitted that it infringed competition law by participating in an exchange of information on sales volumes on the four markets concerned.

49 As regards recital 232 of the contested decision, namely the interpretation by Gyproc of the memorandum and the statements of Mr [E], managing director of

Gyproc, in its reply to the statement of objections, reference should be made to Gyproc's words:

'Gyproc later backtracked on the memo and Mr [E]' explicit statement by arguing that "the so-called Versailles agreement was only an attempt and was never effectively implemented" and also that "there was never a proper meeting of minds among the participants, and definitely not as far as Gyproc was concerned, about all the details of how the German market should be shared. The [undertakings concerned] never agreed about the precise market share that Gyproc should have. … So Gyproc scuppered the attempt to conclude an agreement between the four".'

50 As the Commission noted at recital 233 of the contested decision, the statements by Gyproc, which in principle have less probative value than the abovementioned memorandum and the spontaneous statements of Mr [E], do not negate either the content or the purpose of the talks that were held but only, possibly, their result. Further, it should be recalled that BPB admitted that the Versailles meeting took place and that the purpose of the meeting was to discuss the situation on the German market.

51 Moreover, it should be noted that the Commission found only that the undertakings in question had met in Versailles in 1996, Brussels in 1997 and The Hague in 1998 with a view to sharing or at least stabilising the German market, but it did not claim that they had succeeded in concluding an agreement on allocating shares of the German market.

52 In those circumstances, even if Gyproc's interpretation of Mr [E]'s memorandum and statements set out at recital 232 of the contested decision were disregarded, that fact would not influence the assessments made by the Commission in that decision.

53 Accordingly, the result at which the Commission arrived in the contested decision would not have been different if the extracts from Gyproc's and Lafarge's replies to the statement of objections referred to by BPB had been removed from the file.

54 Lastly, it is apparent from recital 393 of the contested decision that Gyproc accepted the Commission's description of the facts regarding the price increases on the German market. This is indeed a factor that the Commission used to support its contention that there had been concerted action on price increases on the German market, a contention which BPB disputes. Thus, it is necessary to disregard that factor as evidence and then consider, so far as concerns BPB, whether the Commission demonstrated to the requisite legal standard that BPB, Knauf, Lafarge and Gyproc had exchanged information on various occasions and had concerted their action on the application of price increases on the German market between 1996 and 1998.

55 As regards, second, whether the replies of the other addresses of the statement of objections might have contained exculpatory evidence, the applicant has not put forward any arguments to that effect in the application.

56 In response to a written question of the Court requesting it to indicate the paragraphs of the application in which a plea alleging infringement of the rights of the defence relating to exculpatory evidence was raised, the applicant merely referred to paragraphs 75 to 120 of its application. Yet in those paragraphs the applicant does not submit that the replies of the other addressees of the statement of objections might have contained exculpatory evidence which it could have used for its defence. In those circumstances, the applicant's arguments that the replies of the other addressees of the statement of objections might have contained exculpatory evidence must be rejected.

57 It follows from the foregoing that the first plea must be rejected, without prejudice to the possible effect of the fact that Gyproc's statements in its reply to the statement of objections and referred to by the Commission in recital 393 of the contested decision are not to be taken into account. Consequently, it is necessary to examine the complaint in the second plea contesting the Commission's findings on the exchange of information on price increases in Germany.

58 Furthermore, and for the sake of completeness, the Court will examine the substance of the case, disregarding all the inculpatory evidence derived from the replies of the other addresses of the statement of objections, in order to ascertain whether the Commission's assessment as to the existence and effects of the infringement is demonstrated to the requisite legal standard even without that evidence.

2. *The second plea: manifest errors and/or inadequacy of the statement of reasons concerning the application of Article 81(1) EC*

The standard of proof

Arguments of the parties

59 The applicant takes the view that, in cases leading to the imposition of a heavy fine, the standard of evidence required is comparable to that in criminal proceedings. In

that regard, the applicant submits that the burden of proof falls upon the Commission and that the infringement must be demonstrated to the requisite legal standard, a term which, according to the applicant, must be interpreted as requiring that convincing proof be adduced that the alleged infringements have been committed. It considers that, in such a situation, the ordinary application of the balance of probabilities is not sufficient. Moreover, in order to respect the presumption of innocence, any doubts about evidence must favour the defence.

60 The Commission disputes that the standard of proof to be applied in competition cases is the same as that required in criminal proceedings.

Findings of the Court

61 According to case-law, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. In doing this, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an undertaking participated in such an infringement and that it was responsible for the various aspects of it (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86).

62 When the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, 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 the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraph 61 above, paragraph 87).

63 It is normal, in the context of anti-competitive practices and agreements, for the activities to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraphs 55 to 57).

64 It is apparent from that case-law that the Court must reject the applicant's assertion that the Commission must adduce proof 'beyond reasonable doubt' of the existence of the infringement in cases where it imposes heavy fines.

The London meeting

Arguments of the parties

65 The applicant considers that the Commission has failed to prove that an agreement was entered into at the London meeting and that the subsequent information

exchanges were a device to monitor the implementation of that agreement. The London meeting is the key to the Commission's case, since the other events are linked to it and it marks the inception of the infringement.

66 The applicant admits that that meeting took place but submits that the Commission's interpretation of that admission goes beyond what it actually said. Even though Mr [A] (its then Chief Executive Officer (CEO)) discussed with the cousins of the Knauf family the vigorous competition in the plasterboard market and even though both parties recognised the problem, it denies categorically having reached an agreement on a solution with the cousins of the Knauf family. Moreover, no common wish to stabilise the market was expressed at that meeting.

67 The applicant also admits that that meeting may have been a factor in accelerating the end of the price war. However, that meeting is not the only causal factor. The applicant claims that the economic situation on the relevant market was such that in 1992 the price war had ended in any event. That is confirmed by the expert economist retained by it, whose report was however not taken into account by the Commission in the contested decision.

68 The applicant considers that the fact that competition continued on the market concerned contradicts the Commission's interpretation of the London meeting. The Commission's assertions in recitals 212 and 395 of the contested decision are not supported by any evidence. In that regard, the applicant maintains that the Commission decided not to take account of numerous proven examples of price volatility which it had given to the Commission in its reply to the statement of objections. The applicant also contests the Commission's assertions regarding the stability of market shares. It claims that the Commission's own tables in the annex to the contested decision show the contrary. It also states that the Commission's allegations are devoid

of probative value, since the Commission nowhere states in the contested decision what the pre-1992 market shares of the undertakings concerned were and, therefore, a comparison of market shares was impossible.

69 As regards the Commission's assertion that there is no need to take account of the concrete effects of an infringement, the applicant claims that, where the existence of an agreement is merely asserted by the Commission and is not supported by any evidence, it is necessary to take account of evidence of what took place in the market. The applicant is of the opinion that, if that evidence tends to establish the absence of any anti-competitive agreement and no other evidence to the contrary has been adduced by the Commission, the latter must consider that no agreement was made. The applicant states that it is not merely a question of determining whether the agreement was implemented but rather of determining whether the Commission has established the existence of the alleged agreement.

70 The Commission states that the applicant's argument that no agreement existed is based on the misapprehension that the agreement has to be finite, detailed and legally binding. It adds that the object of Article 81 EC is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The elaboration of an actual plan is not therefore required. The Commission maintains that even if the discussions that took place at the 1992 meeting can not be classified as an agreement, they can be classified as a concerted practice, which is just as serious an infringement.

71 The Commission considers that the London meeting and the agreement concluded there constitute the first practical manifestation of the complex and continuous infringement on which the contested decision is based. In view of the observations

set out in recitals 56 to 69 of the contested decision and in particular of the fact that the information exchanges commenced at the London meeting or shortly afterwards, that conclusion is fully justified. It adds that it is unnecessary to prove that all the elements of the infringement were present or foreseen at the initial stage to establish that that agreement formed part of a single, complex and continuous infringement.

72 As regards BPB's statement that the Commission failed to take account of the economic evidence, the Commission contends that it simply explained in recitals 329 to 402 of the contested decision that, in view of the circumstances of the case, the attempt by BPB and the other undertakings concerned to show, on the basis of economic analyses, that the competitive situation on the plasterboard market between 1992 and 1998 excluded any possibility of a restrictive agreement during that period was beside the point. The Commission states that it does not rely on mere similarity of observed conduct, nor does it use economic evidence to establish the infringement of Article 81(1) EC. Its conclusions are based on direct evidence of the anti-competitive agreement, which the economic analyses do nothing to explain away. Where the Commission makes reference, in the contested decision, to improved stability in the market concerned or price increases (as in recitals 289 and 539), the aim was to demonstrate the effects of the anti-competitive activity, not its existence. The Commission adds that the existence of an agreement can be established without the complete elimination thereby of all competition from the plasterboard market. Moreover, since the infringement established by the Commission pursued an anti-competitive purpose, it is settled case-law that there is no requirement for it to take account of the agreement's concrete effects.

73 The Commission takes the view, in response to the applicant's argument that 'fierce' competition or the 'price war' was bound to end for economic reasons, that that argument is not relevant in determining the reasons for which and the conditions under which the 'price war' actually ended and in particular whether or not

anti-competitive conduct by certain operators was the reason for that development. It considers that, having demonstrated that the cartel participants' aim was to put an end to the price war and stabilise market shares and thereby restrict competition at least in the German, French, United Kingdom and Benelux plasterboard markets, it was fully entitled to conclude, as it did in recitals 72, 196, 212, 289 and 395 of the contested decision, that that objective was largely achieved. It contends that the market instability before 1992 was described in paragraph 28 of the statement of objections and was never contested. Moreover, as is clear from recitals 212 and 395 of the contested decision, the Commission found that prices on the United Kingdom and German markets tended to rise or at least be stable, in contrast to the position prior to 1992.

Findings of the Court

74 BPB admits that the London meeting took place and that Mr [A] and the cousins of the Knauf family each expressed the view that it would be in the interests of the industry as a whole to put an end to the destructive price war. It also admits that, at that meeting or at the latest in 1992, the undertakings began to exchange overall market volume data for each principal market.

75 However, BPB disputes that an express agreement to stabilise European markets destined to last for six years was concluded at that meeting.

76 It is therefore necessary to examine whether the London meeting had an anti-competitive object.

77 In this respect, according to recital 55 of the contested decision, BPB stated in its second reply to the request for information that, at that meeting, its representatives and those of Knauf '[had] reached an understanding that it was in [its] interest, [that of] Knauf['s] and [that of] the industry as a whole (including, ultimately, the interests of consumers) for the ruinous price war to end and for producers to attempt to compete at more sustainable economic levels'.

78 BPB subsequently argued that the term 'understanding' used by it should be interpreted in its most general sense as meaning a 'consensus of views'.

79 It is settled case-law that in order for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 199; Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 88; and Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 118). As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the intention of the undertakings concerned to behave on the market in accordance with its terms (Case T-56/02 *Bayerische Hypo- und Vereinsbank* v *Commission* [2004] ECR II-3495, paragraph 60).

80 It follows that, in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (Case C-74/04 P *Commission* v *Volkswagen* [2006] ECR I-6585, paragraph 37).

81 The criteria of coordination, convergence and cooperation, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, namely that each economic operator must determine independently the policy which it intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 173 and 174, and *Adriatica di Navigazione* v *Commission*, paragraph 79 above, paragraph 89).

82 That is the case where there is a gentlemen's agreement between a number of undertakings representing the faithful expression of such a joint intention concerning a restriction of competition. In those circumstances, the question whether the undertakings in question considered themselves bound — in law, in fact or morally — to adopt the agreed conduct is irrelevant (*HFB and Others* v *Commission*, paragraph 79 above, paragraph 200).

83 As regards, in particular, agreements of an anti-competitive nature which are reached at meetings of competing undertakings, the Court of Justice has held that Article 81(1) EC was infringed where those meetings had as their object the restriction, prevention or distortion of competition and were thus intended to organise artificially the operation of the market (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 508 and 509).

84 The Court considers that BPB's explanation regarding the object of the London meeting satisfies the criterion laid down by the case-law referred to above. BPB's

statements suffice to show that Knauf and BPB both expressed their intention to put an end to a price war and therefore to restrict competition.

85 Furthermore, it must be recalled that, where an undertaking participates, even without taking an active part, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at those meetings, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be considered as established that it participates in the cartel resulting from those meetings (*HFB and Others* v *Commission*, paragraph 79 above, paragraph 137).

86 Furthermore, the anti-competitive object of the London meeting is confirmed by the exchange of information which the undertakings carried out after that meeting. According to recital 58 of the contested decision, BPB stated, in its reply to the second request for information, the following:

'[A]t that meeting [Mr [A] and the cousins of the Knauf family] agreed to exchange sales volume information for 1991, to give themselves a reliable basis going forward to monitor whether this understanding was effective (i.e. simply to give each other a more accurate picture of the overall size of the market and thus their own market share). This was necessary because there were no reliable industry statistics.'

87 BPB's arguments that it was at most a mere attempt at an agreement must fail. The fact that BPB and Knauf expressed their common intention to put an end to the price war and to stabilise the markets in question constitutes an agreement for the purposes of Article 81(1) EC.

88 Further, as the quotation at paragraph 86 above demonstrates, BPB and Knauf executed their plan by implementing that agreement through the exchange of information on sales volumes on the four markets concerned. If those undertakings did not consider that they had concluded an agreement to put an end to the price war and to stabilise the markets concerned, they would not have needed to monitor the markets by exchanging information on sales volumes.

89 The applicant's arguments that the Commission has not shown that there had been stability of prices or market shares cannot invalidate that conclusion.

90 In this respect, for the purposes of applying Article 81(1) EC, it is sufficient that the object of an agreement should be to restrict, prevent or distort competition irrespective of the actual effects of that agreement. Consequently, in the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market. In such a case, the liability of a particular undertaking in the infringement is properly established where it participated in those meetings with knowledge of their object, even if it did not proceed to implement any of the measures agreed at those meetings. The greater or lesser degree of regular participation by the undertaking in the meetings and of completeness of its implementation of the measures agreed is relevant not to the establishment of its liability but rather to the extent of that liability and thus to the severity of the penalty (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 145). Undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement was not intended to have an appreciable effect on competition.

91 Moreover, BPB's assertion that the London meeting did not have any effects is contradicted by its reply to the statement of objections, in which it stated that there

had been a turning point in prices in 1992. BPB also admits that the London meeting may have been a factor in accelerating the end of the price war. However, it submits that the commercial and economic reasons set out in the application show that it was not the only cause.

92 The Court considers that the applicant's admission that the London meeting was a factor in accelerating the end of the price war supports the interpretation that the object of the London meeting was anti-competitive. Even if there were other economic reasons which prompted the end of the price war, that does not call in question the anti-competitive object of the London meeting, which was to raise prices and to reduce the intensity of the competition between the undertakings concerned.

93 Lastly, account must be taken of the fact that the applicant stated, in its reply to the statement of objections, that it did not object to the Commission's categorising that meeting as an infringement of Article 81(1) EC. It also admitted, in its reply to an oral question put by the Court, that the London meeting constituted an infringement of Article 81(1) EC.

94 It follows that the Commission was right to find that, at the London meeting, BPB and Knauf had expressed their common intention to put an end to the price war and to stabilise the market concerned. This complaint cannot therefore be upheld.

Exchanges of information concerning quantities sold in Germany, France, the Benelux and the United Kingdom

Arguments of the parties

95 The applicant admits that, either at the London meeting or some time later in the same year, Mr [A] and the cousins of the Knauf family agreed to exchange highly aggregated sales volume data for 1991. However, Mr [A] said that that had been done to enable him to assess whether there was any 'new mood' in the industry, by giving him a more accurate picture of the size of the market and thus of the applicant's own market share. The applicant also admits that those information exchanges may have contributed to ending the price war. However, the applicant denies that the exchanges decided upon by Mr [D] — director of Gyproc and CEO of BPB from 1994 to 1999 — as from 1993 had any bearing on the first two annual information exchanges. The applicant also denies that those exchanges were a method of monitoring any agreement or understanding between producers. In this respect, the applicant claims that the Commission produced no evidence of any command and control structure in relation to the implementation of the cartel. The applicant states that it would have been informed by customers if it was being undercut on price by its competitors and would not have waited months to learn, by the exchange of information, of developments in market shares.

96 The applicant states that the Commission ignores the evidence concerning the nature of the data which was actually exchanged. In that connection, the applicant states that exchanges were initially annual, then half-yearly, but never more than quarterly. Moreover, the data were highly aggregated, being the total square metre surface area of all plasterboard products sold in the period in question, of all thicknesses, dimensions and specifications, expressed as a single figure. It also observes that there are enormous price variations between products. Moreover, the information related

to national markets and, in the case of the Benelux, was wider than that. Furthermore, the information was not exchanged at regular intervals. For those reasons, the applicant considers that the exchanges could not constitute a mechanism for close surveillance of the market.

97 The applicant considers that the Commission's argument is also undermined by the fact that market shares developed considerably over the period in question. In addition, it states that price cutting had taken place. Moreover, the Commission has produced no evidence of any systematic attempt to adjust market shares or prices. The applicant takes the view that all these factors are solid evidence of the lack of any cartel in this case.

98 The Commission states that the applicant does not deny the existence of those exchanges, but contests their purpose. It considers that it responded in detail to those arguments in recitals 104 to 170 of the contested decision.

99 The Commission states that the argument relating to the absence of any 'command and control' structure is irrelevant. The case-law shows that the fact that no measures are taken to force undertakings to adhere to agreements does not mean that there is no infringement. The absence of evidence of such measures simply shows that no retaliatory measures were necessary.

100 The Commission repeats that it has never asserted that the cartel completely excluded all competition or that there were fixed quotas or fixed market shares. The

important achievement of the cartel was overall market equilibrium and stability, not necessarily static market shares in particular markets.

Findings of the Court

101 It should be noted that the applicant stated, in its reply to the statement of objections, that it did not object to the Commission's categorising those exchanges of information as an infringement of Article 81(1) EC. It also admitted, in its reply to a written question put by the Court, that the exchanges of information concerning quantities sold in Germany, France, the Benelux and the United Kingdom constituted an infringement of Article 81(1) EC. The applicant none the less disputes certain assessments made by the Commission in the contested decision.

102 BPB admits that, either at the London meeting or some time later in the same year, Mr [A] and the cousins of the Knauf family agreed to exchange aggregated sales volume data for 1991. Mr [A] said that that was done to enable him to assess whether there was any 'new mood' in the industry, by giving him a more accurate picture of the size of the market and thus of BPB's own market share.

103 BPB also admitted that the information exchanges effected by Mr [A] in 1992 and 1993 in relation to the 1991 and 1992 data may have contributed to ending the price war. However, BPB denies that those information exchanges were a monitoring mechanism for a wider anti-competitive purpose.

104 BPB also admits that, under Mr [D]'s direction, the information exchanges on sales volumes on the four markets concerned became half-yearly from 1993 and quarterly from 1995. None the less, it claims that the exchanges organised by Mr [D] were unrelated to the first two annual exchanges of information effected by Mr [A].

105 Thus, since the applicant has admitted the existence of the information exchange in question, its arguments seek only to call in question the Commission's legal assessment of undisputed facts.

106 According to the case-law, agreements on the exchange of information are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (Case C-238/05 *ASNEF-EQUIFAX and Administración del Estado* [2006] ECR I-11125, paragraph 51).

107 It is inherent in the Treaty provisions on competition that every economic operator must determine autonomously the policy which it intends to pursue on the common market. Thus, according to that case-law, such a requirement of autonomy precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and also the volume of the market (*ASNEF-EQUIFAX and Administración del Estado*, paragraph 106 above, paragraph 52).

108 As regards the lawfulness of the exchange of information, it is apparent from the case-law that, on a truly competitive market, the fact that an economic operator takes into account information on the operation of the market, made available to it under the information exchange system, in order to adjust its conduct on the market, is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other operators all uncertainty about the foreseeable nature of its competitors' conduct. However, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between the operators (Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraphs 88 and 90).

109 Subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period (*HFB and Others* v *Commission*, paragraph 79 above, paragraph 216).

110 In the present case, the plasterboard market was oligopolostic and the applicant does not dispute that this was the case. It is therefore necessary to ascertain whether, in the light of that market characteristic, the exchanges of information reduced or removed the degree of uncertainty of the undertakings concerned as to the operation of the market in question and thus restricted competition on that market.

111 The applicant takes the view that, as organised, the exchange of information made it possible to achieve only one objective, namely to check in broad terms the individual estimates of the market conditions and, in particular, the volume of that market.

112 Such an explanation is not convincing. It is apparent from the explanation given by Mr [D] in his statement of 9 July 2001 in order to justify the exchanges of information that, whilst the data were useful to see the size of the market, they also made it possible to determine market trends and competitors' market shares so that 'one was not operating completely in the dark'.

113 For the same reasons, the applicant's argument that the market was transparent and the data could be collected on the market must be rejected.

114 That finding is borne out by BPB's reply of 28 October 1999 to the second request for information, referred to in recital 58 of the contested decision, according to which:

'[The representatives of BPB and Knauf] agreed to exchange sales volume information for 1991, to give themselves a reliable basis going forward to monitor whether this understanding was effective (i.e. simply to give each other a more accurate picture of the overall size of the market and thus their own market share). This was necessary because there were no reliable industry statistics.'

115 In this respect, proof of the collusory nature of the exchange of information is even more cogent in the light of BPB's reply to the statement of objections. According to 106 of the contested decision:

'BPB subsequently specified that the objective of the agreement to exchange information with Knauf was to provide Mr [A] with "a basis to assess whether there was

a new mood in the industry", i.e. that "the information exchange, at a high level, would provide the degree of mutual assurance that the price war was ending". BPB has moreover explicitly acknowledged that the purpose of the information exchanges effected by Mr [A] was to put an end to the fierce competition prevalent in the plasterboard industry in the early 1990s: "the subsequent two exchanges of historical data effected by Mr [A] may have served, and have been intended to serve, to assist the ending of the price war".'

116 The applicant's argument that there was no restriction of competition in the absence of any informative value of the sales data exchanged, given that the figures had been communicated in a very global and imprecise form without being broken down according to the different types of plasterboard, is irrelevant in so far as the information exchanges between the undertakings in question were intended to monitor that their respective market shares remained stable or, at the very least, did not diminish. Since the applicant and Knauf had expressed a common intention to put an end to the price war and to stabilise the markets in question at the London meeting, it sufficed, in order to attain that objective, that the undertakings in question knew that by terminating the price war they would not lose market shares. To that end, the general sales data, which made it possible to calculate market shares, were sufficient. That also explains why the figures did not need to be broken down according to the different types of plasterboard.

117 As regards the applicant's argument that the exchange of data was not effected at regular intervals and, for that reason, it was not a monitoring mechanism, it is clear that the anti-competitive nature of that exchange of information, the objective of which — as clearly described by the applicant itself in its reply to the statement of objections — was to put an end to the price war, can in no way be called in question.

118 As regards BPB's argument distinguishing Mr [A]'s information exchanges in 1991 and 1992 from those of Mr [D], it is a mere assertion which is devoid of any real

foundation. In his statement, Mr [A] said that he had counselled Mr [D] in 1993 against making the exchanges too frequent, which shows that both were well aware that those exchanges were being made. The mere fact that the exchanges of information were effected by two different persons is thus explained by the change of person at the head of BPB. Moreover, the reason for those exchanges of information, in particular as regards their object, is identical. In his account of the exchanges which he effected from 1993, Mr [D] states that, even in highly aggregated form, the information was useful to see the size of the market and the trends and that knowledge of competitors' market shares meant that 'one was not operating completely in the dark'.

119 In conclusion, the collusive nature of the exchanges of information concerning quantities sold in Germany, France, the Benelux and the United Kingdom from 1992 to 1998 is sufficiently established.

The exchanges of information on sales volumes in the United Kingdom

Arguments of the parties

120 The applicant maintains that the purpose of the United Kingdom information exchange was to have a better view of the total size of the United Kingdom market for plasterboard and of its market share.

121 The applicant claims that, even if the data exchanged were monthly data on highly aggregated sales volumes, the exchanges were not monthly but were sporadic and related to information concerning several months.

122 The Commission replies that it does not claim that the exchanges occurred on a monthly basis but simply that they remained remarkably consistent over time (seven successive years) and that the assertions that the exchange was an irregular ad hoc exchange are contradicted by the content of the table kept by Mr [N], managing director of British Gypsum ('BG'), the subsidiary of BPB in the United Kingdom, from which the existence of a regular flow of information can be inferred.

Findings of the Court

123 It should first be noted that the applicant stated in its reply to the statement of objections that it did not object to the Commission's categorising the exchanges of data on sales volumes in the United Kingdom as an infringement of Article 81(1) EC. It also admitted in its reply to a written question put by the Court that those exchanges had taken place from 1992 until the beginning of 1998 and constituted an infringement of Article 81(1) EC.

124 Next, it should be noted that in response to a written question of the Court the Commission confirmed that the exchange of information on sales on the United Kingdom market and that on the sales of the four markets concerned were both elements of the single and continuous infringement, even if their anti-competitive

effects might have duplicated and mutually reinforced one another in so far as they related to the United Kingdom market. Given that the applicant disputes the object and the frequency of the exchanges of sales volume data on the United Kingdom market, it is necessary to consider whether the contested decision is vitiated by errors regarding that exchange.

125 As regards the object of the exchange of sales volume data on the United Kingdom market, the Commission found, at recital 171 of the contested decision, that it was identical to that of the exchange of information on sales volumes on the four markets concerned. However, the applicant asserts that its object was to have a better view of the total size of the United Kingdom market for plasterboard and of its market share.

126 The applicant's explanation does not alter the anti-competitive nature of the information exchange, having regard to the general context of the infringement in question, which was characterised by the pursuit of the objective, expressed at the London meeting, of putting an end to the price war.

127 The applicant's assertion that the fact that the data were compiled on a monthly basis in the tables does not show that the exchange of those data also took place with the same frequency is immaterial in the present case. Even if the sales volume data were exchanged less frequently, that would not invalidate the conclusion that such an exchange was anti-competitive for the same reasons as those set out regarding the exchange of data on the four markets concerned. In any event, the applicant has not adduced any evidence showing that, although the data were compiled monthly, the exchange did not take place monthly. In those circumstances, it must be concluded that the applicant has failed to show that the Commission's finding at recital 194 of the contested decision, that the systematic and detailed nature of Mr [N]'s table was based on a regular flow of information, is vitiated by error.

128 It follows that the Commission's assessment concerning the exchange of sales volume data on the United Kingdom market is not vitiated by any error.

Exchanges of information on price rises in the United Kingdom from 1992 to 1998

Arguments of the parties

129 The applicant claims that the Commission made no finding that the parallel price rises were other than independently arrived at.

130 The evidence relied on by the Commission consists, first, of a conversation in 1996 between the regional directors of Knauf and BG, second, a conversation in 1998 between Lafarge's sales director and a member of BG's sales staff and, third, one or two communications from Mr [N] to his opposite numbers to inform them of price rises.

131 The applicant maintains that the Commission attached unjustified importance to those isolated events. Moreover, the first two contacts were two years apart and the

discussions took place in the course of social events. In addition, there were only one or two communications by Mr [N], and, contrary to the Commission's allegations, it was not a question of exchanges of information but of unilateral communications.

132 The applicant contests the Commission's conclusion that those contacts corroborate the existence of a single and continuous infringement. The applicant submits that they took place only between November 1996 and March 1998 and related only to the United Kingdom.

133 The Commission states that it never alleged that prices had been agreed or negotiated. It takes the view that the very fact that the contacts concerning certain price rises were reported internally indicates their importance.

134 The Commission considers, referring to recitals 471 to 477 of the contested decision, that exchange of information to be a concerted practice which was part of the particular manifestations of the complex and continuous agreement having as its object the restriction of competition at least in the four main European plasterboard markets.

Findings of the Court

135 As is apparent from the application and an examination of BPB's cooperation, it was BPB which informed the Commission of those exchanges on price rises in the United Kingdom. Moreover, the facts mentioned in the contested decision are not contested by BPB.

136 Account must also be taken of the fact that the applicant stated in its reply to the statement of objections that it did not object to the Commission's categorising those contacts as an infringement of Article 81(1) EC. In its reply to a written question of the Court, the applicant also admitted that the fact that Mr [N] had, once or twice, informed Knauf and Lafarge of the list price increases in the United Kingdom constituted an infringement of Article 81(1) EC.

137 However, BPB attempts to qualify the anti-competitive nature of those exchanges by stating that the conversations which took place at the golf days were just a report of industry gossip and that the memoranda recording them present this information as such. Further, the information was imparted unilaterally. Lastly, it submits that the price rises would have been known in any event through market intelligence and that the exchanges of information were merely the communication of decisions which had already been made. Moreover, the communication related only to list prices and did not reflect the 'net net' prices (net of discounts).

138 It is apparent from recitals 198 to 200 of the contested decision that, as regards the period prior to 7 September 1996, the price rise announcements were virtually

simultaneous in four cases. Thus, BG's announcement on 21 July 1992 (with effect from the end of August 1992) was followed by Lafarge's (Redland's) announcement of 31 July 1992 (with effect from 31 August 1992). Knauf announced its new prices on 3 August 1992 (with a new price list for September 1992).

139 In November 1993 BPB announced a 12% rise with effect from January 1994. Lafarge followed this announced rise but Knauf did not follow it in full.

140 On 29 September 1994 Knauf announced a rise of approximately 6.5% with effect from 1 March 1995 and on 2 December 1994 BPB announced a 9% rise with effect from 27 February 1995. That rise was followed by the announcement of an identical rise by Lafarge on 6 January 1995, with effect from the same date.

141 On 22 September 1995, BG announced a 12% price rise for standard board to enter into force on 1 January 1996. This announcement was followed by Lafarge, which announced the same increase on 13 October 1995 with effect from 1 January 1996 and by Knauf, which announced the same increase on 27 October 1995 with effect from the same date.

142 Thus, as regards the period prior to 7 September 1996, the price rises of BPB, Lafarge and Knauf succeeded one another at very close intervals or were even simultaneous.

143 It must therefore be ascertained whether the near-simultaneity of the price rise announcements and the parallelism of the prices announced, as found, constitute a sound, precise and consistent body of evidence of prior concertation designed to inform the competing undertakings of the price rises. Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 81 EC prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 71).

144 In the present case, even if the intervals between the various price rise announcements may have enabled the undertakings to ascertain those price rises by information from the market and even if those rises were not always exactly of the same level, the near-simultaneity of the price rise announcements and the parallelism of the prices announced amount to strong evidence of concerted action prior to those announcements, since those rises were made in a context characterised by the fact that, as the Commission found in the contested decision, the applicant and Knauf agreed at the London meeting at the beginning of 1992 to put an end to the price war on the four European markets.

145 In any event, the fact remains that, as regards the exchange of data on price increases on the United Kingdom market, the Commission concluded, at recital 476 of the contested decision, only that there were contacts — acknowledged by BPB, Knauf and Lafarge — which accompanied certain price increases, referring in this respect to recital 211 of the contested decision. Otherwise, as is apparent from recital 210 of that decision, the Commission stated that it could only note the parallel behaviour between undertakings which were also engaged in other collusive contacts, without inferring from this that that parallel behaviour had necessarily been preceded by concerted action. Further, by its use of the word 'nevertheless' in the English, French and Dutch versions of recital 211 of the contested decision, it clearly placed that mere parallelism in the context of the admitted existence of contacts preceding the price rise announcements.

146 As regards the period after 7 September 1996, the existence of contacts between the competitors on prices rises in the United Kingdom is demonstrated by the following documentary evidence.

147 First, it is apparent from an internal BG memorandum that, during the weekend of 7 and 8 September 1996, Knauf announced that it would follow the BG price increase initiative when BG's intentions were expressly stated. As is clear from recital 201 of the contested decision, that discussion took place before BG sent out announcements of a price rise on 9 September 1996.

148 Further, that increase was followed, on 20 September 1996, by that of Lafarge.

149 Second, the near-simultaneity of the price rise announcements and the parallelism of the prices announced continued. Thus the Commission found, at recitals 203 and 204 of the contested decision, that on 3 June 1997 BG had announced a rise of 3.8% for standard board with effect from 1 August 1997. Lafarge announced a rise of 3.7% with effect from 4 August 1997 and Knauf announced a rise of 3.7% with effect from the same date as Lafarge. Further, on 27 January 1998, BG announced a rise of 4.4% with effect from 1 April 1998. Lafarge announced a rise of 4.1% with effect from 6 April 1998 and Knauf announced an identical rise with effect from 1 April 1998.

150 Third, according to recital 205 of the contested decision, before the announcement on 8 September 1998 of BG's 5% price rise with effect from 1 November 1998, a Lafarge representative mentioned to a member of British Gypsum's staff that, for budgetary reasons, Lafarge had decided not to follow the price increase planned

for the beginning of January of the following year. However, if the undertakings concerned had not agreed to exchange information on price rises, Lafarge would not have needed to inform the BG representative that it was not going to follow the planned increase.

151 Fourth, BPB acknowledged what it calls 'isolated instances' when Mr [N] had telephoned the managing directors of Lafarge and Knauf in the United Kingdom to inform them of BG's pricing intentions and the planned range of increases (recital 207 of the contested decision). Even though BPB does not indicate even the approximate date of these telephone calls, and even though it terms them 'pure courtesy calls', they show that the competing undertakings were in contact regarding price rises.

152 In those circumstances, the Commission was right to find, at recital 477 of the contested decision, that the contacts on price rises on the United Kingdom market constituted a concerted practice prohibited by Article 81(1) EC.

153 That finding cannot be invalidated by the argument that it was unilateral conduct. It is true that the concept of concerted practice does in fact imply the existence of reciprocal contacts. However, that condition is met where the disclosure by one competitor to another of its future intentions or conduct on the market is requested or, at the very least, accepted by the latter (*Cement*, paragraph 32 above, paragraph 1849).

154 As regards the applicant's claims that the price information transmitted was known by the customers of the undertaking concerned before it was transmitted to the competitors and that, therefore, the information disclosed could already have been

collected on the market by those competitors, it should be recalled that the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti-competitive intention (Joined Cases T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 66). Moreover, the discussions for which the Commission found direct evidence or whose existence was acknowledged by the applicant occurred before the official price rise announcements.

155 In view of the circumstances of the present case, the Commission has shown to the requisite legal standard that the three undertakings informed one another of price rises on the United Kingdom market during the period 1992 to 1998.

The stabilisation of German market shares

Arguments of the parties

156 The applicant admits that the objective of the Versailles meeting was to arrive at an agreement to stabilise German market shares. However, that attempt was unsuccessful. It claims that Gyproc's subsequent statement supports its statement.

157 The applicant also admits that at the meetings in Brussels and The Hague the discussions continued to focus on the market shares of each undertaking in question in Germany. Further, the latter discussions were preceded by a further exchange of

market share data for the first four months of 1998. However, those discussions likewise did not yield any results.

158 The applicant states that although the parties met and had a common interest in establishing stability in the German market, they did not make a common commitment. However, the applicable law requires such a commitment. The applicant claims that undertakings may share a common view of what they would like to see occur but unless an undertaking, by contact and conduct, acts in a manner which unmistakably conveys to the other that it proposes to act in a certain way and that it feels under an obligation to do so, that does not constitute an agreement in law. It contends that the Commission cannot consider that negotiations are equivalent to an agreement.

159 The applicant claims that the Commission's approach consists in asserting that a common objective is evidenced by 'manifestations' of an agreement within the meaning of Article 81(1) EC and that the 'manifestations' themselves are evidence of a common objective. According to the applicant, that argument is devoid of any legal merit.

160 The applicant submits that the Commission was wrong to consider that the information exchange system that the undertakings in question had organised in November 1996 with the assistance of an independent expert ('the information exchange system') was more sophisticated and that it supplied them with more accurate and verifiable information than the other exchanges. It states that the producers provided information to the independent expert, but that he did not carry out any verification of it. Moreover, the exchanges within the information exchange system were no more frequent than those between the CEOs of the undertakings in question, both having been quarterly in the period from 1996 to 1998. Moreover, the exchanges made within the information exchange system provided the undertakings in ques-

tion with less information than those between the CEOs, given that the independent expert provided those undertakings only with a total market size figure.

161 It also claims that the fact that the information exchange system was launched after the Versailles meeting was a coincidence.

162 The Commission contends that even if the undertakings did not succeed in concluding an agreement as to how the German market could be shared between them, they expressed a common wish to restrict competition in the plasterboard market by sharing the German market or, at least, stabilising it. According to it, the mere disclosure by an undertaking of the fact that it does not want to increase its market share is sufficient to inform competitors of an essential element in its strategy and is manifestly anti-competitive. It submits that the undertakings did feel bound to act in a particular way, as demonstrated by the continuous discussions in that sense.

163 The Commission submits that the only plausible explanation for an information exchange which the participants wish to keep secret and which is based on figures allegedly of limited value for defining future strategy is that there is a tacit agreement between the undertakings in question to respect traditional flows.

164 The Commission considers that even if market shares in Germany continued to fluctuate after the Versailles meeting in 1996, those fluctuations were minimal and are consistent with its findings, in so far as it never maintained that there was a strict market sharing agreement.

165 The Commission states that even if the information exchange system itself is not contrary to Community law, it should not be examined in isolation but in the light of the fact that it was set up to supply more accurate and verifiable information. Moreover, BPB's assertion that the information provided was no more accurate than that already being exchanged does not explain why BPB and the other undertakings participated in the system. Furthermore, the explanation put forward by BPB, that the undertakings wanted an accurate measure of the size of the German market, merely supports the Commission's interpretation.

Findings of the Court

166 It is apparent from the applicant's arguments that it does not dispute the existence of the Versailles, Brussels and The Hague meetings. Further, it admits that it participated in those meetings and discussed the situation on the German market. It also acknowledges that a proposal was made at the Versailles meeting in order to arrive at an agreement to stabilise German market shares at their 1995 levels.

167 However, it submits that the Commission has not shown that the undertakings in question made a common commitment. In its submission, the applicable law requires that there be such a commitment, but in the present case there were merely negotiations with a view to securing an agreement.

168 Consequently, the question on which the applicant and the Commission disagree concerns the legal classification of the Versailles, Brussels and The Hague meetings and the information exchange system.

169 As regards the applicant's argument seeking to demonstrate that there was no agreement on German market shares, it should be noted that in the contested decision the Commission found, at recital 469, *in fine*, that 'an agreement [had been] concluded between the [undertakings concerned], who aimed to divide up the German market between them or at least to stabilise it, this agreement being a particular manifestation of the complex, continuous agreement having as its object the restriction of competition on the plasterboard market at least in the four major European markets'. Moreover, it is apparent from recitals 462, 463, 465 and 469 of the contested decision that the Commission found that, irrespective of whether such an agreement had been concluded or not, the undertakings in question, by expressing their common intention to divide up the German market between them or at least to stabilise it, had concluded an agreement within the meaning of Article 81(1) EC.

170 Thus, even if the Commission had not succeeded in showing that the undertakings penalised had concluded an agreement, in the strict sense of the term, as to how the German market could be shared between them, it would suffice if it were clear from undisputed facts that the undertakings in question knowingly substituted for the risks of competition practical cooperation between them by remaining in direct contact with a view to stabilising the German market. Consequently, it is necessary to ascertain whether that is the case here.

171 The existence of the Versailles meeting of June 1996 is not disputed, nor the fact that, during that meeting, the undertakings in question disclosed their real sales figures for 1995, that they discussed the stabilisation of their German market shares and that Gyproc was not satisfied with the market share that the other undertakings were offering it.

172 BPB also admits the existence of the Brussels meeting of 4 December 1997, but states that it was also an opportunity to discuss the stabilisation of the German market.

173 Nor does BPB dispute that The Hague meeting of May 1998 took place. However, it submits that, even if the object of the talks was the situation in Germany, they did not yield any concrete results. In this respect, it is apparent from recital 257 of the contested decision that, according to Gyproc, the participants exchanged their figures on sales volumes in Germany for the first four months of 1998, that each participant mentioned the share of the German market he wished to have and that, since the total of those market shares represented 101%, the participants proposed that Gyproc limit its market share to 11%, but Gyproc refused.

174 Consequently, it follows from the foregoing that, even if a specific agreement on the sharing of the German market could not be concluded either at the Versailles meeting or at the subsequent Brussels and The Hague meetings, the four undertakings in question expressed a common intention to stabilise the German market, and therefore to restrict competition. Thus, the Versailles meeting proves the existence of an agreement on the principle of sharing the German market between BPB, Knauf, Lafarge and Gyproc, as the Commission asserted at recital 264 of the contested decision.

175 It is not contested by BPB that, at the Versailles meeting, notwithstanding the position adopted by Gyproc, the three other undertakings, Knauf and Lafarge and itself, informed each other of the market shares they agreed to and that those market shares corresponded to the shares those undertakings actually held. In this respect, it should also be recalled that the undertakings do not dispute having exchanged their sales figures for 1995 at the Versailles meeting.

176 Account must also be taken of the information exchange system. The existence of that system supports the Commission's contention that those undertakings wished to stabilise the German market. Each producer gave its figures to the independent expert on a confidential basis and the results were compiled by it, giving an aggregate figure, which was then sent to the participants. This figure enabled each producer to

calculate its own market share, but not that of the others. The figures were supplied every quarter and concerned the sales figures of each producer. In addition, the producers supplied the independent expert, on a confidential basis, with the figures for January to December 1995 and for January to September 1996.

177 The information exchange system thus enabled the undertakings in question to check whether their market shares on the German market were remaining relatively stable.

178 As regards the legal assessment of that situation, it must be recalled that the disclosure of information to one's competitors in preparation for a cartel suffices to prove the existence of a concerted practice within the meaning of Article 81 EC (see, to that effect, Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 82).

179 The concept of a concerted practice within the meaning of Article 81(1) EC refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (*Suiker Unie and Others* v *Commission*, paragraph 81 above, paragraph 26, and *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 143 above, paragraph 63).

180 The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual 'plan' to have been worked out, are to be understood in the light of the concept inherent in the provisions of the EC Treaty on competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market and

the conditions which it intends to offer to its customers (*Deere* v *Commission*, paragraph 108 above, paragraph 86, and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 82).

181 While it is true that this requirement of independence does not deprive operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between them, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (*Deere* v *Commission*, paragraph 108 above, paragraph 87, and *Thyssen Stahl* v *Commission*, paragraph 180 above, paragraph 83).

182 Further, as the Court of First Instance held in *Cement*, paragraph 32 above (paragraph 1852), in order to prove that there has been a concerted practice, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several other competitors, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect from it on the market.

183 In this respect, the Commission rightly took the view, at recital 466 of the contested decision, that the mere disclosure by an undertaking of the fact that it does not want a larger market share than the one it already holds is sufficient to inform competitors of an essential element of its strategy.

184 Moreover, it must be recalled that the market in question is a highly concentrated oligopolistic one. On such a market, the exchange of information is liable to enable undertakings to be aware of the market positions and business strategies of their competitors and thus to impair appreciably the competition which exists between

economic operators (*Deere* v *Commission*, paragraph 106 above, paragraphs 88 to 90, and *Thyssen Stahl* v *Commission*, paragraph 180 above, paragraph 84).

185 Further, as regards the applicant's argument that the Commission's reasoning is circular, it must be recalled that all the elements of the case in question must be examined, not separately as isolated infringements, but in the overall context, as possible elements of a single infringement having as its object the restriction of competition on the plasterboard market in the four European markets concerned. According to the case-law, the items of evidence on which the Commission relies in the Decision in order to prove the existence of an infringement of Article 81(1) EC by an undertaking must not be assessed separately, but as a whole (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 68).

186 Moreover, in the light of the general context, the objective of stabilising the markets concerned, the exchange of information on the German market enabled the undertakings in question to check that their competitors' market shares remained stable.

187 Lastly, as regards the applicant's argument that, in the absence of an agreement, the Commission ought at least to have proved the effects on the market, it must be recalled that, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition within the common market (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 261).

188 Likewise, a concerted practice falls within Article 81(1) EC even where there are no anti-competitive effects on the market. First of all, it follows from the very wording of

that provision that, as in the case of agreements between undertakings and decisions of associations of undertakings, concerted practices are prohibited, independently of any effect, where they have an anti-competitive object (Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 137 and 138).

189 Next, although the very concept of a concerted practice presupposes certain conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 188 above, paragraph 139).

190 In the light of the overall context of the case, the Court finds that, on the basis of the undisputed facts, the Commission has demonstrated to the requisite legal standard that even if the undertakings in question did not succeed in concluding a specific agreement on sharing the German market between them, they did express their common intention to conduct themselves on that market in a specific manner, namely to restrict competition by stabilising that market.

Exchanges of information on price rises in Germany

Arguments of the parties

191 The applicant contests the Commission's allegation that the four producers kept each other informed of their intentions or that there was coordination concerning

the dates and levels of the planned price increases in the period from the end of 1994 to September 1998. It considers that the Commission has not adequately proved its allegations. The fact that competition continued in the German market shows, on the contrary, that producers continued to operate independently. In any event, the contacts in question cannot prove the existence of a common wish or be evidence of an agreement concluded in 1992.

192 As regards the alleged direct contact that it had with competitors concerning price rises in Germany, BPB stated that it had not sent copies of its own price increases to its competitors. As regards the sending by Knauf of its price list to its competitors, such information cannot constitute collusion on prices because the letters concerned price rises which were already widely known or anticipated in the market. Moreover, list prices were frequently reduced by the granting of discounts.

193 The applicant disputes that the Lafarge memorandum of 17 December 1996 was drawn up following the discussion of prices between Mr [V], commercial director at Rigips, the applicant's German subsidiary, and Mr [X], managing director of Lafarge Gips. It has always denied the existence of that discussion. Moreover, it rejects the Commission's conclusion that that memorandum is evidence of direct contacts between the producers. So far as concerns the parallelism of the price increases, the applicant states that, in an oligopolistic market, it is normal for undertakings to follow competitors' prices and act in parallel, at least in respect of list prices. However, competition remained vigorous at the level of net net prices.

194 With regard to the Lafarge memorandum of 7 October 1998, the applicant considers that it describes the normal mechanism of price increases in an oligopolistic market. It submits that the memorandum discloses a number of facts which contradict the Commission's allegations, such as the fact that producers granted discounts even

after raising list prices, the fact that Rigips announced an increase eight weeks before the date of the memorandum without the other producers following that increase, the fact that there was uncertainty about competitors' reactions to a price increase, the fact that most price increases were limited during the previous years and that until 1993-1994 Lafarge attempted to gain market share.

195 As regards the Knauf internal memorandum of 15 November 1993, the applicant claims that, even if that memorandum recommended the adoption of a course of action which might be anti-competitive, that does not mean that that course of action was actually adopted.

196 As regards the Rigips internal memorandum of October 1994, the applicant submits that the phrase 'it is expected that the prices will be frozen on this level' does not disclose any collusion but merely records Rigips' assessment of the outlook for price developments.

197 As regards the price increase of 1 December 1995, the applicant denies that the failure of that rise was the reason for the Versailles meeting. It contends that the fall in prices from December 1995 to June 1996 is in fact evidence of the absence, rather than the existence, of an agreement.

198 As regards the September 1997 price increase, the applicant denies having participated in the attempts made by other producers to avoid 'poaching' of customers. The applicant submits that, even if the producers had discussions on market sharing, those discussions did not yield any results. Thereafter, competition continued in the market and, therefore, the proposed September 1997 list price increase failed.

199 As regards the September 1998 price rise, the applicant maintains that it did not participate in any collusion between producers. It argues that the Commission's only evidence regarding it is the fact that it received a copy of a letter from Knauf concerning a price increase. However, that adds nothing to the admission by Knauf that it occasionally sent letters to its competitors informing them of a price increase. In addition, it denies having received a communication from Gyproc. Thus, the Commission's assertion that the September 1998 price increase constituted a further manifestation of collusion in which the applicant participated in the German market is unsupported by evidence.

200 As regards the Lafarge memorandum of 7 October 1998, the Commission contends that it was used not to decide whether there were contacts between the undertakings in question but as evidence of the fact that price increases followed a particular pattern. The fact that the announced price increases were not always reflected in achieved increases in transaction prices does not mean that the contacts established were not illegal or that they had no effect. It also considers that the fact that Lafarge tried to gain market share until 1993-1994 does not call in question its findings in that respect, since it merely found that there was coordination of price increases from the end of 1994 or the beginning of 1995.

201 As regards the fact that Knauf sent its price lists to its competitors, the Commission refers to recitals 313, 314 and 472 to 474 of the contested decision.

202 The Commission accepts that the Knauf internal memorandum of 15 November 1993 does not describe a course of action already adopted, but rather recommends a course of conduct. However, the content of that memorandum illustrate the attitudes within Knauf which led to the later contacts between competitors, which the Commission has proven and which clearly corroborate the Commission's find-

ings that those contacts were anti-competitive. They also cast light on the motives underlying those later contacts.

203 As regards the Rigips internal memorandum of October 1994, the Commission contends that the context in which it was written, including the fact that it is dated one month before letters announcing the February 1995 price increases, is not just evidence that the author of the memorandum was well informed.

204 As regards the 1 December 1995 price increase, the Commission contests the applicant's claim that the failure of that increase shows that no agreement was concluded in 1992. Moreover, subsequent events showed that contacts had been made in 1996 (perhaps in response to that failure), including the June 1996 meeting in Versailles, and that a price increase had been agreed for 1 February 1997.

205 As regards the Lafarge memorandum of 17 December 1996, the Commission submits that the price increases agreed upon are a manifestation of the complex and continuous agreement described in recitals 430 to 434 of the contested decision. Moreover, the importance of that memorandum is described in recitals 335 to 352 of the contested decision.

206 As regards the September 1997 price increase, the Commission states that the failure of that increase does not show that there was no agreement.

207 As regards the September 1998 price increase, the Commission observes that, if an undertaking receives price information from a competitor and does not protest, there is sufficient reciprocity to constitute a concerted practice. The Commission also considers that the fact that Gyproc admitted that there were concerted attempts to raise prices on the German market supports its conclusion. It observes that the BPB memorandum referred to in recital 380 of the contested decision (containing a reference to a second price increase in the first quarter of 1999) preceded the Knauf instructions referred to in recital 337 of the contested decision, and therefore could not be a reaction to those instructions or to the market rumours that undertaking suggested provoking.

Findings of the Court

208 BPB disputes that it had direct contact with its competitors on price rises on the German market and that there was concerted action on the application of the price rises. It also submits that, in any event, even if direct contact with competitors were established, that could not prove a common wish to concert with one another on prices.

209 It is necessary to examine, first, evidence of contacts and concerted action between the undertakings, which is expressly contested by BPB.

210 In this respect, it should be recalled that those contacts must be viewed in the context of a period characterised by a series of anti-competitive manifestations demonstrating

a common wish of the competitors to stabilise the plasterboard market in the four major European markets, including the German market. It must also be observed that, although the content of an isolated document found by the Commission may not unequivocally disclose the existence of anti-competitive conduct and so might possibly be explained otherwise than by a wish to restrict competition, that fact cannot preclude that document from being interpreted as corroborating the existence of such a wish when it is one of a series of other documents which provide reliable indicia of the existence of contemporaneous and similar anti-competitive conduct.

211 As regards Knauf's internal memorandum of 15 November 1993 (recital 305 of the contested decision), BPB observes merely that that memorandum recommends a line of conduct which could be anti-competitive, but that it does not constitute evidence that that line of conduct was actually adopted. It should be noted that, according to that memorandum, '[Knauf's] new price list was sent to all direct customers at the end of October. At the same time, a copy was sent to all [its] competitors to inform them'. Thus, BPB's explanation is contradicted by the fact that the event mentioned in that memorandum of November 1993 took place at the end of October 1993. Consequently, the explanation given by BPB of that memorandum is not convincing. In any event, BPB's argument seeks at most to reproach the Commission for not demonstrating that the exchange of information in question had had any effect, an argument which cannot diminish its anti-competitive object.

212 As regards the internal memorandum of October 1994 discovered at Rigips' premises, the applicant maintains its explanation set out in recital 323 of the contested decision. In its view, that memorandum reflects a company manager's assessment of the state of the German market based on the knowledge he had acquired from information collected by his sales staff.

213 In this respect, the Commission's interpretation of that memorandum is more convincing in view of the other evidence in the file which shows that, at the time, there was concerted action between the undertakings in question. The Commission rightly considers that that memorandum reveals knowledge of competitors' strategies and points to contact between them. Having first summarised the situation on the market, the author of that memorandum explains that Gyproc's sales manager had complained that his firm had lost market share and had to win it back. Further, the memorandum envisaged a price freeze at the level referred to therein and that a price increase would take place from 1 February 1995. That last comment is particularly revealing. If the notification of the price rise announcements by Knauf were unilateral and if BPB was merely following that price rise, BPB could not have known in October 1994 that a price rise was planned for 1 February 1995, given that Knauf announced that price rise only in November 1994. Furthermore, if, as BPB claims, it had been aware of that price rise through its customers, nothing prevented it from demonstrating that so as to contradict the tangible evidence that the Commission found. Further, it should be recalled that a price rise actually took place on 1 February 1995.

214 Furthermore, it is noteworthy that, despite that concrete evidence of collusive contact between producers, the Commission merely finds, at recital 329 of the contested decision, that the competitors informed each other of their intentions concerning the price rise of 1 February 1995 but does not claim that that memorandum constitutes direct evidence of concerted action on the price rise.

215 As regards the price increase in December 1995 (recitals 330 to 333 of the contested decision), the applicant submits that the fact that it failed is further evidence of the non-existence of the 1992 agreement. In this respect, it is sufficient to recall that, even if there are no economic effects, that is not proof that there was no cartel, but, at most, evidence that the cartel did not function well, which is irrelevant for a finding that there has been concerted action with an anti-competitive object.

216 Moreover, the fact that the Commission again mentions, in that context, the Versailles meeting of June 1996, the purpose of which was to stabilise the German market is entirely relevant, since it is evidence that the undertakings concerned felt the need to rediscuss the situation on the German market after the failure of the 1995 price rise.

217 That view is backed up by Lafarge's memorandum of 17 December 1996 (recital 335 of the contested decision). The author begins that memorandum by stating:

'[W]e were discussing again the current situation on the German market.'

218 BPB disputes that that discussion with its representative, to which reference is made, took place. BPB submits that it is normal market behaviour in an oligopolistic market for undertakings to follow each other's prices and act in parallel. Competition was vigorous at the level of transaction prices.

219 BPB's argument must be rejected. Given that the memorandum of 17 December 1996 recounts the events that took place at the meeting of the German Plasterboard Association on 16 December 1996, there is no reason to doubt that the discussion between the BPB representative and the author of that memorandum, a Lafarge employee, took place.

220 Further, the Commission's interpretation of that memorandum, marked 'strictly confidential and personal!', is not vitiated by error. That memorandum clearly

reflects the author's concern, against the background of a price increase announced by all producers for 1 February 1997, about the conduct of competitors and the pricing policies, especially discounts, that they applied. It establishes the existence of direct contacts between the competitors during which they conveyed their analyses and intentions. The author of that memorandum explained that the price offered by BPB to certain customers would be 'below the [then] agreed lowest price level' and that '[t]his [would] lead to a destabilization again.' He adds:

'[Knauf] gave them prices for projects until May [19]97 for a lower than agreed price level. With us they insist on discipline for the price increase … To increase the price to the agreed level ([2.5-3] DM/m^2) will be very tough again.'

221 In those circumstances, the Court considers that the Commission was right to find, at recital 352 of the contested decision that, on the occasion of the February 1997 price rise, the competitors colluded directly on the price rise and, at the very least, had informed one another of their intentions in anticipation of the price rise.

222 So far as concerns the attempted price increase of September 1997, BPB submits that none of the documents submitted by the Commission relates to it and that any imputation of customer sharing does not concern it.

223 First of all, it must be pointed out that the four undertakings in question sent out letters announcing the price increase of 1 September 1997 in May or at the beginning of June 1997 (recital 353 of the contested decision). Those facts are not contested by the applicant.

224 In addition, even if the Commission does not provide direct evidence of contacts between BPB and its competitors concerning that increase, the exchanges between Knauf and Lafarge, referred to in recital 356 of the contested decision by way of example, confirm that there was concerted action on the price increases and monitoring of the prices charged by distributors in general. The fact that an undertaking did not hesitate to contact a competitor to discuss customers or the prices charged by a distributor bears out the fact that there was cooperation between producers.

225 The Commission gives another example which, in its view, is an additional manifestation of the collusion between BPB, Knauf, Lafarge and Gyproc on the German market. It concerns an attempted price increase in September and October 1998.

226 In this respect, it is true that as early as June 1998 BPB announced a price increase for September 1998 and that the other competitors did so only in August 1998 for an increase planned to start in October 1998. It is also true that the only other evidence directly concerning BPB that the Commission cites in the contested decision is the fact that Knauf sent a copy of its announcement of a price increase to the private address of a BPB director.

227 It should be borne in mind that it is normal, in the context of anti-competitive practices and agreements, for the activities to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraphs 55 to 57).

228 In this instance, given the context of the case, the Court considers that the fact that Knauf sent a copy of its announcement of a price increase to the private address of a BPB director, which is an unusual manner of communication between competing undertakings, suffices to show that there was also close cooperation between the producers concerning the price rises on the German market in September and October 1998.

229 Lastly, as regards the Lafarge memorandum of 7 October 1998 (recitals 290 to 294 of the contested decision), BPB takes the view that it is a mere description of the operation of the market. It is true that if that memorandum were the only item of evidence found, it would not constitute sufficient evidence of prior concerted action on price rises. However, examined in the context of the other evidence described above, that memorandum confirms, first, that there were contacts between the competitors on price rises and that there was a connection between them and, second, that there were discussions on German market shares. Having regard to the other steps taken by the undertakings in question in order to stabilise the German market, the parallelism of the price rises and the discovery by the Commission, during its investigations, of numerous copies of announcements of their competitors' price increases in those undertakings' premises, which those undertakings admitted in part having sent to or received directly from their competitors, the coherent interpretation of that memorandum cannot be the one given by the applicant.

230 It is necessary to consider, second, the applicant's argument that, even if proved, the direct contacts between the competitors did not amount to anti-competitive conduct.

231 As regards the applicant's assertion that it was purely unilateral conduct given that the applicant never sent to its competitors copies of its letters announcing price increases, it is true that the concept of concerted practice does in fact imply the existence of reciprocal contacts. However, that condition is met where the disclosure by one competitor to another of its future intentions or conduct on the market is

requested or, at the very least, accepted by the latter (*Cement*, paragraph 32 above, paragraph 1849).

232 In addition, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, in which the applicant had been accused of taking part in meetings at which competitors exchanged information concerning, inter alia, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking, by its participation in a meeting with an anti-competitive purpose, had not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not have failed to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (paragraphs 122 and 123).

233 That conclusion also applies where, as in the present case, the participation of one, or more than one, undertaking in a concerted practice with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of its market competitors.

234 Each economic operator must determine independently the commercial policy which he intends to adopt on the market. That therefore precludes any direct or indirect contact between economic operators with the object or effect of influencing their conduct on the market, giving rise to conditions of competition which do not correspond to the normal conditions of the market in question, but also any disclosure by an undertaking to a competitor of the course of conduct which it itself has decided to adopt or contemplates adopting on the market (Joined Cases T-305/94

to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, '*LVM* v *Commission*', paragraph 720).

235 As regards the applicant's claim that the price information which was transmitted was known by the customers of the undertaking concerned before it was transmitted to the competitors and that, therefore, the information disclosed could already have been collected on the market by those competitors, it should be recalled that the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti-competitive intention (*Tate & Lyle and Others* v *Commission*, paragraph 154 above, paragraph 66).

236 The applicant's claim that the price information was known by customers before it was transmitted to the competitors and, therefore, could be collected on the market must be rejected. That fact, if proved, does not mean that, at the time that the price lists were sent to the competitors, those prices already constituted objective market data that were readily accessible. The fact that those price lists were sent directly allowed the competitors to become aware of that information more simply, rapidly and directly than they would via the market. Further, that prior notification allowed them to create a climate of mutual certainty as to their future pricing policies.

237 In those circumstances, the Court considers that, even if the Commission has not been able to prove that there were contacts between all the producers as regards each price rise on the German market during the period in question and even if Gyproc's acknowledgement of price collusion on the German market cannot be taken into account (see the first plea), the Commission was right to find that the information exchange system set up between BPB, Knauf, Lafarge and Gyproc on price rises on the German market constituted a concerted practice which is contrary to Article 81(1) EC.

The geographic scope of the cartel

238 The applicant asserts that the Commission has failed to show to the requisite legal standard that the geographic scope of the cartel also extended to France and the Benelux.

239 In this respect, it is sufficient to recall that the London meeting and the exchanges of information on quantities sold also concerned France and the Benelux.

240 When the Commission is legally entitled to conclude that the various manifestations were part of a single infringement in that they were elements of an overall plan designed to distort competition, the fact that the number and intensity of the collusive practices varied according to the market concerned does not mean that the infringement did not concern the markets on which the practices were less intense and less numerous. It would be artificial to split up continuous conduct, characterised by a single purpose, into a number of separate infringements on the ground that the collusive practices varied according to the market concerned. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the amount of the fine (see, by analogy, *Commission* v *Anic Partecipazioni*, paragraph 61 above, paragraph 90).

241 In conclusion, the Commission did not commit an error of law or a manifest error of assessment in its examination of the various elements constituting the infringement in question.

242 In those circumstances, the second plea must be rejected.

3. *The third plea: misapplication of the concept of single infringement*

Arguments of the parties

243 The applicant claims that the essential legal condition in establishing a continuous infringement is proof of continuity of the undertakings' participation in the pursuit of the final objective. It submits that the Commission erred in considering that the alleged 1992 common purpose could be a basis for the illegality of the various subsequent acts. According to the applicant, the subsequent events, such as the Versailles meeting, do not constitute an infringement but only an attempted infringement and that classification cannot be called in question by presuming that it is a continuous infringement. The applicant thus considers that, in order to prove the existence of a complex and continuous agreement, the Commission must examine each manifestation with sufficient rigour in declaring it illegal. Moreover, the Commission committed an error of deduction in finding the existence of a common wish on the basis of those manifestations and in considering that their illegality derived from the common wish. The applicant submits that the Commission must show that the common wish exists independently of the infringement in question.

244 According to the applicant, the Commission's explanation, namely that it found the common wish by looking at the five instances of anti-competitive conduct in conjunction, is unconvincing. The applicant observes that the identity of object found by

the Commission is vague and goes no further than saying that all anti-competitive activity ultimately achieves the same purpose because all anti-competitive conduct will, ultimately, have an impact on price. It also states that the Commission is quite unable to explain with any clarity what the alleged agreement actually contained and when it was made, if it was not made at the 1992 meeting. It also maintains that the alleged single and continuous infringement in which four undertakings participated and which lasted from 1992 to 1998 is further undermined by the limited number of undertakings which took part in some of the anti-competitive manifestations or by the non-involvement of certain undertakings in them. The applicant and Knauf participated in the 1992 London meeting, but Lafarge and Gyproc did not. Although it is common ground that the information exchanges that followed that meeting were extended to Lafarge and Gyproc, the Commission does not explain how or when that took place or through whom those undertakings acceded to the common wish or joint intention allegedly underlying the information exchanges. Moreover, the applicant considers that the Commission could not draw any inference from the anti-competitive manifestations with regard to the French and Benelux markets, since they related only to the German and United Kingdom markets.

245 The Commission claims that it set out considerations concerning the factual elements of each of the five instances of conduct referred to in recital 429 of the contested decision and that it is the existence of those factual elements that it must demonstrate. It adds that it concluded, in the light of those factual considerations, that those instances of conduct were the expression of a common wish to restrict competition to a minimum in the four main European plasterboard markets. Once those deductions had been made, the only logical way of describing those instances of conduct was to consider them as manifestations of that common wish. The Commission did not thus engage in any circular reasoning in that analysis. It also contends that the various elements of the single infringement are clearly complementary, that complementarity being evidence of the identity of object of the various manifestations of that infringement. For example, for the price rises to be successful, the competitors had to be satisfied with the market shares they held.

Findings of the Court

246 As a preliminary paragraph, it must be observed, according to the contested decision (recital 479), that the Commission found that the set of agreements and concerted practices in the present case formed part of a series of actions by the undertakings in question pursuing a single economic aim, namely the restriction of competition, and constituted the various manifestations of a complex, continuous agreement, the object and effect of which was to restrict competition. Taking the view that the abovementioned agreements and concerted practices had given, without interruption from 1992 until 1998, substantive shape to those undertakings' common wish to stabilise, and hence restrict competition on at least the German, French, United Kingdom and Benelux plasterboard markets, the Commission characterised the infringement as single, complex and continuous.

247 Thus, Article 1 of the contested decision states that the undertakings concerned, including the applicant, 'have infringed Article 81(1) [EC] by participating in a set of agreements and concerted practices in the plasterboard business'.

248 It is first necessary to examine the applicant's argument that the Commission erred in law by finding that there was an overall plan on the basis of the various manifestations of the infringement, without showing that the common wish existed independently of those various manifestations.

249 It should be recalled that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 57). That case-law can be transposed

to the concept of a single and continuous infringement. Where there is a complex, single and continuous infringement, each manifestation corroborates the actual occurrence of such an infringement.

250 Thus, contrary to what the applicant claims, the various manifestations of the infringement in question must be assessed in the overall context explaining the reason for their existence. It is not a question of circular reasoning but of evaluation of evidence, in which the evidential value of various facts is corroborated or weakened by other facts, which, taken as a whole, may show that there has been a single infringement.

251 BPB also submits that the Commission has not demonstrated to the requisite legal standard the common purpose causing the various manifestations to constitute a single and continuous infringement.

252 In this respect, it should be recalled that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. When the different actions form part of an overall plan because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 258).

253 In the present case, examination of the second plea clearly shows that, following the London meeting, BPB participated in a single, complex and continuous infringement characterised by the sole purpose of putting an end to the price war and stabilising the four plasterboard markets. The meetings, the exchange of information and the price-fixing practices pursued the same anti-competitive object of maintaining prices at a supra-competitive level and of reducing competition between the undertakings on the relevant market.

254 The matters set out in the second plea permit the conclusion that the Commission was right to find, at recital 432 of the contested decision, that:

'These various manifestations are … clearly complementary in the light of the functioning of the plasterboard market. The improvement of the economic situation of the undertakings through an increase in prices rendered necessary a coordination of those undertakings at the level of market shares.'

255 In the present case, the Court finds that, owing to their identical object and close synergies, the agreements and concerted practices formed part of an overall plan which was itself part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to influence the normal movement of prices. As the Commission correctly states at recital 422 of the contested decision, it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices. The infringement constitutes a single infringement by virtue of the identical nature of the objective pursued by each participant in the cartel, not by virtue of the methods of implementing it (see, to that effect, *Cement*, paragraph 32 above, paragraph 4127).

256 Further, in the context of an overall agreement extending over several years, a gap of several months between the manifestations of the cartel is immaterial. The fact that the various actions form part of an overall plan owing to their identical object, on the other hand, is decisive (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 260).

257 As regards the argument alleging that there was no such plan, it is sufficient to recall that the notion of a single infringement covers precisely a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition, and also individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object).

258 Lastly, as regards the applicant's assertion that the single nature of the infringement is contradicted by the fact that a limited number of undertakings took part in some of the anti-competitive manifestations and that some of the undertakings did not participate in the infringement from the beginning, it is sufficient to recall that the fact that an undertaking has not taken part in all aspects of a cartel or that it played only a minor role in it is not material to the establishment of the existence of an infringement committed by it. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the amount of the fine (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 86).

259 Thus, even if the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings who are all co-perpetrators of the infringement, their participation can take different forms according, in particular, 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.

260 Consequently, the mere fact that each undertaking participates in the infringement in forms specific to it does not affect the categorisation of the infringement as a single and continuous infringement.

261 It follows from the foregoing considerations that the complaints challenging the categorisation of the cartel as a single and continuous infringement are unfounded.

4. *The fourth plea: infringement of Articles 253 EC and 15(2) of Regulation No 17 and breach of general principles in the calculation of the amount of the fine*

262 This plea comprises five parts. First, with regard to the starting amount of EUR 80 million, the applicant considers that amount to be arbitrary, disproportionate and not supported by a statement of reasons. In this respect, it also submits that the Commission erred in classifying the infringement as very serious. Furthermore, it claims that the Commission was wrong to conclude that the infringement had an actual adverse impact on the plasterboard market. Second, the increase of the starting amount in respect of the duration of the infringement is based on an incorrect interpretation of the duration of the infringement and of the Guidelines. The Commission also failed to assess and take due account of the limited intensity of the infringement during the relevant period or during certain periods concerned. Third, the applicant considers that the Commission erred by increasing the amount of the fine on account of aggravating circumstances. Fourth, the Commission did not take proper account of the attenuating circumstances. Fifth, the Commission erred in applying the Leniency Notice.

The disproportionate nature of the starting amount of the fine determined according to the gravity of the infringement

The gravity of the infringement

— Arguments of the parties

263 The applicant considers that, in view of its limited impact on the market, the infringement should have been classified as serious rather than very serious.

264 The applicant observes that in Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] EC (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24) and Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article [81] EC (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1), the Commission considered that the infringements in question could be regarded as serious rather than very serious on the basis of their limited market impact.

265 The applicant submits, in the alternative, that, even if the Commission's classification were correct, it should have recognised that even infringements within the very serious category vary in their degree of gravity and that in comparison with other cartel cases, the agreement alleged in this case was a considerably less intensive and

anti-competitive example of a cartel. The applicant states that when the contested decision was adopted, the fine imposed on the undertakings concerned was the second highest imposed by the Commission, after that imposed in the case which gave rise to Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1). It claims that the cartel alleged in the present case was much less intensive than, for example, that in the Vitamins case and in the cases which gave rise to Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case No COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18), Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81 EC] (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/36.545/F3 Amino Acids) (OJ 2001 L 152, p. 24) and Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/36.490 — Graphite electrodes) (OJ 2002 L 100, p. 1). It claims that those five cases concerned very serious infringements of Article 81(1) EC. Thus, they all involved cartels which covered the entire common market or the European Economic Area (EEA). Those cartels displayed attempts to set up cartels which were much more intensive than the alleged cartel among plasterboard producers which, compared with other cartels, was a rather loose and vague agreement, lacking any form of structure or organisation. In those circumstances, the applicant considers that the starting amount of the fine imposed on it by reason of the gravity of the infringement in question is disproportionate and contrary to the principle of equal treatment, given that that amount is the third highest set in comparison with all the participants in the other cartels mentioned above.

266 The applicant submits that the Commission was wrong to compare the various fines by reference to the size of the relevant market. First, the Guidelines do not say that account should be taken of the size of the market in terms of value in order to assess the gravity of the infringement. Second, the Commission took account only of the size of the market and not of other factors which determine the gravity of the

infringement. Third, the Commission does not usually take account of the size of the product market in assessing the gravity of an infringement.

267 The Commission refers to the aspects of the infringement which were found to be particularly serious in this case (recitals 534, 535 and 539 to 542 of the contested decision). It also states that the cartel was conceived, directed and encouraged at the senior levels of each of the undertakings participating. BPB was involved in all the manifestations of anti-competitive conduct in question and it was accepted by BPB that the same persons, Mr [D] and Mr [A] (both CEOs of BPB), were directly involved in all but one of the instances of offending conduct described in the contested decision.

— Findings of the Court

268 For the purpose of fixing the amount of the fine, the gravity of the infringement is to be assessed by taking into account, in particular, the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 176).

269 Article 81(1)(a) EC expressly states that concerted practices which directly or indirectly fix purchase or selling prices or any other trading conditions are incompatible with the common market.

270 Infringements of that kind, particularly in the case of horizontal cartels, are classified by the case-law as 'particularly serious' since they involve direct interference with the essential parameters of competition on the market in question (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 675) or clear infringements of the Community competition rules (*Tréfilunion* v *Commission*, paragraph 178 above**,** paragraph 109, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 303).

271 It is also important to bear in mind that very serious infringements within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines are 'generally horizontal restrictions such as price cartels and market-sharing quotas'.

272 It follows that the Commission was right to classify the infringement at issue as very serious, having regard to its nature. It is nevertheless necessary to examine the factors capable of moderating that classification on which the applicant relies.

273 As regards the applicant's argument that the infringement should have been classified as serious on the ground that its impact on the market was limited, it must be observed that in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraphs 258 and 259, the Court held that the gravity of the infringement could be established by reference to the nature and the object of the abusive conduct and that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects.

274 Therefore, even if the size of the geographic market concerned and the impact on the market, when measurable, must also be taken into account, the nature of the infringements constitutes an essential criterion for assessing the gravity of an infringement (Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 84).

275 As regards the applicant's argument that the Commission has reduced the amounts of fines in its other decisions owing to the limited impact of the cartels on the market, assuming that this is correct, it should be pointed out that the Commission's previous decision-making practice does not in itself serve as a legal framework for fines in competition matters (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 234).

276 As regards the applicant's alternative claim that, even if the classification of the infringement were correct, the Commission should have recognised that even infringements within the very serious category vary in their degree of gravity and that in comparison with other cartel cases, the agreement alleged in this case was a considerably less intensive and anti-competitive example of a cartel, that question overlaps with the question, which will be examined below, whether the amount of the fine imposed by the Commission was proportionate to the gravity of the infringement.

277 It must none the less be borne in mind that, in any event, a comparison between the gravity of the various cartels is virtually impossible because of the different circumstances in each case.

278 As regards the applicant's claim that the Commission erred in comparing the various fines by reference to the size of the relevant market, it must be borne in mind that, in assessing the gravity of an infringement, the Commission is required to take account

of numerous factors, the nature and importance of which vary according to the type of infringement at issue and the specific circumstances surrounding the infringement in question (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120). The factors tending to establish the gravity of an infringement may, where appropriate, include the size of the market for the relevant product (Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 37).

279 Lastly, it must be observed that a horizontal price cartel as extensive as the one found by the Commission in the contested decision, relating to such an important economic sector, cannot normally escape classification as a very serious infringement, whatever its context. In any event, the circumstances invoked by the applicant in this case are not such as to call in question the validity of the Commission's assessment of the gravity of the infringement.

280 The Court must therefore reject the applicant's complaints challenging the classification of the infringement as very serious on account of its nature.

The actual impact of the infringement on the market

— Arguments of the parties

281 The applicant submits that in the contested decision, the Commission was not able to demonstrate any quantifiable loss.

282 The applicant considers that the impact of the cartel on the market concerned was limited given that, during the period 1992 to 1998, the 'net net' prices remained at the same level in real terms in the United Kingdom and fell by 11% in Germany. The applicant states that the Commission has not demonstrated any effects on the market in France or the Benelux. Moreover, the Commission has failed to show any consumer detriment.

283 The applicant further claims that prices and market shares moved in the United Kingdom and Germany during the period concerned in a predictable manner in the context of the return to more normal conditions of competition after a savage price war.

284 It admits that the London meeting may have contributed to an acceleration of the ending of the price war but denies that it could have been the only cause. According to the applicant, the price war would have ended anyway.

285 The applicant also maintains that the information exchanges had little effect. It submits in that connection that it used the information obtained only to determine whether there was a new mood in the industry. Moreover, Mr [D] had disclosed the data to no-one, except once in 1993. The lack of effect of those exchanges is borne out by an examination of the data actually exchanged. The applicant states that the initial exchanges were of annual data. In 1993, the exchanges became half yearly, and in 1996 they became quarterly. However, the exchanges did not occur on a regular basis. Moreover, the information was of an aggregated nature, being a single figure for the entire national market.

286 The applicant refers to *Deere* v *Commission*, paragraph 108 above, and the judgment in *Thyssen Stahl* v *Commission*, paragraph 270 above, and submits that the circumstances giving rise to the present case are completely different from those which led to those two judgments. In those two cases the information exchanged was much more detailed and recent.

287 As regards the advance warnings of list price increases, the applicant argues that in almost every case the advance warning preceded the announcement of those increases to customers by only a few days and that, in certain cases, was even made at the same time. Thus, the information was not confidential when it was imparted. Moreover, the applicant observes that the list prices are rarely the prices which customers pay.

288 The applicant also considers that the alleged infringement could not have caused harm to consumers because the customers are nearly all commercial concerns with considerable buyer power and the ability to negotiate discounts by playing the producers off against each other.

289 The applicant also contests the Commission's conclusion that competition tends to be more limited in an oligopolistic market. It submits that market shares moved considerably, with considerable customer switching.

290 Finally, the Commission has not shown that the infringement had an impact on the French and Benelux markets. It states that the Commission's main evidence is that the information exchanges extended to those markets. However, it failed to produce evidence of anti-competitive conduct relating to those two markets.

291 The Commission considers that the infringement committed in this case had a practical impact by reason of the very nature of the relevant market.

292 Further, the end of the price war was one of the principal objectives of the cartel and the price war did end as a result of the cartel. As to BPB's argument that the infringement was not the only cause of the ending of the price war, it submits that even if that were true it does not lessen the practical impact of the infringement on the market concerned.

293 As regards the information exchanges, the Commission found that they were used to monitor the market and to prevent any competition considered too aggressive by the undertakings in question in the four markets concerned.

294 The fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had as both its object and its effect a serious restriction of competition. It is not therefore necessary to determine whether the variations in the transaction prices obtained evolved in parallel with those of the prices announced in order to show a practical effect on the market concerned.

295 The Commission states that it is not required to demonstrate either that the infringement caused a quantifiable loss or that consumers were harmed. It contends, however, referring to recital 534 of the contested decision, that increased price and market share stability is consistent with the implementation of the cartel. It

also states that plasterboard is used in the construction industry, and that it affects housing prices and therefore consumers.

296 As regards the geographic scope of the cartel, the Commission contends that the fact that anti-competitive activity may have been less intense in some markets does not mean that the cartel did not operate in those markets.

— Findings of the Court

297 It should be borne in mind that, according to Section 1A, first paragraph, of the Guidelines, the Commission is to take account, inter alia, of '[the] actual impact [of the infringement] on the market, where this can be measured', when calculating the amount of the fine on the basis of the gravity of the infringement.

298 In this regard, it is necessary to analyse the exact meaning of the words 'where this [i.e. the actual impact] can be measured'. In particular, it is a question of establishing whether those words mean that the Commission can take account of the actual impact of an infringement for the purpose of calculating fines only if, and in so far as, it is able to quantify that impact.

299 It should also be emphasised that when appraising the effects of agreements or practices in the light of Article 81 EC it is necessary to take into consideration the actual context in which they are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services

affected, as well as the real conditions of the functioning and the structure of the market or markets in question (*ASNEF-EQUIFAX and Administración del Estado*, paragraph 106 above, paragraph 49).

300 Further, consideration of the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. When examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. Account must be taken of the objective fact that, because of the price cartel, the undertakings concerned specifically waived their freedom to compete with one another on prices. Thus, the assessment of the influence of factors other than that voluntary decision of the undertakings concerned in the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable.

301 Therefore, unless the criterion of Section 1A, first paragraph, of the Guidelines is to be deprived of its effectiveness, the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti-competitive object even though it does not quantify that impact or provide any assessment in figures in this respect. Consequently, the actual impact of a cartel on the market must be regarded as having been sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market.

302 In the present case, it is apparent from the summary of the Commission's analysis (see recitals 534 to 538 of the contested decision) that it relied on several indicia in order to find that the cartel had an actual impact on the market. The Commission relied on the fact that the cartel participants held all or almost all plasterboard supply on the four markets to which the cartel extended. It also found that the various elements of the cartel were put into practice in that the undertakings in question effectively modified their conduct after the London meeting and that the information

exchanges decided on were implemented throughout the period in question, on the main markets and more specifically on the United Kingdom and German markets. As regards prices, it added, referring to recitals 212 and 395 of the contested decision, that they had tended to rise or, at least, stabilise and that the contacts relating to price increases were effectively linked to the publication of price lists subsequently taken into account in the prices invoiced to customers. Furthermore, the Commission, referring to recitals 71, 196 and 289 of the contested decision and the annex thereto, found that market shares had been relatively stable during the period in question, more so than during the period before 1988-1992, which was characterised by the undertakings in question as a price war.

303 Both the fact that the parties involved in the cartel held the majority (indeed even almost all) of the market concerned and that the arrangements brought to light were specifically intended to increase prices to a level higher than that which they would otherwise have reached are indications tending to show that the infringement was capable of producing significant anti-competitive effects.

304 Thus, the Commission cannot be criticised for having found that the fact that the cartel participants held a very considerable share of the market concerned was an important factor which ought to be taken into account in examining the cartel's actual impact on the market. It cannot be denied that the probability that a cartel on prices and on market stabilisation is effective increases with the size of the market shares divided among the participants in that cartel. Although that alone does not prove an actual impact, nevertheless in the contested decision the Commission did not show a cause-and-effect relationship of that kind, but merely took it into account in the same way as other factors.

305 As regards the Commission's assertion that prices effectively tended to rise or, at least, stabilise (recital 534 of the contested decision), it must be pointed out that the

Commission does not present statistics on price developments, but notes merely that BPB and Lafarge stated in their replies to the statement of objections that prices on the United Kingdom and German markets had tended to rise or, at least, stabilise.

306 In this respect, the following should be noted. First, concerning Lafarge's reply to the statement of objections, it is apparent from paragraph 58 above that the Court has decided, for the sake of completeness, to disregard it as inculpatory evidence against the applicant. Second, even if the applicant's reply to the statement of objections can be interpreted in the way that the Commission claims, namely that, for the United Kingdom and German markets, the applicant itself admitted that prices tended to rise or, at least, to stabilise, the French and Benelux markets are not covered by that assertion. Third, it is apparent from the applicant's reply to the statement of objections that it stated that, during the period 1992 to 1998, transaction prices had remained at the same level in real terms in the United Kingdom and had fallen in Germany.

307 However, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel. It would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved (Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, I-9858, point 109).

308 In the present case, it is apparent from the contested decision and from the applicant's own admission that the price war came to an end, which, by definition, had the

effect of increasing prices to levels higher than they would have reached without the illicit arrangements.

309 Further, the fact that the contacts relating to price increases were linked to the publication of price lists subsequently taken into account in the prices invoiced to customers (recital 534 of the contested decision) had, by its very nature, an impact on the market and on the conduct of the various operators, both on the supply and demand side, given that such announcements influenced the pricing process, in that the price announced constituted a point of reference for individual negotiation of transaction prices with customers (see, to that effect, Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 342), who inevitably saw their scope for price negotiation restricted (see, to that effect, *LVM* v *Commission*, paragraph 234 above, paragraph 745).

310 Moreover, the fixing of a price, even one which merely sets a target, affects competition because it enables all the cartel participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 21). More generally, such cartels involve direct interference with the essential parameters of competition on the market in question (*Thyssen Stahl* v *Commission*, paragraph 270 above, paragraph 675). By expressing the common intention to apply a given price level to their products, the producers concerned do not independently determine their policy in the market, thus undermining the concept inherent in the provisions of the Treaty relating to competition (see, to that effect, *BPB de Eendracht* v *Commission*, paragraph 270 above, paragraph 192).

311 The Court therefore considers that the Commission has demonstrated to the requisite legal standard that the cartel had an actual impact on the marked concerned as regards prices.

312 As regards the Commission's assertion at recital 534 of the contested decision that market shares were relatively stable during the period in question on account of the infringement in question, that assertion is not borne out. Admittedly, it is apparent from the table in the annex to the contested decision, to which the Commission refers, that market shares during the period 1992 to 1998 seem to have remained relatively stable. None the less, in the absence of data relating to the situation on the market concerned before the cartel, that table does not prove to the requisite legal standard that the stability, if established, was the consequence of the infringement in question.

313 So far as concerns the exchanges of information, it is settled case-law that, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period, as is the case here (see *HFB and Others* v *Commission*, paragraph 79 above, paragraph 216, and the case-law cited).

314 In the light of the foregoing considerations, the Court finds that the Commission has sufficiently proved the effects of the infringement on the market concerned, with the exception of the stability of market shares. Given the gravity of the conduct in question and the nature of the market, it may also be presumed that there was an effect on the French and Benelux markets.

315 Thus, it is still necessary to consider whether the fact that the Commission has not proved all the alleged effects of the infringement has an impact on the classification of the infringement as a very serious infringement and therefore on the amount of the fine.

316 In this respect, it should be recalled that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

317 The Court held, in *Michelin* v *Commission*, paragraph 273 above (paragraphs 258 and 259), that the gravity of the infringement could be established by reference to the nature and the object of the abusive conduct and that, according to settled case-law, factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects.

318 The Court of Justice has confirmed that approach by holding that the effect of an anti-competitive practice is not a conclusive criterion for assessing the proper amount of a fine. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as price fixing and market sharing (judgment of the Court of Justice in *Thyssen Stahl* v *Commission*, paragraph 180 above, paragraph 118).

319 Moreover, it must be remembered that horizontal price agreements have always been regarded as among the most serious infringements under Community competition law (*Tate & Lyle and Others* v *Commission*, paragraph 154 above, paragraph 103, and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 262).

320 Finally, it is also important to point out that the Commission did not attach primary significance to the criterion of the actual impact of the infringement on the market in

setting the starting amount of the fine. The Commission also based its determination on other considerations, namely the finding that the infringement was to be classified as very serious by its very nature (recitals 528 to 530 of the contested decision) and that the relevant geographic market constituted a large part of the Community market, geographically and in terms of value, since it represented approximately 80% of the market's total value (recitals 539 to 542 of the contested decision).

321 Consequently, in the light of all the foregoing considerations, the Commission was right to classify the infringement as very serious.

322 Further, the Court finds, in the exercise of its unlimited jurisdiction and in the light of the foregoing considerations, that the fact that the Commission demonstrated only partially the effects of the infringement is not capable of calling in question the Commission's assessment of the starting amount of the fine set according to gravity.

The determination of the starting amount of the fine according to the gravity of the infringement

— Arguments of the parties

323 The applicant considers that, according to the third indent of the second paragraph of Section 1.A of the Guidelines, a very serious infringement will attract a fine of a starting amount which will be likely to be above EUR 20 million. The applicant takes

the view that, in view of that provision, the Commission should explain on the basis of which criterion it chose an amount above EUR 20 million. In the absence of such an explanation, the figure chosen appears to have been chosen at random.

324 The applicant asserts that its fine is also disproportionate and excessive when compared with its turnover. It observes that the fine imposed represents 18.1% of its plasterboard turnover in Europe, 24.3% of its plasterboard turnover in the four main markets, and 44.4% of its plasterboard turnover in the United Kingdom and Germany in 2001-2002. Moreover, its fine is much higher in terms of its turnover than the other fines imposed for the same or comparable infringements.

325 The applicant submits that, in examining the proportionality of the fine, a comparison with other cases must be 'illuminating'. It asks by what yardstick proportionality is to be measured if it is not able to argue that the fine is disproportionate by comparison even with contemporaneous cases or by reference to the applicant's turnover or that of other undertakings.

326 The applicant also maintains that the Commission's delay of at least one year in taking the contested decision has contributed to the imposition of a much higher fine than would have been likely had that decision been taken at the end of 2001 rather than on 27 November 2002. At that time, the Commission tried to deflect public attention away from a number of setbacks in a series of merger cases and therefore sought to derive maximum political capital from the imposition of 'heavy fines' for that cartel.

327 The Commission asserts that the starting amounts it selected for each of the undertakings bear a clear and proportionate relationship to each other and to the gravity of the infringement.

328 The Commission states that the reasons which prompted it to set the initial amount at EUR 80 million are set out in recitals 545 to 549 of the contested decision. It states that it is not required to give further reasons for its choice.

329 The Commission contends that any comparison between the fines imposed in the other cases is not illuminating, because it determines the amount of the fines case by case and may in any event increase the general amount of fines within the limits set by Regulation No 17 if that proves necessary in order to implement competition policy. The Commission gives a table of the starting amounts of fines imposed in cases concerning markets with the largest values to demonstrate that the starting amount of the fine imposed on the applicant is no higher than those of the fines imposed in other cases and that, on the contrary, it is significantly lower when the size of the relevant market is taken into account. It emphasises, however, that it does not seek to justify the starting amount by reference to that table, which relates to only one of the factors taken into account in assessing the starting amount.

330 Finally, the Commission submits that BPB has shown neither that there has been unreasonable delay, given the complexity of the case, nor that this delay had caused any prejudice to its rights of defence. BPB's assertions concerning the political climate are pure speculation, and wholly irrelevant to the question whether the fine was lawfully imposed.

— Findings of the Court

331 As regards the scope of the duty to state reasons as it applies to the setting of a fine imposed for infringement of the Community competition rules, it should be noted, first, that such a fine must be fixed in the light of the provisions of the second subparagraph of Article 15(2) of Regulation No 17, which states that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement'. In this respect, the Guidelines and the Leniency Notice indicate what factors the Commission takes into consideration in measuring the gravity and duration of an infringement (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 217). In those circumstances, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine (*Cheil Jedang* v *Commission*, cited above, paragraph 218).

332 It is true that, in the present case, the Commission has not indicated figures other than those relating to the market shares of the undertakings in question on the basis of which it set the starting amount of the fine imposed on the applicant at EUR 80 million.

333 However, there is no obligation on the Commission, as part of its duty to state reasons, to indicate in its decision the figures relating to the method of calculating the amount of fines (Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 66).

334 Statements of figures relating to the calculation of the amount of fines, however useful such figures may be, are not essential to compliance with the duty to state reasons for a decision imposing fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own power of assessment (Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraph 75).

335 As regards the reasons underlying the setting of the amount of fines in absolute terms, it must be borne in mind that fines constitute an instrument of the Commission's competition policy and the Commission must be allowed a margin of discretion when fixing their amount in order that it may channel the conduct of undertakings towards observance of the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59).

336 Moreover, it is important to ensure that fines are not easily foreseeable by economic operators. If the Commission were required to indicate in its decision the figures relating to the method of calculating the amount of fines, the deterrent effect of those fines would be undermined. If the amount of the fine were the result of a calculation which followed a simple arithmetical formula, undertakings would be able to predict the possible penalty and to compare it with the profit that they would derive from the infringement of the competition rules.

337 In the present case, it must be noted that in recitals 522 to 553 of the contested decision the Commission set out the factors which it took into account in calculating the fines on the basis of the gravity of the infringement of each of the undertakings concerned. Those recitals plainly set out the reasoning followed by the Commission in a clear and detailed manner, thereby allowing the applicant to ascertain the factors taken into account in order to measure the gravity of the infringement for the purposes of calculating the amount of the fine and the Court to exercise its power of

review. It must therefore be held that the contested decision satisfies the duty to state reasons imposed on the Commission under Article 253 EC.

338 Concerning the applicant's argument that its fine is disproportionate and excessive when compared with its turnover, it is sufficient to recall that, as the Commission is not obliged to calculate the fine by reference to amounts based on the turnover of the undertakings concerned, it is likewise not required to ensure, where fines are imposed on several undertakings involved in the same infringement, that the final amount of the fines produced by the calculation for the undertakings concerned reflects any distinction between them regarding their total turnover or their turnover in the relevant product market (*Dansk Rørindustri and Others* v *Commission*, paragraph 90 above, paragraphs 255 and 312).

339 Further, Community law contains no general principle that the penalty be proportionate to the undertaking's size on the product market in respect of which the infringement was committed (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 101).

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

turnover, than that imposed on other undertakings (Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 203).

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

342 It must be emphasised, in that connection, that the Commission's practice in earlier decisions does not in itself serve as a legal framework for fines in competition matters. The fact that in the past the Commission has applied fines of a particular level for certain types of infringements does not mean that it is estopped from raising that level within the limits indicated by Regulation No 17 if that is necessary to ensure implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, paragraph 278 above, paragraph 109).

343 Furthermore, the gravity of infringements must be established by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (*Ferriere Nord* v *Commission*, paragraph 316 above, paragraph 33, and *LR AF 1998* v *Commission*, paragraph 275 above, paragraph 236). The relevant data, such as the markets, the products, the countries, the undertakings and the periods concerned differ in each case. It follows that the Commission cannot be compelled to impose on undertakings fines whose amount

corresponds to the identical percentage of their respective turnovers in cases that are comparable as regards the gravity of the infringements (see, to that effect, Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraphs 187 to 189).

344 In this respect, it must be borne in mind that the Court has power to assess, in the exercise of its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amount of the fines.

345 In the present case, the Court finds that the infringement is particularly serious in the light of certain factors, as observed by the Commission at recitals 534, 535 and 539 to 542 of the contested decision, in particular the oligopolistic nature of the market and the fact that the infringement in question affected all or almost all plasterboard supply on the four national markets covered by the cartel. Further, the size of the market concerned, both geographically and in terms of value, was large. The four markets concerned were the four main Community plasterboard markets and accounted for approximately 80% of the total value of the Community market, which amounted to EUR 1.21 billion in the last complete year of the infringement. Lastly, having regard to the nature of the product concerned, the cartel necessarily had an impact on a substantial part of the construction market and thus affected a sector which is very important for the whole of the economy.

346 Moreover, it is not evident that the starting amount set according to the gravity of the infringement in the present case is more severe than that imposed in other cases, having regard to the size of the market in question. However, that comparison does not mean that the size of the relevant market is the best or only criterion for comparing the fines imposed in different cartels. Comparison between different cartels is difficult, given the large number of the various factors that the Commission may take into account in order to assess the gravity of the infringement. Further, as

was recalled at paragraph 342 above, such a comparison, in any event, only serves as an indication, since the Commission's practice in earlier decisions cannot itself constitute a legal framework for fines in competition matters.

347 Given the numerous factors which made the infringement particularly serious in the present case (see paragraph 345 above), the Court finds that the starting amount of the fine imposed on the applicant determined according to the gravity of the infringement is proportionate.

348 Lastly, the applicant's argument that its fine would have been less severe had the Commission brought the administrative procedure to an end at an earlier stage, given that it is only very recently that it has increased the general level of penalties, must be rejected. Even if it is accepted that the general level of fines has increased during the period of the administrative procedure, it is sufficient to recall that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique diffusion française and Others* v *Commission,* paragraph 273 above, paragraph 109, and judgment of the Court of Justice in *Dansk Rørindustri and Others* v *Commission*, paragraph 90 above, paragraph 169).

349 It follows from all the foregoing that the applicant's arguments seeking to show that the starting amount of the fine determined according to the gravity of the infringement was disproportionate must be rejected.

Duration of the infringement

Arguments of the parties

350 The applicant considers that the Commission incorrectly assessed the duration of the alleged infringement on the basis of separate and distinct facts. The Commission was wrong to conclude that it had committed an infringement lasting from 31 March 1992 to 25 November 1998, namely six years and seven months, amounting to an infringement of long duration justifying an increase of 65% of the starting amount of the fine.

351 The applicant maintains that the alleged infringements relate to two separate periods. The first includes the London meeting and the exchange of information between Mr [A] and the cousins of the Knauf family from 1992 to early or mid-1993, and the second includes information exchanges from mid- or late 1993 to 1998 between Mr [D] and the CEOs of the undertakings in question. Those events have no connection with other alleged infringements, which occurred in the period 1994 to 1998 or with the information exchanges on United Kingdom sales from mid-1992 to February 1998.

352 In those circumstances, the applicant maintains that there was no complex and continuous agreement and contends that, under Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), infringements occurring before the five-year period ending with the commencement of the Commission inspections are time barred and cannot be the subject of any fine.

353 Moreover, the applicant maintains that Mr [D] continued the information exchanges in March and November 1998, even though it had prohibited them in March 1998. The applicant considers that it cannot be responsible for action taken by an employee who is acting contrary to its instructions and that the end of the infringement should therefore be set at the end of March 1998.

354 The applicant further claims that the Guidelines are unclear on the question whether the Commission is entitled to take into account partial years. Adopting a strict interpretation of the Guidelines, the applicant submits that the Commission was entitled only to impose an increase of 60% of the starting amount, rather than 65%, that is to say 10% for each complete year of infringement.

355 The applicant also observes that the Commission should not always apply a 10% increase, as it has automatically in all the recent cartel cases. The Commission should take account of all the relevant circumstances of the case in determining the increase of the fine. It adds that that was the Commission's practice in its Decisions 98/273/EC of 28 January 1998 relating to a proceeding under Article [81 EC] (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60) and 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 [EC] (Case COMP.F.1/35.918 — JCB) (OJ 2002 L 69, p. 1), and in the pre-insulated heating pipes case, in which it took account of the intensity of the infringement in the different periods.

356 The Commission considers that BPB's arguments are yet another attempt to challenge the Commission's finding in the contested decision of a single, complex and continuous infringement.

357 As regards the conduct of Mr [D], the Commission contends that it is not required to distinguish between various organs of the undertakings, some of whom are actively involved in the cartel and some of whom were attempting to put an end to the infringement.

358 According to the Commission, there is nothing in the Guidelines to indicate that the Commission must confine itself to increasing the amount of fines only for complete years of infringements. It explains that the risk of having to pay a much larger fine, proportionate to the duration of the infringement, will necessarily increase the incentive to denounce it or to cooperate with the Commission. Any other approach would be inconsistent with its stated goal of increasing the fine proportionately to the duration of the infringement.

Findings of the Court

359 The applicant's arguments seeking to show that this case involves separate infringements, part of which is therefore time barred, overlap with those set out in the third plea. Thus, since the Court held earlier that the Commission did not err in finding that it was a single and continuous infringement, the applicant's arguments must be rejected.

360 The applicant's argument that its participation in the infringement would have already come to an end in March 1998 if Mr [D] had not disobeyed its instructions is irrelevant. An undertaking — that is to say an economic unit comprising personal, tangible and intangible elements (Case 19/61 *Mannesmann* v *High Authority* [1962] ECR 357, 371) — is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management

as provided for in those articles of association (management board, management committee, chairman, manager, and so on). The rules of competition would be easily circumvented if the Commission, faced with unlawful conduct on the part of an undertaking, were required to ascertain and to prove who is the author of the various activities, which could have the effect of preventing it from penalising the undertaking which benefited from the cartel.

361 As regards the applicant's assertion that the Guidelines are unclear on the question whether the Commission is entitled to take into account partial years, it is sufficient to note that nothing in the Guidelines prevents the actual duration of the infringement from being taken into account in the calculation of the amount of the fine. Such an approach is entirely logical and reasonable and falls, in any event, within the Commission's discretion.

362 As regards the applicant's objection to the fact that the Commission automatically applied the maximum rate of 10% per year, it must be borne in mind that, even if the third indent of the first paragraph of Section 1.B of the Guidelines does not provide that there should be an automatic increase of 10% per year for infringements of long duration, it leaves the Commission a margin of assessment in that connection (*Cheil Jedang* v *Commission*, paragraph 331 above, paragraph 134).

363 In the present case, at recital 554 of the contested decision, the Commission found that BPB had committed the infringement for six years and seven months, that is a long duration for the purposes of the Guidelines, and it thus increased the amount of the fine determined on the basis of the gravity of the infringement to 65%. It is apparent from this that the Commission complied with the rules which it had imposed upon itself in the Guidelines. Furthermore, the Court considers that, having regard to the duration of the infringement, the increase of 65% is not disproportionate in the present case.

364 So far as concerns the applicant's assertion that the Commission did not take account of the different levels of intensity of the infringement during the period in question, it must be borne in mind that the increase is calculated by the application of a certain percentage to the starting amount which is determined according to the gravity of the infringement as a whole, thus already reflecting the different levels of intensity of the infringement. Thus, it would not be logical to take into account, for the increase of that amount on the basis of the duration of the infringement, a variation in the intensity of the infringement during the period concerned.

365 In so far as BPB submits that in other cases concerning restrictions of a similar nature and duration the Commission applied increases in respect of the duration of the infringement that were lower than that applied in the present case, it is sufficient to point out that the Commission's practice in earlier decisions does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and that, moreover, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Commission in the exercise of its discretionary power will be maintained (judgment of the Court of Justice in *Dansk Rørindustri and Others* v *Commission*, paragraph 90 above, paragraph 171).

366 It follows that the complaint alleging that the Commission erred in increasing the amount of the fine in respect of the duration of the infringement must be rejected.

Repeated infringement

Arguments of the parties

367 The applicant considers that the increase of 50%, that is EUR 66 million, of the basic amount of the fine for repeated infringement is excessive and disproportionate.

368 First, the applicant claims that the role played by its subsidiary in the earlier infringement was minor and passive (Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article [81 EC] (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1)). Consequently, the fine ultimately imposed on its subsidiary was only EUR 750 000. Moreover, the earlier infringement was penalised more than eight years before the contested decision was issued. The applicant maintains that the Commission is not entitled to determine an increase mechanically on the basis of the existence of an earlier infringement. It should take account of all the circumstances of the earlier infringement: its nature, the circumstances in which it was committed, how long ago it took place and the penalty imposed. The applicant refers to a number of jurisdictions to show that the nature of any earlier infringement and the time that has elapsed since it was committed are taken into account when a court envisages an increase of the penalty for repeat offences.

369 Second, the applicant claims that the Commission is not entitled to increase the fine on account of repeated infringement where the first offence is contemporaneous with the second offence. In this case, the decision in Cartonboard (see paragraph 368 above) was adopted on 13 July 1994 and, accordingly, the increase of 50% should have been applied only as from that time. According to the applicant, the increase should therefore be reduced accordingly to EUR 43.7 million. Looked at another way, the aggravation factor should only be applied to the fine increased in respect of the duration of the infringement from July 1994. In that case, the amount to be added for aggravating circumstances would be EUR 56 million.

370 Third, the applicant maintains that the increase is excessive and disproportionate because it exceeds the starting amount of the fine imposed in respect of the gravity of the infringement on Knauf, Lafarge and Gyproc.

371 Fourth, the applicant claims that the increase exceeded the 30% decrease in the fine awarded to it to recognise its cooperation with the Commission in this case. Reduc-

tions granted for cooperation should be real and should not be cancelled out on account of the increase for repeated infringment.

372 Fifth, the applicant claims that there is only one Commission decision, that concerning the British Sugar case (see paragraph 264 above), in which the increase was higher, namely 75% of the basic amount, and that, in that case, the increase was based on British Sugar's role as instigator of the first infringement. In the light of the circumstances of that case and of Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 [EC] (COMP/E-2/36.041/PO — Michelin) (OJ 2002 L 143, p. 1), the increase of 50% which was applied to it is excessive.

373 Finally, the applicant claims that the Commission applied to it the same increase in respect of repeated infringement as to Lafarge even though the infringement committed by Lafarge in the case which gave rise to Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article [81 EC] (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1) was more serious than that penalised in the Cartonboard case. The Commission should have taken account of the differences between the two earlier cartels, in particular Lafarge's significant role, the long duration of the cartel in which Lafarge had participated and the fact that Lafarge had been fined EUR 14.9 million for that infringement. By not taking account of those differences and by imposing the same increase of 50% on both the undertakings, the Commission infringed the principle of equal treatment.

374 The Commission considers repeat offending to be an aggravating circumstance because the undertaking commits a further infringement despite having been

penalised for an infringement of the same type and therefore having received a clear warning that those actions were unlawful and not to be repeated.

375 As regards the applicant's argument that the first and second infringements are contemporaneous and that the increase should be applied pro rata, the Commission maintains that the applicant fails to take account of the aim of the increase, which is to penalise the undertaking's willingness to infringe the competition rules despite earlier penalties being imposed.

376 It is wholly irrelevant whether the increase for repeat offending is above or below the starting amount of the fine imposed on other undertakings or the reduction granted on account of BPB's cooperation.

377 According to the Commission, BPB has added a complaint which was not made in the application, namely that the Commission should have considered the length of time that has elapsed since its previous offence which, according to the reply, took place 'more than eight years before the decision in this case was issued'. That complaint is inadmissible under Article 44(1)(c) of the Rules of Procedure.

Findings of the Court

378 It follows from the case-law that the taking into account of aggravating circumstances when setting the amount of the fine is consistent with the Commission's task

of ensuring compliance with the competition rules (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 71).

379 Thus, any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (*Aalborg Portland and Others* v *Commission*, paragraph 36 above, paragraph 91).

380 The applicant's argument that the Commission did not correctly take account of all the circumstances of the earlier infringement must be rejected.

381 First of all, as regards the period of time which elapsed between the two infringements, it is common ground that the first infringement was penalised after the beginning of the infringement at issue.

382 In accordance with settled case-law, the Commission has a discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as the particular circumstances of the case, its context and the dissuasive effect of fines, there being no need to refer to a binding or exhaustive list of the criteria which must be taken into account (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

383 It must be emphasised that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and that the Commission cannot be bound by any limitation period when making such a finding. Repeated infringement is an important factor which the Commission must appraise, since the purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including the time that has elapsed between the infringements in question.

384 In this respect, it should be noted that the Court has held that a time lapse of less than 10 years between the findings of two infringements showed a tendency on the part of an undertaking not to draw the appropriate conclusions from a finding that it had infringed the competition rules (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraphs 354 and 355).

385 A fortiori, in the present case, the history of the infringements found against the applicant shows a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules, given that, having already been the subject of Commission measures imposed previously by the decision in the Cartonboard case, the applicant continued for more than four years to participate actively in the cartel at issue in the present case after that decision had been notified to it.

386 In those circumstances, it is not necessary to examine the admissibility of the applicant's argument relating to the period of time which elapsed between the sanctioning of the first infringement and the issuing of the contested decision.

387 Next, with regard to the characteristics of the previous conduct, the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement of Community competition law has been made in the past (*Groupe Danone* v *Commission*, paragraph 384 above, paragraph 363).

388 The purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct when it transpires that a previous finding of infringement on its part has not been sufficient to prevent the repetition of unlawful conduct. Thus, it is not the previous imposition of a fine, and a fortiori not the amount thereof, which is determinative of repeated infringement, but the fact that a previous finding of infringement has been made.

389 Lastly, the applicant does not even claim that the infringement for which its subsidiary was penalised in the Cartonboard case is not of the same type as that in question in this case.

390 Consequently, the Commission did not err in finding, in the present case, that the specific circumstances of the case, in particular the fact that the same undertaking had already been the subject of a finding of infringement and that, despite that finding and the penalty imposed, it had continued to participate in a similar infringement of the same Treaty provision, were proof of repeated infringement.

391 Concerning the applicant's argument that where the first offence is contemporaneous with the second offence the Commission is entitled to increase the amount of the fine on account of repeated infringement only from the time of the adoption of the first decision penalising one of those offences, it must be rejected.

392 It is true that a policy of penalising repeated infringement can have no practical effect on the perpetrator of an infringement unless the threat of a more severe penalty for a new infringement is capable of inducing him to change his conduct. The taking into account of a repeated infringement is justified by the need to ensure a higher level of deterrence, as demonstrated by the fact that a previous finding of an infringement had not been sufficient to prevent the repetition of the infringement. Thus, a repeated infringement necessarily arises after the finding and the sanctioning of the first infringement, since it is explained by the fact that that penalty was not a sufficient deterrent.

393 In this respect, in *Thyssen Stahl* v *Commission,* paragraph 270 above, the Court of First Instance held that the Commission's decision was vitiated by an error of law in so far as the increase of the amount of the fine imposed on Thyssen Stahl AG was based on the consideration that the Commission had already penalised it for similar infringements by Decision 90/417/ECSC of 18 July 1990 relating to a proceeding under Article 65 of the ECSC Treaty concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products (OJ 1990 L 220, p. 28), whilst, in the case then before the Court, the greater part of the infringement period, from 30 June 1988 to the end of 1990, taken into account against Thyssen Stahl, pre-dated that decision (paragraphs 617 to 625).

394 However, unlike in *Thyssen Stahl* v *Commission*, paragraph 270 above, in which the greater part of the infringement took place before the first decision, in the present case, BPB continued to participate in the cartel in question for more than four years after the decision adopted in the Cartonboard case.

395 As stated in paragraph 382 above, the assessment of the specific characteristics of a repeated infringement depends on an appraisal of the circumstances of the case by the Commission in the course of its discretion.

396 In the circumstances of the present case, the Court holds that the Commission did not exceed its discretion in finding that the fact that BPB had continued to participate, after the first finding of an infringement, in a similar infringement of the same Treaty provision for more than four years was proof of repeated infringement, and in therefore increasing the amount of the fine for that reason.

397 With regard to the level of that increase, the Court recalls that, when fixing the amount of the fine, the Commission has discretion. In this respect, it is not required to apply specific mathematical formulae (*Michelin* v *Commission*, paragraph 273 above, paragraph 292).

398 Furthermore, in the context of deterrence, repeated infringement justifies a significant increase in the basic amount of the fine. It is evidence that the sanction previously imposed was not sufficiently deterrent (*Michelin* v *Commission*, paragraph 273 above, paragraph 293).

399 As regards the rate of increase applied in the present case, the Court considers that it is proportionate. In this respect, it should be noted that the decision adopted in the Cartonboard case and the contested decision concern similar infringements. The consequences of that finding cannot be called in question by the applicant's assertion that the role played by its subsidiary in the Cartonboard case was minor and passive. What matters is the fact that, despite the finding that there has been an infringement of Community competition law, the undertaking in question continued to infringe it. Accordingly, the Commission was entitled to increase the basic amount of the fine by 50% in order to channel the conduct of the applicant towards observance of the Treaty competition rules.

400 In so far as the applicant's argument that the increase on account of repeated infringement was not proportionate relies, in essence, on the fact that the increase in absolute terms (EUR 66 million) is disproportionate, it must be rejected.

401 When setting an increase for repeated infringement, the Commission may confine itself to examining what would be the proportional percentage and does not need to take into account the amount, in absolute terms, of the increase of the basic amount of the fine as a result of the application of that percentage. As long as the percentage increase is not excessive, the increase in absolute terms is only the mathematical consequence of the application of that percentage to the basic amount, whose proportionality in relation to the gravity and duration of the infringement in question was examined separately.

402 Consequently, the increase of 50% of the basic amount of the applicant's fine on account of repeated infringement is not disproportionate.

403 So far as concerns the Commission's previous practice, the applicant claims that there is only one Commission decision, in the British Sugar case, in which the increase was higher (75%), and that, in that case, the increase was based on British Sugar's role as instigator of the first infringement. The applicant considers that, in the light of the circumstances of that case, the increase of 50% applied to it is excessive.

404 As regards the comparisons with other Commission decisions imposing fines for infringements of the competition rules, those decisions can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions are identical to

those of the present case (see, to that effect, *JCB Service* v *Commission*, paragraph 343 above, paragraph 187).

405 However, the applicant has failed to adduce sufficient evidence that those conditions have been met in the present case. In particular, the applicant does not refer to any decisions contemporaneous with that of the present case in which the Commission applied a lower percentage increase for circumstances similar to those of the present case. As regards the reference to the Michelin decision, in which Michelin was penalised for repeated infringement in respect of a rebate system designed to secure customers' loyalty, that is clearly a different set of circumstances from those of the present case, since such a rebate system cannot be deemed equivalent, in terms of the gravity of the Community competition law infringement, to a secret cartel concerning prices and the stabilisation of a market of considerable value.

406 In any event, the mere fact that, in another decision, the Commission increased the basic amount for a repeated infringement differently does not mean that it was required to apply the same percentage increase in the contested decision. The Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 (*Michelin* v *Commission*, paragraph 273 above, paragraph 292).

407 The applicant also maintains that the increase is excessive and disproportionate because it exceeds the starting amount of the fine imposed for the gravity of the infringement on Knauf, Lafarge and Gyproc.

408 That argument is irrelevant. Since BPB's fine was determined correctly and the increase for repeated infringement is proportionate, the fact that the increase in absolute terms is higher than the starting fines imposed on the other cartel participants is just a mathematical consequence of the increase which is unrelated to the amount of the other fines.

409 The applicant also claims that the increase was more than the 30% decrease in the fine awarded in recognition of its cooperation with the Commission in this case.

410 That argument is also irrelevant, since they are two separate stages in determining the amount of the fine.

411 Finally, the applicant claims that the Commission applied to it the same increase for repeated infringement as to Lafarge even though the infringement committed by Lafarge in the Cement case was more serious than that penalised in the Cartonboard case.

412 That argument is also unfounded. As explained above, since the increase for repeated infringement relates to an aggravating circumstance specific to the undertaking in question, the fact that the characteristics of the earlier infringement committed by Lafarge are not analogous to those of the earlier infringement attributed to the applicant is irrelevant. What is relevant is the fact that both undertakings were previously involved in very serious infringements, but that, despite the finding of those infringements, they did not bring to an end their involvement in the infringement penalised in the case in point.

413 It follows from all the foregoing that the applicant's arguments relating to the taking into account of the repeated infringement must be rejected.

Attenuating circumstances

Arguments of the parties

414 The applicant considers that the Commission should have reduced the amount of the fine by virtue of the measures taken before and after the Commission's investigation. It submits that the Commission was wrong to regard its efforts as ineffective. The Commission's refusal to recognise its efforts is contrary to the principles of equal treatment and protection of legitimate expectations.

415 First, the applicant claims that, on the basis of allegations contained in the anonymous letter, it engaged the services of independent lawyers to carry out its own investigations ('Project Alpha'). On the basis of the conclusions of Project Alpha, the applicant's Board of Directors implemented a more formal competition law compliance programme, under which it adopted a more formal policy statement on compliance which the directors, the other officers and members of staff concerned were required to sign. The applicant also decided to cease all information exchanges and instructed a firm of lawyers to help it design and implement various further elements of its formal compliance programme.

416 Second, the applicant claims that, after the opening of the Commission investigation, the measures taken by it evinced a high level of cooperation. It gave the inspectors

unhindered access to its business records and computers. It also provided the documents requested and Mr [D] accurately answered the questions put by the Commission. Moreover, it provided the Commission, in its reply to the second request for information, with information of which the Commission had no previous knowledge. The applicant considers that, because of its efforts to bring the infringement to an end even before the start of the Commission's investigations and its willing cooperation during the investigations, the amount of its fine should be further reduced.

417 The applicant rejects the Commission's argument that it destroyed or concealed evidence. The applicant states that those allegations are not supported by any evidence. It states that, although documents were removed in connection with Project Alpha, a note recording their removal was left in the file.

418 Third, with regard to the fact that its CEO, Mr [D], disobeyed the instructions of its Board of Directors and continued the information exchanges without the knowledge of the Board or that of any of the staff, the applicant considers that it cannot be held responsible for Mr [D]'s activities, particularly because of his independent position. The applicant also claims that when Mr [D]'s continued information exchanges came to light, he had to leave his position immediately without any compensation. The applicant states that Mr [D]'s failure to obey its instructions was the only occasion on which its efforts to terminate the infringement failed. Consequently, the Commission cannot say that the measures taken by the applicant were ineffective.

419 Fourth, the applicant maintains that it withdrew from the information exchange system in April 1998. Thus, had it not been for Mr [D]'s wilful disregard of the instructions from the Board of Directors, there would have been total compliance from March 1998. Furthermore, it submits that it is entitled to a reduction of the fine for having terminated the infringement immediately after the Commission's intervention.

420 Fifth, the applicant submits that it did not profit from the infringement. Prices remained at the same level in real terms in the United Kingdom and fell in Germany whilst its costs were rising. Moreover, its market share in each of the four markets concerned was less in 1998 than in 1992 and its turnover did not reach its 1991-1992 level until 1997-1998. Furthermore, prices would have recovered in any event following the end of the price war. The applicant considers that if the Commission can increase the amount of a fine on account of profits obtained following an infringement, it should also take account of the absence of any profit from the infringement and reduce the amount of the fine.

421 The Commission disputes the applicant's arguments.

422 The Commission considers that, in its reply, BPB sets out a new argument seeking a reduction of the amount of the fine for ceasing the infringement after the Commission's investigations at the end of 1998. That new argument is inadmissible at this stage of the procedure. It is also unfounded since the Commission is not required, as a general rule, either to regard the continuation of an infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance.

Findings of the Court

423 First, with regard to the measures adopted by the applicant in order to prevent a repeated infringement on its part (the dismissal of its senior executive officers involved in the offending conduct and the adoption of internal programmes to ensure

compliance with the competition rules and awareness-raising initiatives for the staff in that connection), it should be noted that, whilst it is indeed important that an undertaking takes steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance cannot affect the fact that an infringement was found to have been committed. It follows that the mere fact that in certain cases the Commission took the implementation of a competition law compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in any given case (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 280).

424 The Commission is therefore not required to take a circumstance such as that into account as a mitigating factor, provides that it adheres to the principle of equality of treatment, which requires that it should not assess the matter differently for any undertaking addressed by the same decision (judgment of the Court of First Instance in *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 423 above, paragraph 281). There is no indication whatsoever in the contested decision that the Commission's assessment differentiated in this respect as between the four undertakings in question, and the applicant does not claim that that was the case.

425 Second, the applicant claims that the measures that it took after the opening of the Commission investigation evinced a high level of cooperation and that, consequently, its fine should be further reduced. Those arguments overlap with the question whether the Commission correctly took account of the applicant's cooperation in the context of the Leniency Notice. Accordingly, the applicant's cooperation during the administrative procedure will be examined below, but does not constitute an attenuating circumstance justifying a reduction separate from that granted under the Leniency Notice.

426 It should, however, be borne in mind that the possibility of granting to an undertaking which has cooperated with the Commission during proceedings for infringement of the competition rules a reduction of the fine outside the framework laid down by the Leniency Notice is recognised by the Guidelines, the sixth indent of Section 3 of which provides for the taking into account, as an attenuating circumstance, of 'effective cooperation by the undertaking in the proceedings, outside the scope of the [Leniency Notice]'.

427 However, to the extent that this complaint must be interpreted as seeking a finding that the Commission should have granted the applicant another reduction of its fine under that provision, it must be pointed out that the infringements in the present case fall well within the scope of application of the Leniency Notice, Section A.1, first subparagraph, of which refers to secret cartels between undertakings aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports. The applicant cannot therefore validly complain that the Commission failed to take into account the extent of its cooperation as an attenuating circumstance outside the legal framework of the Leniency Notice (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 586).

428 Moreover, such a complaint cannot be levelled at the Commission, even if it were necessary to accept that cooperation with an investigation into horizontal cartels which fix prices and share sales is capable of being rewarded under the sixth indent of Section 3 of the Guidelines. If that were to be the case, a reduction under that provision would necessarily mean that the cooperation in question was not capable of reward under the Leniency Notice and that it was effective, that is to say, that it facilitated the Commission's task of finding and putting an end to infringements of the competition rules (*BASF* v *Commission*, paragraph 427 above, paragraphs 587 and 588).

429 Third, the applicant considers that it cannot be held responsible for the fact that Mr [D], its CEO, disobeyed the instructions of its Board of Directors and continued the information exchanges without the knowledge of the Board or of any of the staff.

430 That argument is irrelevant. An undertaking — that is to say an economic unit comprising personal, tangible and intangible elements (Case 19/61 *Mannesmann* v *High Authority*, paragraph 360 above, 357, 371) — is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management as provided for in those articles of association (management board, management committee, chairman, manager, and so on). The rules of competition would be easily circumvented if the Commission, faced with unlawful conduct on the part of an undertaking, were required to ascertain and to prove who is the author of the various activities, which could have the effect of preventing it from penalising the undertaking which benefited from the cartel.

431 Although BPB claims to have been betrayed by its former CEO, who failed to follow the explicit instructions of his Board of Directors, the solution to that conflict must be sought in the relationship between Mr [D] and BPB, and not at the level of the Commission's application of competition law. Thus, even if Mr [D] did in actual fact disobey the instructions of BPB's Board of Directors and continue the information exchanges without the latter's knowledge, the Commission was entitled to impose a fine on the undertaking, whilst BPB and/or its owners were free to pursue any action deemed appropriate against Mr [D].

432 Fourth, the applicant maintains that it withdrew from the information exchange system in April 1998. Thus, had it not been for Mr [D]'s wilful disregard of the instructions from the Board of Directors, there would have been total compliance from March 1998.

433 That argument overlaps in part with the previous one and is no more relevant. Since the applicant is responsible for Mr [D]'s activities, the infringement continued until November 1998.

434 Furthermore, the Commission rightly found that, even if the withdrawal from the information exchange system demonstrated a willingness to avoid conduct which could give rise to suspicion, it was not accompanied by other measures designed to put an end to the collusive arrangements, as illustrated by the continued exchange of information or the discussions which took place between competitors at The Hague.

435 As regards the applicant's argument relating to the termination of the infringement after the Commission's investigation, which the Commission regards as inadmissible, it must be stated that the applicant already referred, in its application, to 'prompt termination of the infringement as a mitigating factor'. Thus, that argument does not constitute a new plea for the purposes of Article 48(2) of the Rules of Procedure but the amplification of a plea made previously, whether directly or by implication, in the original application and must be considered admissible (see Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 86, and the case-law cited).

436 Under the third indent of Section 3 of the Guidelines, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is an attenuating circumstance. However, a reduction of the fine by reason of the termination of an infringement as soon as the Commission intervenes cannot be automatic but depends on an appraisal of the circumstances of the case by the Commission in the course of its discretion. In that regard, the application of that provision of the Guidelines in favour of an undertaking will be particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive, on the assumption that it is proven (Case T-44/00 *Mannesmannröhren-Werke* v

Commission [2004] ECR II-2223, paragraph 281; see also, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraphs 292 and 294).

437 Even if, in the past, the Commission has regarded voluntary termination of an infringement as an attenuating circumstance, it is entitled, when applying its Guidelines, to take account of the fact that, even though their illegality was established at the inception of Community competition policy, very serious manifest infringements are relatively frequent and, therefore, to take the view that it is appropriate to abandon that generous practice and no longer reward the termination of such an infringement by a reduction of the fine.

438 In those circumstances, the appropriateness of a reduction of a fine by reason of termination of the infringement depends on whether the applicant could reasonably doubt the illegality of its conduct.

439 In the present case, it should be recalled that the infringement in question relates to a secret cartel whose object was an exchange of information in an oligipolistic market and a stabilisation of markets. That type of cartel constitutes a very serious infringement. The undertakings concerned must therefore have been aware of the unlawful nature of their conduct. The secret nature of the cartel confirms moreover the fact that the undertakings concerned were aware of the unlawful nature of their actions.

440 Accordingly, for the reasons set out above, the failure in the present case to take the termination of the infringement as soon as the Commission intervened into account as an attenuating circumstance cannot be regarded as incorrect.

441 Fifth, with regard to the applicant's argument that the Commission did not take account of the fact that it had not benefited from the infringement in question, it must be borne in mind that, whilst the amount of the fine imposed on an undertaking must be proportionate to the duration of the infringement and the other factors capable of affecting the assessment of the gravity of the infringement, including the profit that it was able to derive from those practices, the fact that an undertaking did not benefit from an infringement cannot preclude the imposition of a fine since otherwise it would cease to have a deterrent effect (Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 89).

442 Lastly, it must be stated that, although the Commission may, under its Guidelines (Section 2, fifth indent) and in respect of aggravating circumstances, increase a fine in order to exceed the amount of gains improperly made as a result of the infringement, that possibility does not mean that the Commission is then under an obligation to establish in every case, for the purpose of determining the amount of the fine, the financial advantage linked to the infringement found to have been committed. In other words, the absence of such an advantage cannot be regarded as an attenuating circumstance (*SNCZ* v *Commission*, paragraph 441 above, paragraph 91).

443 Consequently, the applicant's arguments seeking to obtain a reduction in respect of attenuating circumstances must be rejected.

Cooperation

Arguments of the parties

444 The applicant maintains that the Commission infringed the principle of the protection of legitimate expectations and the principle of fairness by deciding that the

measures taken by it merited a reduction of only 30% of the amount of the fine in accordance with Section D of the Leniency Notice. The applicant considers that it should have been granted a reduction of 50% to 75% of the amount of the fine in accordance with Section C of the Leniency Notice.

445 The applicant submits that it provided decisive information on which the contested decision relied heavily. For example, that the Commission would not have obtained any information concerning the London meeting, which was the factual basis of the start of the infringement, without its admission in response to the second request for information. In that connection, it states that the Commission's question related only to the information exchanges conducted under the direction of the chief executives of the four companies in question. It could therefore have confined itself strictly to answering that question. However, in the meantime, it had learned from its former Chairman and Chief Executive, Mr [A], that a meeting had taken place in 1992. It chose to disclose that meeting and what took place. That was therefore a major admission. The information exchanges in the United Kingdom and the advance warning of one or two list price rises in the United Kingdom would likewise not have come to light without its cooperation. It states that, on a fully voluntary basis, it admitted that there had been discussions on the attempt to share the German markets in Versailles and also admitted in its reply to the statement of objections that other discussions had taken place in Brussels at the end of 1997 and at a dinner in The Hague, even though it contends that no agreement had been concluded. The applicant states that it also admitted its participation in the information exchange system. Moreover, even though certain information concerning those exchanges was obtained from the inspection of BPB's head office, the information provided by BPB gave the Commission a better understanding of the exchanges.

446 Although Knauf confirmed the existence of the London meeting and the Commission also relied to some extent on the evidence provided by Knauf concerning that meeting, Knauf acted in that way only because the meeting was referred to in the statement of objections. Knauf would have had nothing to confirm if BPB had not disclosed the existence of the meeting prior to the issue of the statement of objections. Moreover, after its initial inspections, the Commission was not in a position to

initiate an administrative procedure because, rather than doing so, it continued the preliminary investigation phase by issuing requests for information to the undertakings concerned. One of those requests, addressed to the applicant, was based entirely on information it had provided voluntarily. It was therefore only after the receipt of the applicant's information that the Commission was in a position to issue the statement of objections.

447 The applicant claims that, had Mr [D] not disobeyed its instructions, it would have already ended its involvement in any infringement eight months before the Commission's inspection.

448 The applicant further observes that it did not compel any other undertaking to take part in the cartel, did not instigate it and did not play a determining role in the offending conduct at issue.

449 Finally, the applicant maintains that, even if the Commission were right to grant it a reduction only under Section D of the Leniency Notice, it infringed the principle of equal treatment by granting Gyproc a reduction of 40% and as regards the applicant a reduction of only 30%. The information provided by it was more decisive for the Commission's arguments on the ground that the information provided by Gyproc related exclusively to the period 1996 to 1998 and to the German market. As regards the Commission's argument that Gyproc's participation in the infringement was less serious than the applicant's, the applicant takes the view that the extent of the reduction of the amount of the fine the Commission grants to an undertaking should depend on the quality of the information provided, and not on the gravity of an undertaking's participation in the infringement.

450 The applicant adds that the Commission is not entitled to treat it differently from Gyproc on the basis that Gyproc did not contest the facts or their classification as infringements. It emphasises that its objections related mainly to the inferences the Commission drew from the facts rather than the facts themselves.

451 The Commission considers that its findings under the Leniency Notice could only be annulled if they were vitiated by an error of fact or a manifest error of assessment.

452 The Commission claims that, with the exception of paragraphs 5, 6 and 9 of the table set out on pages 151 to 154 of the application, the information referred to by the applicant was provided either in response to requests for information or given orally in response to questions during investigations. The Commission considers itself entitled not to take account of information of that kind when assessing the cooperation of an undertaking. The Commission states that it took account of the fact that the answers were very detailed and on occasion went further than was necessary to give a full answer.

453 As regards the information given spontaneously, the Commission contends that, as regards paragraph 6 of the table, it already had the information indicated at recitals 201 and 205 of the contested decision. It states that, even before BPB's admissions, it had sufficient information about paragraph 9 (and paragraph 10) of the table. As regards paragraph 5, although the information was useful and the Commission took account of it to determine the reduction of the amount of the fine under the Leniency Notice, it adds that there were two reports to Mr [D] mentioned in paragraph 77 of the statement of objections. They contain detailed information on sales

of the other producers, which could have provided the basis for further inquiries on that question, even though it was not decisive in itself. Thus, much of the information provided by BPB was not decisive.

454 As regards the London meeting, the Commission does not deny that that meeting is an important element of the infringement, but states that, without the information provided on that subject, it would still have been able to establish the existence of a single, complex and continuous infringement on the basis of the anti-competitive conduct as a whole, including the information exchanges regarding which it had direct contemporary proof. Moreover, the information concerning the London meeting was provided in response to a specific question in the second request for information concerning the origins of the exchange of information, so that its disclosure was not absolutely spontaneous. Also, the Commission's second request for information was not based entirely on the information provided voluntarily by BPB. In fact, the second part of that request related to information provided orally by Mr [D] following the discovery of the two series of tables setting out details of sales by the four major European producers on BPB's premises on the first day of the Commission's investigation on 25 November 1998.

455 Consequently, the Commission contends that none of the information provided by BPB was decisive evidence of the cartel's existence.

456 The Commission emphasises that Gyproc's participation in the infringement was less serious than that of BPB. On the other hand, in relation to those elements of the cartel in which it participated actively, Gyproc provided important information. Thus, the findings concerning the German market are heavily based on Gyproc's contribution. The Commission maintains that the information given by that undertaking was as valid for the finding of the infringement as that provided by BPB.

Moreover, Gyproc's statement of 1 September 1999 was not a reply to a request for information. In addition, Gyproc has never contested that those activities constituted an infringement of Article 81(1) EC.

Findings of the Court

457 In the Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from a fine or be granted a reduction in the fine which would otherwise have been imposed on them (see Section A, paragraph 3 of the Leniency Notice).

458 As is stated in Section E, paragraph 3, of the Leniency Notice, the notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on an undertaking, it assesses the latter's cooperation (Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 147).

459 In accordance with Section B of the notice, an undertaking 'will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if [it] had not cooperated' if it:

'(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the [undertakings] involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another [undertaking] to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity'.

460 Furthermore, pursuant to Section C of the notice, '[undertakings] which both satisfy the conditions set out in Section B, paragraphs (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the [administrative] procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine'.

461 The applicant submits, principally, that the Commission was wrong to deny it the reduction of 50% to 75% referred to in Section C of the Leniency Notice. It is thus necessary to ascertain whether the Commission failed to have regard to the conditions for applying that provision.

462 In the present case, the relevant question for deciding whether Section C was applicable in the determination of the amount of the fine imposed on the applicant is whether the investigations carried out by the Commission provided it with sufficient grounds for initiating the administrative procedure leading to the contested decision.

463 The Commission states at recitals 593 and 594 of the contested decision that following its investigations, it had enough information to prove the existence of the cartel and that since BPB did not meet the conditions of Section B(b) of the Leniency Notice, it was therefore not eligible for a major reduction in the amount of its fine under Section C of the Notice.

464 In this respect, it is important to note that the applicant does not claim that it provided decisive evidence in relation to all the manifestations of the cartel or that the Commission would not have been able to demonstrate the existence of the cartel without the evidence that it provided the Commission. It asserts, in essence, that the Commission would not have been able to prove the existence of a single and complex cartel in the way that it did.

465 Consequently, it is necessary to ascertain whether, following its investigations, the Commission had enough information to prove the existence of the cartel which was ultimately penalised.

466 As regards the London meeting, BPB disclosed information about that meeting only in its reply to the second request for information (of 21 September 1999) in response to a specific question: 'Please state at whose suggestion or initiative the exercise of exchanging data amongst the CEO's was initiated.'

467 Thus, since it already knew about the exchanges of information on sales volumes on the four markets concerned, the Commission had, on the basis of the investigations carried out in November 1998, sufficient grounds for initiating the administrative procedure leading to a decision.

468 In this respect, it must be borne in mind that in Case C-301/04 P *Commission* v *SGL Carbon* [2006] ECR I-5915 the Court held that replies given pursuant to Article 11(1) of Regulation No 17 did not constitute voluntary cooperation but the performance of an obligation. It recalled that, in carrying out the duties assigned to it in the matter, the Commission could obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings. The Commission is therefore entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct (paragraphs 34, 39, 41 and 44).

469 As regards the exchanges of information on sales volumes on the four markets concerned, it is not contested by the applicant, as is indeed apparent from paragraph 334 of the application, that the Commission found direct evidence of those exchanges during the investigations which it carried out in November 1998.

470 As for the exchanges of information on sales volumes and market shares in the United Kingdom, the Commission states that two reports to Mr [D], mentioned in paragraph 77 of the statement of objections, contained detailed information on sales of the other producers, which could have provided the basis for further inquiries on that question, even though it was not sufficient in itself.

471 In that connection, it is noteworthy that the documents mentioned in paragraph 77 of the statement of objections are reports by Mr [M], managing director of BG before Mr [N], on developments in the United Kingdom market sent to Mr [D]. Thus, those internal documents do not show that the information in question was disclosed to persons outside BPB. However, in its note of 17 March 1996 and, in a more detailed manner, in its statement of 28 May 1999, BPB admitted that an exchange of information on sales volumes on the United Kingdom had taken place between the competitors during the period 1992 to the beginning of 1998.

472 So far as concerns the exchanges of data on price rises on the United Kingdom market, the Commission claims that it already had the information set out in recitals 201 and 205 of the contested decision. As is apparent from those recitals, not only do the two BPB internal memoranda found during the investigations prove only that the price rises were discussed, but the Commission relies on the parallelism of the price rises to demonstrate that aspect of the infringement. In those circumstances, the fact that BPB admitted in its note of 17 March 1996 and in a more detailed manner in its statement of 28 May 1999, as is clear from recital 207 of the contested decision, that there had been 'isolated instances' when Mr [N] had telephoned the representatives of Lafarge and Knauf in the United Kingdom to inform them of BG's pricing intentions and the planned range of increases, significantly strengthened the Commission's reasoning.

473 Concerning the Versailles and The Hague meetings, only in its reply to the statement of objections did the applicant admit that it took part in those meetings. With regard to the Brussels meeting, it admitted that it participated in it only in response to an explicit question by the Commission in the context of the first request for information.

474 Lastly, as regards the information exchange system, it is apparent from recital 271 of the contested decision that the Commission knew of its existence on the basis of the information found during the inspections.

475 Consequently, the Court finds that, to the extent that the information provided by BPB can be regarded as voluntary in the light of the case-law of the Court of Justice referred to in paragraph 468 above, it does not constitute decisive evidence of the cartel's existence and that, in fact, the Commission had sufficient information to establish its existence following those inspections.

476 In the light of the cumulative nature of the conditions set out in Section B(b) to (e) of the Leniency Notice, as referred to in Section C thereof, and since at least one of those conditions, namely that laid down in Section B(b), in conjunction with Section C of that notice, is not satisfied, it is not necessary to consider whether BPB satisfied the other conditions laid down in those provisions.

477 It follows that the Commission did not err in denying the applicant a reduction in the amount of its fine under Section C of the Leniency Notice.

478 None the less, it is still necessary to ascertain, in the exercise of the Court's unlimited jurisdiction, whether the reduction granted by the Commission in respect of BPB's cooperation under Section D of the Leniency Notice was sufficient.

479 In this connection, it must be pointed out, as recitals 592 and 596 of the contested decision make clear, that BPB was the first cartel participant to send, after the Commission's request for information but in a way that went beyond what was requested, evidence in addition to that discovered during the inspections, confirming the existence of the cartel. The Commission admits that this information includes details regarding the meetings in question, especially that in London, and the sharing of information on the major European markets, and the United Kingdom market in particular.

480 Further, as is apparent from the examination of the second plea, although the Commission could, without knowledge of the London meeting, have proved the existence of the cartel, its perception of it would have been different. The Court has found that the information provided by BPB, in particular regarding the London meeting, substantially strengthened the Commission's arguments concerning the existence of an overall plan and, consequently, made it possible to substantially increase the amount of the fines in respect of the gravity of the infringement. The same reasoning applies to the detailed information that BPB provided on the exchanges of information on sales volumes and price rises on the United Kingdom market. That conclusion is supported by the numerous references in the contested decision to evidence provided by BPB.

481 Lastly, as is apparent from point 2.2.2 of its reply to the statement of objections and from the examination of the second plea, BPB also admitted most of the facts set out in the statement of objections. Similarly, as is apparent from points 1.1.4, 2.2.2 and 6.2.27 of its reply to the statement of objections, from the examination of the second plea and from the reply to the written question of the Court, BPB does not

dispute the classification of some of the evidence as infringements of Community law. Thus, BPB acknowledged that the London meeting, the exchange of data on the four markets concerned and in particular on the United Kingdom market together with an exchange, on one or two occasions, on price rises on the United Kingdom market constituted infringements of Article 81 EC.

482 In the exercise of its unlimited jurisdiction, the Court holds that is appropriate to grant the applicant an additional reduction of 10% of the amount of its fine, as calculated before the application of the Leniency Notice, in addition to the 30% already granted by the Commission.

483 In those circumstances, it is no longer necessary to examine the applicant's arguments that the Commission infringed the principle of equal treatment in granting a 40% reduction in respect of Gyproc's cooperation.

5. *The claim that the Commission should be ordered to repay the amount of the fine or, in the alternative, the amount by which the fine is reduced, plus interest*

Arguments of the parties

484 The applicant claims that it has already paid the fine. However, it deplores the fact that the rate of interest applicable in the event that the Commission is required to

repay it wholly or in part is not mentioned in the contested decision. It considers that that interest rate should, at the minimum, be the same as that which would have been applied if BPB had provided a bank guarantee, namely 4.79%. However, it relies on the wisdom of the Court with regard to the applicable interest rate and asks the Court to give a decision on that point if its fine is annulled or the amount thereof is reduced. It also requests that default interest be paid from the date of the present judgment until full reimbursement of the sums due by the Commission.

485 The Commission considers that those arguments are premature. Moreover, the third head of claim is inadmissible in so far as the Court of First Instance cannot order that type of measure.

Findings of the Court

486 It has been held on numerous occasions that as a consequence of a judgment of annulment, which takes effect *ex tunc* and thus has the effect of retroactively eliminating the annulled measure from the legal system, the defendant institution is required, by virtue of Article 233 EC, to take the necessary measures to reverse the effects of the illegalities as found in the judgment of annulment, and, in the case of a measure that has already been executed, this may take the form of restoring the applicant to the position he was in prior to that measure (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 222).

487 Foremost amongst the measures referred to in Article 233 EC, in the case of a judgment annulling or reducing the fine imposed on an undertaking for infringement of the Treaty competition rules, is the Commission's obligation to repay all or part of the fine paid by the undertaking in question in so far as that payment must be characterised as a sum unduly paid following the annulment decision. That obligation applies

not only to the principal amount of the fine overpaid but also to default interest on that amount (*Corus UK* v *Commission*, paragraph 486 above, paragraph 223).

488 It follows that, if the Commission did not consent to any default interest on the principal amount of the fine reimbursed following such a judgment, it would be failing to take a measure necessary to comply with that judgment and would thereby be in breach of its obligations under Article 233 EC.

489 Thus, the claim that the Commission should be ordered to repay the amount by which the fine is reduced, plus interest, is inadmissible.

6. *The application for measures of organisation of procedure*

490 The applicant stated in its application that '[t]he Court may wish to consider a measure of inquiry, in the form of an independent expert's report, to determine which of the parties is correct regarding the economic context'.

491 In so far as that application must be interpreted as an application for measures of organisation of procedure, the Court considers that it is not necessary to act on it, given that the examination of the case has demonstrated the clearly anti-competitive nature of the cartel in question.

Costs

492 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

493 In the present case, the Commission has been unsuccessful only in so far as the reduction that it granted in respect of BPB's cooperation was not sufficient.

494 In such a situation, the Court will make an equitable assessment of the case in holding that the Commission is to pay one tenth of its own costs and one tenth of the costs incurred by BPB and that BPB will pay nine tenths of its own costs and nine tenths of the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Sets the amount of the fine imposed on BPB plc by Article 3 of Commission Decision 2005/471/EC of 27 November 2002 relating to a proceeding under Article 81 [EC] against BPB plc, Gebrüder Knauf Westdeutsche Gipswerke

KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard) at EUR 118.8 million;

2. Dismisses the action as to the remainder;

3. Orders the Commission to pay one tenth of its own costs and one tenth of the costs incurred by BPB;

4. Orders BPB to pay nine tenths of its own costs and nine tenths of the costs incurred by the Commission.

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 8 July 2008.

E. Coulon M. Jaeger

Registrar President

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