Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

5 June 2012*

(Competition — Agreements, decisions and concerted practices — Methacrylates market — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Participation in a part of the cartel — Rights of the defence — Fines — Obligation to state the reasons on which the decision is based — Gravity of the infringement — Deterrent effect — Equal treatment — Proportionality — Principle of sound administration — Cooperation during the administrative procedure — Duration of procedure — Reasonable time)

In Case T-214/06,

Imperial Chemical Industries Ltd, formerly Imperial Chemical Industries plc, established in London (United Kingdom), represented initially by D. Anderson QC, H. Rosenblatt, B. Lebrun, lawyers, W. Turner, S. Berwick and T. Soames, Solicitors, subsequently by R. Wesseling and C Swaak, and lastly by R. Wesseling, C. Swaak and F. ten Have, lawyers,

applicant,

v

European Commission, represented initially by V. Bottka, I. Chatzigiannis and F. Amato, and subsequently by V. Bottka, I. Chatzigiannis and F. Arbault, and lastly by V. Bottka and J. Bourke, acting as Agents,

defendant,

APPLICATION for annulment of Article 2(c) of Commission Decision C(2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates), or, in the alternative, a reduction of the fine imposed under that provision,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz, President, I. Labucka (Rapporteur) and D. Gratsias, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2011.

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 By Commission Decision C(2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates) ('the contested decision'), the Commission of the European Communities found inter alia that a number of undertakings had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating, during various periods between 23 January 1997 and 12 September 2002, in a complex of anti-competitive agreements and concerted practices in the methacrylates industry, covering the whole EEA territory (Article 1 of the contested decision).

2 According to the contested decision, there was a single and continuous infringement involving three polymethyl-methacrylate ('PMMA') products as follows: PMMA moulding compounds, PMMA solid sheet and PMMA sanitary ware. The contested decision indicates that although those three PMMA products are physically and chemically distinct and have different uses, they may be considered as one homogenous product group due to their common raw-material input, methacrylate-monomers ('MMA') (recitals 4 to 8 of the contested decision).

3 According to the contested decision, the infringement in question consisted in discussing prices, agreeing, implementing and monitoring price agreements either in the form of price increases, or at least stabilisation of the existing price level; discussing the passing-on of additional service costs to customers; exchanging commercially important and confidential market and/or company-relevant information and participating in regular meetings and having other contacts which facilitated the infringement (Article 1 and recitals 1 to 3 of the contested decision).

4 The contested decision was addressed to Degussa AG, Röhm GmbH & Co. KG, Para-Chemie GmbH (together 'Degussa'), Total SA, Elf Aquitaine SA, Arkema SA (formerly Atofina SA), Altuglas International SA, Altumax Europe SAS (together 'Atofina'), Lucite International Ltd, Lucite International UK Ltd (together 'Lucite'), Quinn Barlo Ltd, Quinn Plastics NV, Quinn Plastics GmbH (together 'Barlo') and to the applicant, Imperial Chemical Industries Ltd (formerly Imperial Chemical Industries plc).

5 The applicant is the parent company of the Imperial Chemicals Industries group and is a manufacturer of speciality chemicals. From 1990 responsibility for the production or sale of the products covered by the contested decision had lain with ICI Acrylics, a separate business unit not incorporated as a company. By an agreement dated 3 October 1999 the business and assets of ICI Acrylics were sold to Ineos Acrylics UK Parent Co 2 Ltd and Ineos Acrylics UK Trader Ltd, which subsequently became, respectively, Lucite International Holdings Ltd and Lucite International UK Ltd.

6 The investigation which led to the adoption of the contested decision was initiated after Degussa submitted an application for immunity on 20 December 2002 under the Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice').

7 On 25 and 26 March 2003, the Commission conducted inspections at the premises of Atofina, Barlo, Degussa and Lucite.

8 On 3 April and 11 July 2003 respectively Atofina and Lucite submitted applications for immunity or reduction in the amount of the fine under the Leniency Notice (recital 66 of the contested decision).

9 By letter of 8 May 2003, the Commission answered a question from Lucite as to whether Lucite should contact the applicant and provide it with access to its staff and its documents in order to enable the applicant to prepare its defence.

10 On 29 July 2004, the Commission sent a request for information to a number of undertakings, including the applicant, pursuant to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1). That was the first measure of inquiry addressed to the applicant in the context of the investigation.

11 On 18 October 2004, the applicant submitted an application for a reduction in the amount of its fine, pursuant to the Leniency Notice. On 11 August 2005 the Commission informed it that its application was rejected.

12 On 17 August 2005, the Commission adopted a statement of objections concerning a single and continuous infringement relating to MMA, PMMA moulding compounds, PMMA solid sheet and PMMA sanitary ware; that statement of objections was addressed to, inter alia, the applicant and Lucite. Taking the view that the sale of ICI Acrylics to Ineos (now Lucite) had taken place on 1 October 1999, the Commission took 30 September 1999 as the end date of the infringement imputed to the applicant.

13 The applicant's reply to the statement of objections is dated 4 November 2005.

14 An administrative hearing was held on 15 and 16 December 2005.

15 By letter of 10 February 2006, in reply to a request from the Commission, Lucite provided further information about the date of purchase of ICI Acrylics.

16 By letter of 13 February 2006, the Commission forwarded the letter referred to in paragraph 15 above to the applicant, which was invited to submit its observations.

17 The applicant submitted its observations by letter of 17 February 2006.

18 On 31 May 2006, the Commission adopted the contested decision. In that decision the Commission dropped certain objections set out in the statement of objections and, in particular, the objections raised against all the companies concerned in respect of the part of the infringement relating to MMA (recital 93 of the contested decision).

19 Article 1(i) of the contested decision provides that the applicant participated in the infringement referred to in paragraphs 2 and 3 above from 23 January 1997 until 1 November 1999.

20 The Commission considered, in particular, that the applicant was the legal person of which the business unit that had committed the infringement in question, namely ICI Acrylics, formed part at the material time. Consequently, the Commission found that the applicant should be considered to be an undertaking, for the purposes of the application of Article 81 EC, participating in the collusive behaviour in question and that the contested decision should therefore be addressed to it (recitals 288 to 290 of the contested decision).

21 As regards the date on which the infringement period imputed to the applicant ended, the Commission stated that, in the light of Lucite's reply to the statement of objections, it would take 2 November 1999, the date on which ownership of ICI Acrylics was transferred, for the purpose of apportioning liability between the applicant and Lucite (recital 291 of the contested decision). Consequently, the Commission took 1 November 1999 as the end date of the infringement imputed to the applicant, although it stated that that change by reference to the statement of objections had no impact on the amount of the fine (recital 292 of the contested decision).

22 Article 2(c) of the contested decision imposes a fine of EUR 91 406 250 on the applicant.

23 In the first place, with regard to the calculation of the fine, the Commission examined the gravity of the infringement and found, first of all, that, in view of the nature of the infringement and the fact that it covered the entire territory of the EEA, it was a very serious infringement within the meaning of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3) ('the Guidelines') (recitals 319 to 331 of the contested decision).

24 The Commission then considered that, within the category of very serious infringements, it was possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant economic damage to competition. To that end, the Commission found in the present case that the undertakings concerned '[could] be subdivided into [three] categories according to their relative weight in turnover achieved with the PMMA products for which they [had] participated in the cartel', taking as a reference the turnover generated by those products in the EEA in 2000. The Commission placed the applicant and Lucite in the second category, on the basis of Lucite's turnover for the three PMMA products concerned in 2000 (EUR 105.98 million) and fixed the starting amount of their fines at EUR 32.5 million (recitals 332 to 336 of the contested decision).

25 Furthermore, the Commission stated that, within the category of very serious infringements, the scale of likely fines also made it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size and economic power of each undertaking. In the light of the applicant's total turnover in 2005 (EUR 8.49 billion), the Commission applied a multiplier of 1.5 to the starting amount of its fine, which increased that amount to EUR 48.75 million.

26 In the second place, the Commission examined the duration of the infringement and found that, since the applicant had participated in the infringement for 2 years and 9 months, the starting amount of its fine should be increased by 25%. Thus, the basic amount of the applicant's fine came to EUR 60 937 500 (recitals 351 to 354 of the contested decision).

27 In the third place, the Commission considered whether there were any aggravating or mitigating circumstances. So far as the applicant was concerned, the Commission found that, taking into account the existence of two previous decisions addressed to the applicant, it had committed a repeated infringement by committing an infringement of the same type; the Commission therefore decided to increase the basic amount of its fine by 50% (recitals 355 to 369 to the contested decision). In addition, the Commission rejected the mitigating circumstances put forward by the applicant. The amount of its fine was therefore set at EUR 91 406 250, which did not exceed the maximum amount of 10% of its turnover laid down in Article 23(2) of Regulation No 1/2003 (recitals 372 to 398 of the contested decision).

28 In the last place, the Commission applied the Leniency Notice, observing that the applicant's application pursuant to that notice had been rejected. As regards the other undertakings which had applied for leniency, the Commission granted total immunity from fines to Degussa and reduced the fines imposed on Atofina and Lucite.

29 In view of the rejection of the applicant's application for leniency, the final amount of its fine was therefore set at EUR 91 406 250.

Procedure and forms of order sought

30 By application lodged at the Court Registry on 17 August 2006, the applicant brought the present action.

31 The written procedure was closed on 11 April 2007.

32 Upon hearing the report of the Judge-Rapporteur, the General Court (Third Chamber) decided, on 15 September 2011, to open the oral procedure and, by way of measures of organisation of procedure, to request the parties to reply to questions. The parties complied with that request within the period prescribed.

33 The parties presented oral argument and replied to the Court's questions at the hearing on 8 November 2011. At the hearing, the applicant provided the Commission and the Court with certain documents aimed at substantiating the oral submissions. The Commission raised an objection against one of those documents and the Court decided not to place that document in the file. The other documents were placed in the file, the Commission having raised no objection against them.

34 In addition, at the hearing, the Court requested the Commission to produce two documents on which it had relied during its oral submissions. The Commission having complied with that request within the period prescribed, the Court requested the applicant to submit any observations it might wish to make on those documents. Those observations were lodged within the period prescribed.

35 The oral procedure was closed on 15 December 2011.

36 The applicant claims that the Court should:

— annul Article 2(c) of the contested decision;

— in the alternative, vary Article 2(c) of the contested decision in order to reduce the fine imposed on the applicant;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

38 In the application, the applicant put forward five pleas in law in support of the action. The first plea alleges that the evidence of the infringement relating to PMMA moulding compounds is insufficient. The second plea alleges failure to state the reasons for the 'basic amount' of the fine. The third plea alleges that the Commission failed to fulfil its obligation to apportion the 'basic amount' between the applicant and Lucite. The fourth plea alleges that the increase of the starting amount for deterrence is inappropriate. The fifth plea alleges that the refusal to grant a reduction of the fine for cooperation with the Commission is unjustified. In addition, at the hearing, the applicant put forward a sixth plea, alleging that the duration of the procedure was excessive.

First plea: the evidence of the applicant's participation in the infringement relating to PMMA moulding compounds is insufficient

39 In this plea, the applicant claims that its involvement in the infringement relating to one of the products referred to in the contested decision, namely PMMA moulding compounds, was not proved.

40 As is clear from the form of order sought in the application (see paragraph 36 above), and as the applicant also confirmed in its reply to a written question put by the Court, notwithstanding the arguments put forward in this plea, the applicant does not seek annulment of Article 1 of the contested decision in so far as it holds the applicant liable for the infringement in question. This plea is, by contrast, put forward in support of its application for a reduction of the amount of the fine imposed in Article 2 of the contested decision. The applicant submits that the fact that an undertaking has not taken part in all aspects of a cartel must be taken into consideration when the gravity of the infringement is assessed and when it comes to determining the amount of the fine. In its opinion, the amount of the fine should therefore be reduced in such a way as to reflect the proportion represented by PMMA moulding compounds in the value or the overall volume of the three products concerned (according to the applicant, 44% or 36% respectively).

41 In that regard it should be borne in mind that Article 1 of the contested decision holds the applicant liable for 'a complex of agreements and concerted practices in the Methacrylates industry'. Read in the light of the grounds of that decision, and in particular of recitals 2 and 222 to 225 thereof (see, to

that effect, Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 1258 and the case-law cited), Article 1 holds the applicant liable for participation, during the period concerned, in a single and continuous infringement in relation to PMMA moulding compounds, PMMA solid sheet and PMMA sanitary ware.

42 It was by reference to the gravity of that infringement that the amount of the fine imposed on the applicant was determined. In particular, it is apparent from recital 333 of the contested decision that, when determining the starting amount of the applicant's fine, the Commission took account of the turnover achieved by the applicant with the PMMA products in respect of which it had participated in the cartel, and therefore, according to the Commission, all three products concerned.

43 It must therefore be stated that, even though the applicant does not claim that Article 1 of the contested decision should be annulled (see paragraph 40 above), this plea, on the assumption that it is well founded, would be likely to result in the reduction of the amount of its fine and, in particular, the starting amount thereof. As the applicant observes, the fact that an undertaking has not taken part in all aspects of a cartel must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 90, and 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 86). According to the case-law, that assessment has to be made at the stage when the specific starting amount of the fine is set (Case T-18/05 *IMI and Others* v *Commission* [2010] ECR II-1769, paragraph 164).

44 In support of its application, the applicant claims, in essence, that, as regards PMMA moulding compounds during the period when it was the owner of ICI Acrylics, the Commission relied exclusively on the unsupported statements of an undertaking which had made an application for leniency or a reduction of its fine and on the fact that meetings had taken place. In the applicant's submission, those elements do not satisfy the standard of proof required by the case-law.

45 In the applicant's opinion, only the evidence relating to a meeting held on 26 October 1999, referred to in recital 124 of the contested decision, might theoretically satisfy that standard, since the Commission relied on the testimony of two undertakings which had brought applications under the Leniency Notice and on a document contemporaneous with that meeting. The applicant submits, however, that that meeting cannot be relied upon as against it, on pain of breaching its rights of defence. In the statement of objections, which took 30 September 1999 as the date of the end of the infringement imputed to the applicant (see recital 291 of the contested decision), that meeting was relied upon by the Commission as against another participant in the infringement, namely Lucite. Consequently, the applicant was not able to defend itself properly with respect to the claims and evidence relating to that meeting.

46 The Court notes that the argument referred to above alleging breach of the applicant's rights of defence is put forward exclusively in order to contest that the meeting of 26 October 1999 and the evidence relating thereto can be used against it, in the context of the assessment of the gravity of the infringement that it committed. In particular, the applicant does not seek annulment of the contested decision, on account of an alleged breach of its rights of defence, in so as far as that decision finds, as regards the applicant, that the infringement lasted longer than that established in the statement of objections.

47 Accordingly, any finding of a breach of the applicant's rights of defence could have no effect on the result of this case if it were to transpire that, even if the meeting of 26 October 1999 were to be disregarded, the evidence gathered by the Commission was sufficient to establish the applicant's involvement in the part of the infringement relating to PMMA moulding compounds.

48 In those circumstances, for reasons of procedural economy, it is appropriate to examine this plea without taking account of the abovementioned meeting.

49 In that regard, the Court observes that, according to the contested decision, the single and continuous infringement in question consisted 'of a series of actions that can be qualified as agreements or concerted practices covering the three products concerned, which demonstrated a continuous course of action with a common object of restricting competition' (recital 222 of the contested decision). In view of the common features of the anti-competitive arrangements regarding the three products concerned, set out in recital 223 of the contested decision, the Commission took the view that, 'although [those three products] represent different characteristics and may be considered to belong to different product markets, there are sufficient links to conclude that the producers of [those products] adhered to a common scheme which laid down the lines of their action in the market and restricted their individual commercial conduct'. According to the Commission, '[t]he infringement consisted of a complex of behaviour having a common plan and single economic aim, namely to avoid the normal movement of prices in the EEA for all three PMMA-products' (recital 224 of the contested decision).

50 Amongst the 'common features' set out in recital 223 of the contested decision, the Commission referred inter alia to:

— 'a core group of the same undertakings [namely] Atofina, ICI (later Lucite) and Degussa';

— the fact that those three major European producers were 'fully integrated producers' and 'paid great attention to the spill-over effects of the anti-competitive arrangements concluded for each of the products [so that] the cartelisation on one product automatically influenced the cost structure and/or prices of the other products';

— the fact that 'meetings and contacts were occasionally dedicated to more than one of the three PMMA-products', that link being shown in 'numerous meetings which were dedicated both to PMMA-moulding compounds and PMMA-solid sheet';

— the fact that 'a number of representatives of the undertakings involved in the anticompetitive arrangements had responsibility for more than one product under investigation and were therefore aware or should have been aware of the existence of [such arrangements] covering several products'. In that context, the Commission mentioned inter alia 'Mr [D.], Vice President Global Monomers and EAME at ICI Acrylics, who also attended meetings relating to PMMA-moulding compounds and PMMA-solid sheet', including several meetings which took place in the infringement period imputable to the applicant;

— the fact that the same cartel operating mechanisms applied to all three products concerned.

51 As regards specifically the collusion relating to PMMA moulding compounds during the period under consideration, it is common ground between the parties that, apart from the meeting of 26 October 1999 (see paragraph 48 above), the Commission's findings are based on 14 meetings, which were allegedly held between 23 January 1997 and the summer of 1999 (see recitals 110 to 123 of the contested decision). Moreover, it is common ground that the applicant's presence is alleged only with respect to 10 of those meetings and is therefore not alleged with respect to the 4 meetings referred to in recitals 112, 114, 117 and 121 of the contested decision.

52 It is therefore necessary to examine whether the evidence gathered by the Commission was sufficient to establish the applicant's participation in that part of the infringement.

53 In this respect, it should be pointed out that it is incumbent on the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58). It must produce sufficiently precise and consistent evidence to establish the existence of the infringement (see Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 55).

54 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 180 and the case-law cited).

55 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 Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 185 and the case-law cited).

56 It is also necessary to take account of the fact that anti-competitive activities take place clandestinely, and 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 43 above, paragraphs 55 to 57).

57 Moreover, it is settled case-law that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155; *Commission* v *Anic Partecipazioni*, paragraph 43 above, paragraph 96; and *Aalborg Portland and Others* v *Commission*, paragraph 43 above, paragraph 81).

58 As regards the applicant's arguments concerning the value of statements made in the context of applications under the Leniency Notice, it should be borne in mind that, according to settled case-law, there is no general provision or principle of European Union law which prohibits the Commission from using statements against an undertaking which have been provided by other undertakings involved in the infringement (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 512). Statements made pursuant to the Leniency Notice cannot therefore be regarded as devoid of probative value on that ground alone (*Lafarge* v *Commission*, paragraph 53 above, paragraphs 57 and 58).

59 Some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is understandable, since they might tend to play down the importance of their contribution to the infringement and maximise that of others. However, given the inherent logic of the procedure provided for in the Leniency Notice, the fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the cartel in question to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the undertaking seeking to benefit, and thereby jeopardise its chances of benefiting fully under the Leniency Notice (Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 70, and *Lafarge* v *Commission*, paragraph 53 above, paragraph 58).

60 In particular, when a person admits that he committed an infringement and thus admitted the existence of facts going beyond those whose existence could be directly inferred from the documents in question, that implies, a priori, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth. Thus, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (*JFE Engineering and Others* v

Commission, paragraph 54 above, paragraphs 211 and 212; Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 166; and *Lafarge* v *Commission*, paragraph 53 above, paragraph 59).

61 However, according to settled case-law, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (*JFE Engineering and Others* v *Commission*, paragraph 54 above, paragraph 219; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 285; and *Lafarge* v *Commission*, paragraph 53 above, paragraph 293).

62 For the purpose of examining the probative value of statements by undertakings which have submitted an application under the Leniency Notice, the Court takes into account inter alia the strength of consistent evidence supporting the relevance of those statements (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 54 above, paragraph 220, and *Peróxidos Orgánicos* v *Commission*, paragraph 59 above, paragraph 70) and the absence of evidence indicating that they have tended to play down the importance of their contribution to the infringement and maximise that of other undertakings (see, to that effect, *Lafarge* v *Commission*, paragraph 53 above, paragraphs 62 and 295).

63 Regarding the scope of the judicial review in the present case, it should be borne in mind that, according to settled case-law, where it hears an action for the annulment of a decision applying Article 81(1) EC, the General Court must undertake in general a comprehensive review of the question whether or not the conditions for applying Article 81(1) EC are met (see Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 62 and the case-law cited).

64 Moreover, where the Court is in doubt the undertaking which is the addressee of the decision finding an infringement must have the benefit of that doubt, in keeping with the principle of the presumption of innocence which, as a general principle of European Union law, applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hüls* v *Commission*, paragraph 57 above, paragraphs 149 and 150).

65 It is in the context of those general observations that it is appropriate to examine the evidence gathered by the Commission in the present case.

66 In that regard, the Court observes that, with respect to the 10 meetings referred to in paragraph 51 above, the applicant does not dispute either that they were held between the competitors or its presence at those meetings and that it does not claim that it publicly distanced itself from what was discussed. Consequently, in order to establish the applicant's liability, it is sufficient to verify whether the Commission has established to the requisite legal standard that those meetings had a manifestly anti-competitive object so far as concerns PMMA moulding compounds (see the case-law referred to in paragraph 57 above).

67 It must be stated that the description of those meetings is based principally on the statements of Degussa, the beneficiary of immunity from the fine. Degussa clearly ascribes to those meetings a manifestly anti-competitive content so far as concerns PMMA moulding compounds (see recitals 110, 111, 113, 115, 116, 118, 119, 120, and 123), and the applicant does not contest this.

68 The applicant submits, however, first, that those statements do not constitute, in themselves, adequate proof of the infringement and, second, that they are not supported by other evidence.

69 In that regard, it must be noted that, as shown by the case-law referred to in paragraphs 58 to 60 above, statements made in the context of the leniency policy play an important role. Those statements made on behalf of undertakings have a probative value that is not insignificant, since they entail considerable legal and economic risks (see, also, Case T-385/06 *Aalberts Industries and Others* v

Commission [2011] ECR II-1223, paragraph 47). None the less, it is also apparent from the case-law referred to in paragraphs 59 and 61 above that statements made by undertakings in the context of their applications under the Leniency Notice must be assessed with caution and, when they are contested, cannot in general be regarded as sufficiently probative without corroboration.

70 However, contrary to the applicant's contention, Degussa's statements with respect to the existence of the anti-competitive discussions relating to PMMA moulding compounds during the period under consideration are sufficiently supported by other evidence.

71 In the first place, it should be stressed that Degussa was not the Commission's only source of information. The description of the meeting of 11 May 1999 (recital 122 of the contested decision) is based on a statement by Lucite. Even though Degussa, which was not present at that meeting, did not mention it in its own statement, Lucite's statement none the less corroborates Degussa's claim regarding the existence of a cartel concerning PMMA moulding compounds during the period under consideration and the applicant's involvement therein.

72 In the second place, the Court observes that, in respect of the majority of those meetings, the Commission gathered evidence (such as diary entries, notes of expenses), attesting to the holding of the meeting or the presence at the meeting of the persons concerned. Even if, as the applicant rightly submits, the mere fact that a meeting was held between the competitors is not sufficient to establish its anti-competitive nature, the Court none the less considers that it is evidence which substantiates to a certain extent Degussa's statements.

73 In the third place, in its application of 11 July 2003, submitted under the Leniency Notice, Lucite made statements which confirm, in a general manner, the existence of a cartel alleged in the inspection decision, including as regards PMMA moulding compounds, and the applicant's participation therein.

74 Although they are, admittedly, general statements, they are none the less consistent with Degussa's claims. Moreover, the Court would point out that the assets employed in the infringement, including documents and staff, were transferred by the applicant to Lucite, so that Lucite's statements regarding the applicant's involvement in the infringement are particularly relevant.

75 In the fourth place, in its application under the Leniency Notice, Atofina admitted having taken part in a cartel at least from 23 January 1997, including as regards PMMA moulding compounds. Moreover, the companies comprising the Atofina undertaking (Arkema, Altuglas and Altumax, on the one hand, and Total and Elf Aquitaine, on the other) did not contest the existence of such a cartel in their respective actions against the contested decision (Cases T-206/06 and T-217/06).

76 It is true that, in a statement by Atofina of 10 June 2003, the first anti-competitive meeting regarding PMMA moulding compounds in respect of which that statement mentions the presence of ICI Acrylics is the meeting of 26 October 1999. However, in that statement, Atofina clearly asserts that there were anti-competitive contacts regarding PMMA moulding compounds in the period 1998 to 2001. Consequently, Atofina's statement also corroborates Degussa's statements to that effect.

77 In the fifth place, the Court would point out that, according to the contested decision, at least 7 of the 10 meetings analysed concerned both PMMA moulding compounds and PMMA solid sheet (see recitals 110, 111, 115, 116, 118, 119, 120 of the contested decision) and that the applicant does not contest the anti-competitive nature of those meetings as regards PMMA solid sheet. That is a factor which also reinforces the credibility of Degussa's statements so far as concerns the description of those anti-competitive meetings.

78 In the sixth place, Mr D. participated in some of the meetings referred to in paragraph 77 above, including the meeting of 23 January 1997, which is taken as the starting date of the infringement. He had a senior position at ICI Acrylics and was responsible for both PMMA moulding compounds and

PMMA solid sheet. Given that the applicant does not contest the anti-competitive nature of those meetings as regards PMMA solid sheet, or the Commission's finding that the companies concerned paid 'great attention to the spill-over effects of the anti-competitive arrangements concluded for each of the products' (see recital 223 of the contested decision and paragraph 50, second indent, above), it is an indication that PMMA moulding compounds were also covered during those meetings.

79 In the light of those elements, it must be stated that, taken together, they constitute a body of evidence which is sufficiently consistent to corroborate Degussa's statements regarding the existence of a cartel relating to PMMA moulding compounds during the period under consideration and the applicant's participation therein.

80 The applicant's arguments regarding the relevance of Degussa's statements do not affect that conclusion.

81 Contrary to the applicant's contention, Degussa's statements cannot be disregarded on the sole basis that they are statements submitted in an immunity application which are made by lawyers representing the undertaking (see in particular paragraphs 59 and 60 above). Moreover, even though, in the contested decision, the Commission did in fact have to abandon certain allegations based on Degussa's statements (such as in particular all the allegations relating to MMA, the raw material used to produce PMMA), the fact remains that Degussa's allegations proved to be well founded overall, as is apparent from the foregoing. Proof of this, inter alia, is that three other undertakings, namely the applicant, Atofina and Lucite, submitted their applications under the Leniency Notice in relation to the cartel alleged by Degussa. Moreover, with the exception of the applicant in this plea, none of those undertakings contested the existence of the infringement in its respective action against the contested decision (Cases T-206/06, T-217/06 and T-216/06). In particular, the applicant itself implicitly confirmed the relevance of Degussa's immunity application, since it admitted having participated in the cartel as regards PMMA solid sheet and PMMA sanitary ware.

82 Since Degussa's statements are sufficiently corroborated, contrary to the applicant's submissions, its argument that the part of the infringement relating to PMMA moulding compounds could not be taken into account in the assessment of the gravity of its infringement for the purposes of determining the amount of the fine cannot be accepted.

83 Moreover, the Court would also point out that the applicant is wrong to submit, in essence, that the classification of the infringement in question as a single and continuous infringement relating to the three PMMA products, including moulding compounds (see paragraph 49 above), cannot have any consequences for the analysis of this plea.

84 It should be borne in mind, in this respect, that, according to the case-law, 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 individually an infringement of that provision (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 43 above, paragraph 81). When the various acts form part of an 'overall plan' because they have the same object of distorting competition within the common market, the Commission is entitled to attribute liability for those actions on the basis of participation in the infringement considered as a whole (see *Aalborg Portland and Others* v *Commission*, paragraph 43 above, paragraph 258 and the case-law cited), even if it is established that the undertaking concerned directly participated in only one or some of the constituent elements of the infringement (see Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 161 and the case-law cited).

85 According to the case-law of the Court of Justice, in order to establish that an undertaking participated in such a single agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the

actual conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraph 43 above, paragraph 87, and *Aalborg Portland and Others* v *Commission*, paragraph 43 above, paragraph 83).

86 In those circumstances, in order to hold the applicant liable for the whole of the single infringement and to set the amount of the fine accordingly, it was sufficient for the Commission to establish that the applicant knew or ought to have known that, by participating in a cartel relating to PMMA solid sheet and PMMA sanitary ware, it was joining in a global cartel relating to three PMMA products (see, to that effect, Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 45, and *Bolloré and Others* v *Commission*, paragraph 60 above, paragraph 209).

87 The matters analysed above are amply sufficient for this purpose.

88 In particular, the Court would point out that the existence of anti-competitive contacts regarding PMMA moulding compounds during the period under consideration is shown by the statements of three undertakings, namely Degussa, Lucite and Atofina.

89 Moreover, the applicant does not contest its liability for the infringement committed, during the same period, in relation to PMMA solid sheet and PMMA sanitary ware. Similarly, it does not contest the existence as such of a single infringement. In particular, notwithstanding a few fragmentary arguments in the reply, the applicant does not even attempt to challenge the reasons, set out in paragraphs 49 and 50 above, which led the Commission to find that there had been a single infringement.

90 Thus, the applicant does not challenge, inter alia, the Commission's findings that its representative present at anti-competitive meetings (which were limited, according to the applicant, to other products) had responsibility for more than one product under investigation and was 'therefore aware or should have been aware' of the existence of such arrangements covering several products. Similarly, the applicant does not contest the Commission's assertion that it was a 'fully integrated' producer and 'paid great attention to the spill-over effects of the anti-competitive arrangements concluded for each of the products' (see paragraph 50 above, second and fourth indents).

91 Even if the evidence gathered by the Commission was not sufficient to establish the applicant's direct involvement in the part of the cartel relating to PMMA moulding compounds, it is amply sufficient, at the very least, to demonstrate the existence of anti-competitive contacts regarding that product during the period under consideration and that the single infringement related also to that product. That is apparent inter alia from the consistent statements of three undertakings, namely Degussa, Lucite and Atofina.

92 Those considerations suffice to show, at the very least, that the applicant knew or ought to have known that, by participating in an agreement relating to PMMA solid sheet and PMMA sanitary ware, it was joining in a global cartel relating to three PMMA products.

93 In such a case, its liability for the whole of the single infringement could be taken into account in the assessment of the gravity of the infringement for the purposes of determining the amount of the fine, so that the application for a reduction thereof on that basis must be rejected.

94 Lastly, it is apparent from all the foregoing that the alleged infringement of the applicant's rights of defence as regards the meeting of 26 October 1999 would have no practical consequences for the assessment of this plea and the applicant's complaint in that regard must therefore be rejected as ineffective.

95 Accordingly, the Court must reject the first plea, in so far as it seeks to support, first, the application for annulment of Article 2 of the contested decision and, second, the application for a reduction in the fine on the basis of the exercise of the Court's unlimited jurisdiction.

Second plea: failure of the contested decision to state reasons as regards the 'basic amount' of the fine

96 The applicant takes issue with the Commission for not having explained how it arrived at the starting amount of the fine (EUR 32 500 000) fixed in recital 336 of the contested decision and for having thus prevented the applicant and the Court from examining the contested decision with respect to the 'largest component' of the determination of the amount of the fine. The Commission merely provided its reasons for characterising the infringement as very serious and for dividing the undertakings into three categories according to their relative size. However, the Commission failed to explain how it arrived at the amounts assigned to each of those categories, or why the amount set for the applicant was significantly higher than the threshold of EUR 20 million fixed in the Guidelines for very serious infringements. The Commission thus failed to fulfil its obligation to state reasons under Article 253 EC.

97 In that regard, it should be borne in mind that, according to settled case-law, the essential procedural requirement to state reasons is satisfied, as regards the calculation of the amount of the fine imposed under Article 23(2) of Regulation No 1/2003, where the Commission sets out in its decision the assessment factors which enabled it to determine the gravity and the duration of the infringement (see, by analogy, Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 42; Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 463).

98 In the present case, the applicant acknowledges itself that, in the contested decision, the Commission set out, first, its reasons for characterising the infringement as very serious and, second, its reasons for deciding to divide the undertakings concerned into three categories and for differentiating the starting amounts of the fine assigned to each of those categories.

99 Moreover, an examination of recitals 319 to 336 of the contested decision permits the conclusion that the Commission did indeed provide a sufficient statement of reasons in this regard. In particular, it is clear from the contested decision that the starting amount is based inter alia on the nature of the infringement, established in the light of its principal characteristics set out in section 4.2 of the contested decision (see recital 320 of the contested decision), on the size of the relevant geographic market, namely the territory of the EEA (see recital 330 of the contested decision), and on the application of differential treatment to the undertakings concerned, in order to take account of their effective economic capacity to cause significant damage to competition, assessed in the light of turnover achieved with the PMMA products, in respect of which they participated in the cartel in question (see recitals 332 to 334 of the contested decision). In this last context, the Commission also mentioned the overall size of the market for PMMA products in 2000 and 2002, expressed in volume and in value (see recital 333 of the contested decision). In those circumstances, the applicant's claim that the Commission did not explain how the gravity of the infringement imputed to the applicant justified the imposition of such a starting amount has no factual basis.

100 In so far as the applicant criticises the absence of a specific justification for the amount of EUR 32.5 million, assigned to the undertakings classified like itself in the second category, it is sufficient to recall that, according to settled case-law, the obligation to state reasons does not require the Commission to set out in its decision the figures relating to the method of calculating the fines (*Sarrió* v *Commission*, paragraph 97 above, paragraph 80, and judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 97 above, paragraph 464). It follows that the Commission was not required under Article 253 EC to provide further justification for the choice of EUR 32.5 million as the starting amount of the applicant's fine (see also, to that effect, *Microsoft* v *Commission*, paragraph 41 above, paragraph 1361).

101 Regarding the applicant's argument that, in essence, the case-law referred to in paragraph 100 above is not applicable in the present case, in view of the level of the starting amount of the fine, it is sufficient to note that that case-law was also applied in a case in which the Commission had set a far higher starting amount than that in the present case (*Microsoft* v *Commission*, paragraph 41 above, paragraph

1361). Similarly, the applicant's claim that the starting amount of its fine was 'significantly' higher than the threshold of EUR 20 million set for very serious infringements is not capable of altering the assessment in paragraph 100 above. Moreover, the Court would point out that that threshold constitutes only a minimum amount provided for by the Guidelines for such infringements, since the Guidelines stipulate that the 'likely amounts' are 'above [EUR] 20 million'.

102 Accordingly, the second plea must be rejected in so far as it seeks to support the application for annulment of Article 2 of the contested decision. Moreover, the matters put forward in this plea cannot justify a reduction of the fine on the basis of the exercise of the Court's unlimited jurisdiction.

Third plea: the Commission failed to fulfil its obligation to apportion the 'basic amount' between the applicant and Lucite

103 The applicant emphasises that it and Lucite were consecutive participants in the presumed infringement as successive owners of a single set of assets employed in the infringement and that they therefore contributed to a 'single gravity' of the infringement. Therefore, in the applicant's submission, the amount of the fine corresponding to that 'single gravity' ought to have been apportioned between them in order to avoid the double-counting of the 'real impact of the offending conduct of each undertaking on competition' a parameter which, according to the Guidelines, is relevant for the determination of the gravity of the infringement. Yet the amount of the fine was calculated as though the applicant and Lucite had each had a separate and simultaneous impact on competition. That method of calculation resulted in a fine — for a single infringement — that was considerably higher merely because a business underwent a change of ownership and not because of any additional harm to competition or any error made by the applicant. The Commission thus breached the principles of equal treatment and proportionality.

104 In that regard, it is necessary, first of all, to reject the Commission's line of argument that this plea is inadmissible. This plea has been put forward in support of the form of order sought in paragraph 36 above and, if well founded, would lead to the reduction in the amount of the fine imposed on the applicant. Thus, contrary to the Commission's contention, the applicant is contesting the amount of its own fine, and not that of the fine imposed on a third party.

105 Next, the Court would point out that, although the heading of this plea refers to the 'basic amount' of the fine, it is clear from the applicant's pleadings that it concerns only the 'gravity component of the fine', namely, specifically, the starting amount of the fine of EUR 32.5 million, established in recital 336 of the contested decision. As to the remainder, the applicant does not contest, in the context of this plea, the Commission's assessments referred to in paragraphs 25 and 26 above.

106 It is therefore necessary to examine whether, as the applicant submits, the Commission was required to apportion such a starting amount of the fine between the applicant and Lucite.

107 It should be borne in mind that, according to the contested decision, the applicant and Lucite participated in the infringement with the same assets of ICI Acrylics, the entity which was transferred from the applicant to Lucite on 2 November 1999, that is approximately in the middle of the infringement period. That date was indeed the date on which liability for the infringement was 'apportioned' between the applicant and Lucite (see paragraph 21 above). Moreover, when applying differential treatment to those two undertakings, the Commission took account of the same turnover achieved by Lucite in 2000. On that basis, it set the starting amounts of their fines at EUR 32.5 million each (see recitals 334 and 336 of the contested decision).

108 In those circumstances, it can reasonably be assumed that if ICI Acrylics had not undergone a change of ownership, the application of the same methodology for calculating the amount of the fine would have led the Commission to set a single starting amount of the fine of EUR 32.5 million which it would have assigned to the single owner. Consequently, the applicant's claim that the transfer of ICI Acrylics did, as such, influence the overall amount of the fines imposed in the contested decision appears well founded.

109 However, the Court must reject the applicant's argument that the Commission ought to have acted differently and apportioned the starting amount between the two undertakings concerned.

110 In the first place, that argument is based, in essence, on the premiss that the assessment of the gravity of the infringement should be strictly related to the 'impact on competition' or the 'harm' thereto and that, consequently, the applicant and Lucite, as successive owners of ICI Acrylics, contributed to a 'single gravity' of the infringement. In that regard, the applicant relies on the wording of the Guidelines, according to which the assessment of the gravity of the infringement should take account of the 'real impact of the offending conduct of each undertaking on competition'.

111 That premiss is however incorrect.

112 According to settled case-law, the effect of an anti-competitive practice is not, in itself, the conclusive criterion for assessing the proper amount of a fine (Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 118, and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 96). The gravity of an infringement must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines (see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 241 and 242 and the case-law cited) and, for example, factors relating to the intentional aspect may be more significant than those relating to the effects of an infringement, particularly where they relate to infringements which are intrinsically serious (see *Thyssen Stahl* v *Commission*, paragraph 118, and *Prym and Prym Consumer* v *Commission*, paragraph 96 and the case-law cited).

113 Moreover, the applicant relies on an incomplete reading of the Guidelines. According to Section 1 A thereof, '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'. In application of those criteria, '[i]nfringements will … be put into one of three categories: minor infringements, serious infringements and very serious infringements'. With respect to very serious infringements, the Guidelines state inter alia that these 'will generally be horizontal restrictions such as price cartels' and that the likely starting amounts are 'above [EUR] 20 million'. The Guidelines further provide that, [w]ithin each of these categories … the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed'.

114 The Guidelines therefore clearly place the emphasis on the nature of the infringement as a decisive factor for assessing its gravity, in the context of setting the starting amount of the fine (see also, to that effect, Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 91). Regarding the actual effect of the infringement, the Guidelines provide for the criterion of the 'actual impact on the market', which relates to the infringement as a whole and not to the effects of each undertaking's conduct (see, to that effect, judgment of 12 November 2009 in Case C-554/08 P *Carbone-Lorraine* v *Commission*, not published in the ECR, paragraphs 21 and 24), whilst specifying that that impact will be taken into account only where it can be measured.

115 Furthermore, in the contested decision, the Commission found that it 'is not possible to measure the actual impact on the EEA market' of the infringement in question and therefore stated that it did not rely 'specifically on a particular impact [of the infringement on the market]' (recital 321 of the contested decision) in determining the amount of the fine. It is therefore on the basis of its assessment of the nature of the infringement, in the light of its principal characteristics set out in section 4.2 of the contested decision (see recital 320 of the contested decision) and of the size of the relevant geographic market (see recital 330 of the contested decision), that the Commission found that the present case involved a very serious infringement.

116 That approach, which moreover is not contested by the applicant, is in line with settled case-law, according to which the Commission may classify horizontal price or market sharing agreements as very serious infringements solely on account of their nature, without being required inter alia to demonstrate

an actual impact of the infringement on the market (*Prym and Prym Consumer* v *Commission*, paragraph 112 above, paragraph 75, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 103).

117 As regards the criterion of the 'real impact of the offending conduct of each undertaking on competition', relied on by the applicant, that criterion is mentioned in the penultimate subparagraph of Section 1 A of the Guidelines which provides that, '[w]here an infringement involves several undertakings (e.g. cartels), it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'. Accordingly, it is merely an optional criterion which allows the starting amount of the fine to be adjusted, where an infringement involves several undertakings, and is not a decisive criterion for the setting of that amount. Moreover, that criterion does not concern the quantification of the anti-competitive effects of the conduct of each undertaking participating in a given infringement, but rather the taking account, for the purpose of determining the starting amount of the fine, of objective differences which may be present between them, such as, inter alia, considerable disparity between their sizes.

118 It follows that, even if the change of ownership of ICI Acrylics did not result in any additional harm to competition, as the applicant claims, that would not permit the conclusion that the applicant and Lucite contributed to a 'single gravity' of the infringement and that the starting amount of the fine ought therefore to have been apportioned between them.

119 In the second place, the applicant's argument regarding the need to apportion the starting amount of the fine between itself and Lucite fails to take account of the fact that the considerations which underlie the determination of that amount (see recitals 319 to 336 of the contested decision) are fully applicable to the applicant.

120 In that regard, the Court notes that, according to the contested decision, both the applicant and Lucite committed the infringement referred to in Article 1 of that decision. The applicant does not contest its liability for that infringement (see paragraph 40 above). Likewise, it does not contest the Commission's assessment that it should be considered as such 'as an undertaking for the purposes of Article 81 [EC]' (recital 288 of the contested decision).

121 Moreover, the applicant does not contest either the Commission's assessment of the gravity of the infringement in recitals 319 to 331 of the contested decision, or the Commission's assessment that, in the context of the application of differential treatment, Lucite's turnover for the PMMA products in 2000 constituted an appropriate indication of the relative size and economic power of ICI Acrylics on the relevant market (recital 334 of the contested decision).

122 In those circumstances, the applicant's line of argument is tantamount in reality to requiring preferential treatment with respect to the starting amount of the fine, by reference to the other addressees of the contested decision, simply on the basis that it transferred the assets employed in the infringement.

123 The infringement that it committed did not become less serious on that ground alone. Thus, the applicant received exactly the same basic amount of the fine as it would have done if, instead of transferring ICI Acrylics to Lucite with effect from 2 November 1999, it had simply withdrawn from the infringement on that date.

124 It follows that, contrary to its contention, notwithstanding the fact that it participated in the cartel with the same assets as those with which Lucite subsequently participated in it, the applicant committed an infringement whose gravity justified the imposition of the starting amount set by the Commission in its case. Consequently, the applicant's argument that that starting amount ought to have been apportioned between it and Lucite cannot be accepted.

125 The applicant's other arguments are not capable of altering that conclusion.

126 First, the applicant claims that 'apportioning the "duration" component' of the fine between itself and Lucite is not sufficient. According to the method laid down in the Guidelines, it is the '"gravity" component' of the fine that has the preponderant impact on the basic amount of the fine, since the starting amount is increased by 10% only for each year of the infringement. Thus, in the absence of a 'linear relationship' between the duration of the infringement and the basic amount of the fine, even though the '"duration" component' was 'apportioned' between the applicant and Lucite, their combined basic amounts exceed the basic amount which would have been calculated if ICI Acrylics had remained under the same ownership.

127 In that regard, it should be borne in mind that the basic amount of the applicant's fine was determined on the basis of the duration of its own participation in the infringement (see paragraph 26 above). Thus, as the Commission rightly states, the '"duration" component' of the fine was indeed 'apportioned' between the applicant and Lucite.

128 It is true, as the applicant submits, that the combined basic amounts of the applicant and Lucite exceed the basic amount which would have been calculated if ICI Acrylics had remained under the same ownership (see paragraph 108 above). However, it must be stated that this is merely the consequence of the application of the method laid down in the Guidelines, which reflect the policy that the Commission intended to follow when setting fines. In view of the Commission's discretion in this respect (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 to 109), it was open to the Commission to establish such a relationship between the criteria of the gravity and the duration of the infringement.

129 Thus, the fact that the criterion of the gravity of the infringement carried more weight in the present case in the determination of the basic amount of the fine than the criterion of the duration of the infringement is not sufficient to render the applicant's argument regarding the need to 'apportion the "gravity component"' of the fine between it and Lucite well founded.

130 Moreover, a 'linear relationship' between the duration of the infringement and the basic amount of the fine, namely the multiplication of the starting amount of the fine by the number of years of an undertaking's participation in the infringement, would have been to the applicant's detriment in the present case by leading to a higher basic amount than that imposed on it.

131 Second, the Court must reject the applicant's line of argument based on the Commission's statement in the statement of objections that, 'if the undertaking, which has acquired the assets, carries on the violation of Article 81 [EC] and/or Article 53 of the EEA Agreement, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets' (point 347 of the statement of objections).

132 Contrary to what the applicant suggests, that statement is silent on the issue of the possible apportionment of the 'gravity component' of the fine between it and Lucite. As is clear from the wording used by the Commission and its position in point 5.6 of the statement of objections, that statement concerns merely the apportionment of liability for the infringement between the seller and the acquirer of the infringing assets in the context of the determination of the addressees of the statement of objections. The same conclusion must be drawn with respect to the reference, in a footnote, to recital 43 of Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC) (OJ 1989 L 74, p. 1). Moreover, the Court would point out that, in the contested decision, the Commission carried out such apportionment of liability for the infringement between the applicant and Lucite (see paragraph 21 above).

133 Third, the applicant claims that, in its practice in previous decisions, the Commission has applied a method consisting in splitting the amount of the fine according to the periods of ownership of an infringing entity.

134 In that regard, suffice it to note that the Commission's practice in previous decisions does not serve as a legal framework for setting fines in competition matters, since the Commission enjoys a wide discretion in that area and, when exercising that discretion, is not bound by its past assessments (see *Prym and Prym Consumer* v *Commission*, paragraph 112 above, paragraph 98 and the case-law cited).

135 In any event, the applicant does not call in question the Commission's argument that, by contrast with this case, the decisions on which it relies involved the transfer of a subsidiary with legal personality. This is a fundamental factual difference in the context of the determination of the amount of the fines, since, given that ICI Acrylics had no legal personality, no fine could be imposed on it. Accordingly, the Commission's decision-making practice concerning the transfer of a subsidiary during the infringement period cannot, in any event, be usefully relied upon by the applicant in the present case.

136 Lastly, the Court notes that, in this plea, the applicant also mentions breach of the principles of proportionality and equal treatment. However, it does not put forward any specific arguments in this respect, other than those analysed above concerning the existence of the alleged obligation for the Commission to 'apportion the "gravity component"' because there was no additional harm to competition resulting from the transfer. Consequently, those arguments must also be rejected.

137 Accordingly, the third plea must be rejected in so far as it seeks to support the application for annulment of Article 2 of the contested decision. Moreover, the matters raised in this plea cannot justify a reduction of the fine on the basis of the exercise of the Court's unlimited jurisdiction.

Fourth plea: the increase of the starting amount of the fine for deterrence is inappropriate

138 This plea is divided into two parts. In the first part, the applicant claims that, in determining the increase of the starting amount of the fine for deterrence, the Commission failed to take account of the applicant's actual financial capacity. In the second part, the applicant maintains, in the alternative, that the Commission breached the principles of proportionality and equal treatment.

First part of the plea: failure by the Commission to take account of the applicant's actual financial capacity

139 The applicant claims that the increase of 50% of the starting amount of the fine for the purpose of ensuring a sufficiently deterrent effect disregards its actual financial capacity. As it showed during the investigation, its actual financial capacity is not properly reflected in its turnover, on which the Commission relied in order to determine the increase. In the applicant's opinion, the turnover criterion is relevant, as an 'indication' or a 'proxy' of an undertaking's economic strength, but it is not sufficient when the undertaking concerned adduces other evidence of its economic strength. The increase in question should therefore be removed.

140 In that regard, the Court would point out, first of all, that, in recital 337 of the contested decision, the Commission stated that, in the category of very serious infringements, the scale of fines that can be imposed also makes it possible to set the amount of the fines at a level which ensures that they have sufficient deterrent effect 'having regard to the size and economic power of each undertaking'. In order to assess the applicant's size and economic power, the Commission took into account its worldwide turnover in 2005, the last financial year preceding that during which the contested decision was adopted (EUR 8.49 billion) and decided to apply a multiplier of 1.5 to its fine (see recitals 349 and 350 of the contested decision).

141 In that context, in reply to the applicant's arguments regarding the use of turnover in order to assess its economic capacity, the Commission stated that the criterion of turnover serves as a sensible and useful indication of economic capacity and strength of an undertaking and that it had applied that criterion in the present case to all the undertakings concerned equally (recital 347 of the contested decision).

142 Next, it should be noted that 'deterrence' is one of the factors to be taken into account in calculating the amount of the fine. It is settled case-law that the fines imposed for infringements of Article 81 EC and laid down in Article 23(2) of Regulation No 1/2003 are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of European Union competition law in future. Accordingly, when the Commission calculates the amount of the fine it may take into consideration, inter alia, the size and the economic power of the undertaking concerned (see, to that effect, Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 16 and the case-law cited).

143 The fact that the size and global resources of the undertaking in question are taken into consideration in order to ensure that the fine has sufficient deterrent effect is accounted for by the impact it should have on that undertaking, since the penalty must not be negligible in the light, particularly, of its financial capacity (Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 104). Thus, it has been held inter alia that the objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine can be properly achieved only if regard is had to the situation of the undertaking at the time when the fine is imposed (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 278).

144 In the present case, the applicant does not contest the actual possibility for the Commission to take account of the size and economic power of the undertaking in order to adjust the amount of the fine. However, it contests the relevance of the criterion of turnover in the assessment of its own size and its economic power.

145 In that regard, the Court would point out that the Court has consistently held that the total turnover of the undertaking gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power (see *Dansk Rørindustri and Others* v *Commission*, paragraph 112 above, paragraph 243 and the case-law cited). Accordingly, it has already been held that the Commission, in order to determine the amount of the fine at a level which ensures that it has a sufficiently deterrent effect, was entitled to have regard to the total turnover of the undertaking concerned (*Showa Denko* v *Commission*, paragraph 142 above, paragraphs 15 to 18; judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, not published in the ECR, paragraph 120; Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 96).

146 Thus, although the case-law recognises expressly that the total turnover of the undertaking gives an 'indication' of its size and its economic power which may be 'imperfect' and 'approximate', at the same time it validates the use of that criterion in the context of determining the increase of the fine for deterrence. That approach has the indisputable merit of enabling the Commission to use an objective criterion when determining the amount of fines and to apply it without distinction to all the undertakings concerned.

147 It follows that the claim that the turnover of an undertaking reflects its economic power only imperfectly or approximately does not suffice, in itself, to render that criterion irrelevant in the context of determining the increase of the fine for deterrence.

148 It is true, as the applicant submits, in essence, that one should not lose sight of the objective pursued by that increase, namely the adjustment of the fine so that it is not rendered negligible, or excessive, notably by reference to the financial capacity of the undertaking in question (see paragraph 143 above and *Degussa* v *Commission*, paragraph 143 above, paragraph 283, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 379).

149 However, the matters raised by the applicant do not establish that the turnover taken into account by the Commission gave such a misleading picture of its financial capacity that there was a failure to have regard to that objective in the present case.

150 First of all, the Court would point out that the applicant does not provide any specific material in support of the arguments and figures that it puts forward, there being no reference in the application in that respect to any document.

151 Next, it must be stated that the applicant merely relies, in the application, on the existence of liabilities in relation to retirement, which are more significant than their size would suggest, as well as liabilities attributable to the funding of an acquisition in 1997. However, the applicant does not explain in detail how specifically the existence of those liabilities would affect the relevance of its turnover in 2005, the year taken into account by the Commission.

152 It should be noted, as the Commission rightly observes, that these are elements which concern several years, and which do not therefore constitute a reliable indicator of the economic power of the undertaking at the time of adoption of the contested decision, and which, moreover, generally have an inevitable impact on the turnover of the undertaking. Furthermore, the applicant states itself in the application that the liability in question 'impacts its operations'. Similarly, the applicant did not challenge the Commission's argument that the liabilities in question necessarily had a knock-on effect on its turnover.

153 Moreover, the Court notes that the applicant does not explain how the criterion of turnover does not properly reflect its financial capacity, on the basis of the matters that it raises. It merely requests that the increase applied by the Commission be simply set aside. However, it must be stated that that would place the applicant in the same situation as Barlo and Lucite, which received no increase for deterrence. The 2005 turnover of those two undertakings represented approximately 4% and 13% respectively of the applicant's (see recitals 36 and 46 of the contested decision). In the absence of convincing evidence, the argument that the applicant's turnover is so misleading as to its financial capacity cannot be accepted.

154 It follows that the applicant has failed to invalidate the Commission's assessment that its turnover served as a 'sensible and useful indication of [its] economic capacity and strength' (recital 347 of the contested decision). Consequently, contrary to the applicant's contention, the Commission was entitled to rely on that turnover when determining the appropriate increase (see in particular paragraphs 146 and 147 above).

155 Moreover, in so far as the applicant claims that the Commission failed to examine the evidence provided during the administrative procedure regarding its financial capacity, that argument must also be rejected. First, it is a mere assertion by the applicant, which is not substantiated by any specific evidence such as, for example, an indication of the evidence which was allegedly ignored by the Commission. Second, and in any event, it is apparent from the contested decision that the Commission examined the applicant's arguments that its turnover overestimated its financial capacity, but concluded that turnover served as a sensible and useful indication of its economic capacity and strength (recitals 343 and 347 of the contested decision). Although the Commission did not respond in detail to each of the applicant's arguments, that does not make it possible to claim, as such, that those arguments were not examined.

156 Lastly, the applicant also submits that the requirement to show why the increase was necessary is all the more pressing in the present case, since, it claims, none of the persons who actually committed the infringement was employed by the applicant or was in a senior management position within the applicant, none of its management had facilitated the implementation of the infringement and the amount of the fine was already very large.

157 In that regard, it is sufficient to recall that, in recitals 337 to 350 of the contested decision, the Commission, when evaluating the gravity of the infringement, increased the starting amount of the fine in order to ensure 'sufficient deterrent effect, having regard to the size and economic power of each undertaking' (recital 337 of the contested decision). That stage in the calculation of the fine is the result of the need to adjust the starting amount so that the fine is sufficiently deterrent in the light of the undertaking's overall resources and of its ability to mobilise the funds needed to pay the

fine. Consequently, the applicant's claims that none of the persons who actually committed the infringement was employed by the applicant or was in a senior management position within the applicant and that none of its management had facilitated the implementation of the infringement are irrelevant in this context and therefore ineffective.

158 The Court therefore concludes that the arguments put forward in the first part of the plea are not capable of calling into question the increase applied to the applicant in recitals 349 and 350 of the contested decision.

159 Accordingly, the first part of the plea must be rejected in so far as it seeks to support the application for annulment of Article 2 of the contested decision.

Second part of the plea: breach of the principles of proportionality and equal treatment

160 The applicant maintains that, even on the assumption that the Commission was entitled to impose an increase for deterrence based exclusively on turnover, it was required to treat the addressees of the contested decision fairly and proportionately. However, the increase imposed on the applicant is proportionally higher than that imposed on Atofina and, accordingly, constitutes a breach of the principles of proportionality and equal treatment.

161 In that regard, the Court notes that, as the applicant observes, the turnover taken into account by the Commission in the applicant's case (EUR 8.49 billion) is indeed 16 times smaller than Atofina's (EUR 143 billion), although the increase applied to the applicant's fine (50%) is only four times smaller than that applied to Atofina's fine (200%).

162 However, that observation does not suffice to call in question the level of the increase imposed on the applicant in the light of the principles on which it relies.

163 In the first place, that difference in relation to the treatment received by another undertaking does not mean, in itself, that the applicant's increase is not proportionate to the objective pursued, namely, according to recital 337 of the contested decision, to set the amount of the fine at a level which ensures that it has sufficient deterrent effect, having regard to its size and economic power. In this part of the plea, the applicant does not put forward any arguments in this respect.

164 In any event, the applicant's argument, in so far as it focuses on Atofina's situation, and on the assumption that it is well founded, would result in the applicant's increase being only some 12.5% (an increase which is 16 times smaller than the increase of 200% imposed on Atofina). In view of its size and economic strength, as reflected by its turnover in 2005, such an increase would be insufficient to achieve the aim pursued.

165 In the second place, even if that difference could be regarded as a breach of the principle of equal treatment, it would not necessarily follow that the applicant would be entitled to a reduction of the increase imposed.

166 In that regard, the Commission is correct to observe that the applicant attempts to apply the approach adopted in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraphs 244 to 249) 'in the opposite sense'. In the case which gave rise to that judgment, the turnover of Showa Denko KK ('SDK') was twice that of VAW Aluminium AG ('VAW'). However, the Commission imposed on SDK an increase six times higher (150%) than that imposed on VAW (25%). It was in such a situation that the Court decided to replace the increase imposed on SDK by an increase of 50%, and therefore two times higher than that imposed on VAW.

167 However, that does not mean that an undertaking such as the applicant can rely to its advantage on an alleged breach of the principle of equal treatment resulting from the fact that the increase imposed on a larger undertaking is not sufficiently high to take account of the difference in size between those two undertakings.

168 In the third place, and in any event, the merits of the level of the increase imposed on the applicant, in the light of the principles of equal treatment and proportionality, should be examined, if necessary, not only in relation to the increase applied to Atofina, but also in relation to the increases applied to the other undertakings concerned.

169 In particular, as is apparent from the case-law, the solution adopted by the Court in the examination of this part of the plea cannot have the effect of resulting in unequal treatment between the undertakings which participated in the infringement in question (see, to that effect, *Sarrió* v *Commission*, paragraph 97 above, paragraph 97, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 152).

170 In the application, the applicant does not put forward any arguments that it did have such an effect.

171 Moreover, it should be recalled that, in ascending order, the increases applied in the contested decision were the following:

— Barlo, with a turnover of EUR 310.85 million (recital 46 of the contested decision), received no increase;

— Lucite, with a turnover of approximately EUR 1.14 billion (recital 36 of the contested decision), received no increase;

— three companies in the Total group (Arkema, Altuglas and Altumax), with a turnover of EUR 5.71 billion (recital 14 of the contested decision), received a 'hypothetical' increase of 25% (multiplier of 1.25), for the purposes of the calculation of the increase for repeated infringement, an increase which was specific to those three companies (see footnote 233 of the contested decision). Furthermore, ruling on the action brought by those companies against the contested decision, the Court reduced the amount of the fine imposed on them by recalculating its overall amount on the basis of the application of the increase of 25% for deterrence (Case T-217/06 *Arkema France and Others* v *Commission* [2011] ECR II-2593, paragraphs 339 and 340);

— the applicant, with a turnover in 2005 of EUR 8.49 billion, received an increase of 50% (multiplier of 1.5);

— Degussa, with a turnover of EUR 11.75 billion, received an increase of 75% (multiplier of 1.75);

— Atofina (five companies of the Total group) received an increase of 200% (multiplier of 3) on the basis of Total SA's turnover in 2005 of EUR 143.168 billion (recitals 349 and 350 of the contested decision).

172 Thus, it is clear from the contested decision that Atofina's case is a specific case of an undertaking which had a far higher turnover than that of the other undertakings concerned. On the other hand, the Commission's approach with respect to the other undertakings was consistent, since it set increases of 25%, 50% and 75% with respect to undertakings whose turnover was EUR 5.71, EUR 8.49 and EUR 11.75 billion, respectively.

173 It is true that the Commission did not adhere strictly to mathematical ratios and, in particular, the relative difference in the level of increase (in percentage terms) between Arkema and the applicant (+ 100%) is greater than that of their turnover (+ 48%), whilst that discrepancy is smaller as regards the applicant and Degussa (+ 50% for the increase and + 38% for turnover).

174 However, that latter finding does not suffice to establish a breach of the principles on which the applicant relies. In view of the Commission's discretion in this area and the objective of deterrence pursued by the application of the increases in question, the Commission cannot be required, on the basis of the principles of equal treatment and proportionality, to ensure that the differences between

the levels of those increases reflect precisely any distinction between them regarding their turnover (see also, to that effect and by analogy, *Evonik Degussa* v *Commission and Council*, paragraph 145 above, paragraph 122). As is apparent from the case-law, although turnover is a relevant criterion in the setting of the fine at a level which ensures sufficient deterrent effect, the fixing of an appropriate fine cannot however necessarily be the result of a simple arithmetical calculation based on turnover (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 128 above, paragraph 121, and *Evonik Degussa* v *Commission and Council*, paragraph 145 above, paragraph 120).

175 It follows that the treatment of the undertakings which, in the light of their turnover, find themselves in a situation which is more similar than Atofina's to the applicant's, does not permit the conclusion that there was a breach of the principles of equal treatment and proportionality. On the other hand, the applicant's line of argument, in so far as it seeks treatment that is proportionate exclusively to Atofina's, namely, in essence, an increase of some 12.5% (see paragraph 164 above), if accepted, would be such as to result in unequal treatment in relation to the other undertakings concerned.

176 In that context, it should also be stressed that the applicant makes no mention, inter alia, of Lucite's case. It should be recalled that the applicant and Lucite committed the infringement successively with the same assets, and that the Commission assigned to them the same starting amounts of the fine, on the basis of the same turnover as regards the PMMA products. Accordingly, until then, the fines of those two undertakings were therefore calculated in the same manner, but, unlike the applicant, Lucite did not receive any increase for deterrence. However, given that its turnover was 7.5 times lower than the applicant's, it cannot be claimed that the increase of 50% imposed on the applicant is contrary to the principles relied on.

177 In those circumstances, the second part of the plea must be rejected in so far as it seeks to support the application for annulment of Article 2 of the contested decision.

178 Moreover, for the aforementioned reasons, the matters raised by the applicant in the fourth plea cannot justify a reduction of the fine either, in so far as it is based on the increase of the starting amount for deterrence, on the basis of the exercise of the Court's unlimited jurisdiction. Accordingly, the Court must reject this plea in its entirety.

Fifth plea: the refusal to grant a reduction of the fine to take account of the applicant's cooperation with the Commission is unjustified

179 The present plea is divided into two parts. In the first part, the applicant takes issue with the Commission for refusing to grant it a reduction of the fine under the Leniency Notice. In the second part, the applicant claims, in the alternative, that the Commission ought at least to have acknowledged the merits of its cooperation outside the Leniency Notice.

First part of the plea, concerning the refusal to grant a reduction of the fine under the Leniency Notice

180 This part of the plea rests, essentially, on two complaints. First, the applicant takes issue with the Commission for having incorrectly considered that the evidence which the applicant had supplied did not provide any added value to the investigation. Second, the applicant claims that its delay in supplying that evidence by comparison with the other undertakings concerned was caused by the Commission's conduct.

– The incorrect assessment of the added value of the evidence in the application under the Leniency Notice

181 As a preliminary point, it should be borne in mind that the Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted

by its departments. In that regard, the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraphs 81 and 88).

182 In order to justify a reduction of the fine based on the Leniency Notice, it is necessary that the information provided can be regarded as demonstrating genuine cooperation, given that the aim of reducing a fine is to reward an undertaking for making a contribution in the administrative procedure that enabled the Commission to establish an infringement with less difficulty (see, to that effect, *Erste Group Bank and Others* v *Commission*, paragraph 116 above, paragraph 305). Thus, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of the European Union competition rules (see *JFE Engineering and Others* v *Commission*, paragraph 54 above, paragraph 499 and the case-law cited) and reveal a true spirit of cooperation (*Dansk Rørindustri and Others* v *Commission*, paragraph 112 above, paragraphs 395 and 396).

183 In view of the rationale for the reduction, the Commission cannot disregard the usefulness of the information provided, which inevitably depends on the evidence already in its possession (Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 221).

184 Moreover, whilst the Commission is required to state the reasons for which it considers that information provided by undertakings under the Leniency Notice constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent on undertakings wishing to contest the Commission's decision in that regard to show that, in the absence of such information provided voluntarily by the undertakings, the Commission would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines (*Erste Group Bank and Others* v *Commission*, paragraph 116 above, paragraph 297).

185 In the Leniency Notice, the Commission set out the conditions under which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them.

186 In particular, the Commission stated that undertakings that do not meet the conditions enabling them to benefit from immunity from fines may still be eligible to benefit from a reduction of the fine (point 20 of the Leniency Notice). According to point 21 of that notice, in order to qualify for such a reduction, 'an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

187 Moreover, point 22 of the Leniency Notice states:

'The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.'

188 In the contested decision, the Commission observed that the applicant sought the application of the Leniency Notice on 18 October 2004, after the Commission had received applications under that notice from Degussa (on 20 December 2002), Atofina (on 3 April 2003) and Lucite (on 11 July 2003) (recital 416 of the contested decision). Recital 417 of the contested decision states that, pursuant to the Leniency Notice, the Commission examined the applicant's submission in the chronological order in which submissions were made to evaluate whether it constituted significant

added value within the meaning of point 21 of the Leniency Notice. On the basis of those criteria, the Commission took the view that the evidence submitted by the applicant did not represent significant added value within the meaning of the Leniency Notice (recital 417 of the contested decision).

189 In the present case, in the first place, the applicant claims that the Commission applied an incorrect legal test when rejecting its application for a reduction of the fine, in so far as, in recital 419 of the contested decision, the Commission states that the documents that the applicant supplied did not enable it 'to prove the facts'. The applicant submits that the correct test, pursuant to point 21 of the Leniency Notice, was that of strengthening of the Commission's ability to prove the facts.

190 That argument has no factual basis and must be rejected.

191 As was noted in paragraph 188 above, it is apparent from recitals 416 to 419 of the contested decision that the Commission correctly applied the relevant provision of the Leniency Notice, namely point 21 thereof, by using the 'significant added value' test (see paragraph 188 above). Moreover, in the letter of 11 August 2005, informing the applicant that its application for a reduction of the fine had been rejected on the basis of that test, the Commission stated that the 'the evidence submitted [by the applicant] does not represent significant added value within the meaning of points 21 and 22 of the [Leniency] Notice', the Commission thus having mentioned the relevant test.

192 In the second place, the applicant claims, in essence, that the evidence that it submitted satisfies the conditions laid down in points 21 and 22 of the Leniency Notice.

193 In that regard, it should be borne in mind that, pursuant to the case-law cited in paragraph 184 above, it is incumbent on the applicant to show that those conditions have been fulfilled. It should be emphasised that, even though, in the application, the applicant refers, in a general and unsubstantiated manner, to the lengths to which it went in order to cooperate with the Commission, mentioning 'many days' work on the part of the company's information technology specialists' and 'over a thousand hours of outside counsel time to review', which led to the voluntary communication to the Commission of '168 documents from backup systems and servers', its arguments put forward in this complaint are based in reality on a few documents contemporaneous with the infringement cited in recitals 101, 104, 115 and 156 of the contested decision. The applicant submits that those documents strengthened the Commission's case and assisted in its investigation, since the Commission cites them in the contested decision and they are among the few contemporaneous documents used in the investigation. Moreover, the Leniency Notice puts great value on such contemporary documents.

194 However, those arguments do not call into question the Commission's assessment.

195 First, the internal email cited in recital 101 of the contested decision refers to a price increase agreement for the second half of 1998 and to a 5% increase for cast sheet as of 1 January 1999 on the United Kingdom market (see footnote 27 of the contested decision). Similarly, the documents cited in recital 156 of the contested decision mention a price increase for the second half of 1998. However, as the Commission submits, it is apparent from the contested decision (see, for example, recitals 155, 157 and 158 of the contested decision) that, before those documents were received, it was already aware of price discussions and agreements on price increases at the European level for the second half of 1998.

196 It is true, as the applicant submits, that the document cited in recital 101 of the contested decision enabled the Commission to explain the manner in which the anti-competitive meetings in question were conducted. Similarly, the documents cited in recital 156 of the contested decision show how the price increases were implemented. However, it is merely information which enabled the price increases to be placed in their context in respect of which the Commission already had sufficient evidence.

197 Second, as regards the applicant's two internal emails cited in recital 104 and footnote 31 of the contested decision in order to illustrate the fact that the price increases were not always implemented (see footnote 31 of the contested decision), the Court would point out that, before receiving those documents, the Commission was already aware of that fact and had evidence in support thereof, as is apparent from a number of recitals of the contested decision (see, for example, recitals 110, 120, 123, 125, 128, 129, 134, 140, 143, 148, 167 and 184 of the contested decision). The fact, noted by the applicant, that they are the only documents contemporaneous with the infringement which are cited in section 4.2.3 of the contested decision, entitled 'Implementation and monitoring of the price agreements', is not, as such, capable of establishing its significant added value.

198 Third, with respect to the minutes of a meeting cited in recital 115 of the contested decision, that document confirms only that a meeting between the applicant and Degussa took place on the date indicated, the information regarding its anti-competitive nature having been provided by Degussa. Moreover, the Court would point out that, in this action, the applicant specifically submits that that document ascribes a legitimate nature to the meeting in question, and the applicant cannot therefore reasonably claim that it had significant added value for the Commission.

199 In addition, the Court notes that the applicant does not contest the Commission's assessment that, at the time when it received the documents referred to above, it already had sufficient decisive evidence from other undertakings to prove the facts. However, the applicant submits that, in accordance with the Leniency Notice, the issue is not whether the Commission had already received 'sufficient evidence' to prove its case but whether its evidence 'strengthened' that case. In the applicant's opinion, however strong a case may be, it is always capable of being strengthened by further or better evidence, and in particular by contemporaneous documents.

200 That line of argument cannot succeed. It would mean, in essence, that any evidence cited in a cartel decision, and a fortiori a contemporaneous document, should be regarded as providing 'significant added value' within the meaning of the Leniency Notice, thereby justifying a reduction of the fine. Such an outcome would be incompatible with the case-law set out in paragraphs 181 to 183 above.

201 Thus, it has been held, for example, that a statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly and that it is not sufficient to justify a reduction in the fine for cooperation (see *Gütermann and Zwicky* v *Commission*, paragraph 183 above, paragraph 222 and the case-law cited). It follows that the mere fact that a document is to some extent useful for the Commission and that it relies on it in its decision does not justify a reduction of the fine for cooperation.

202 Moreover, the Court would point out that the applicant focuses its line of argument on the wording of point 22 of the Leniency Notice, according to which it is necessary to ascertain whether the 'evidence provided strengthens … the Commission's ability to prove the facts in question'. However, it is clear from that point that it sets out the definition of the concept of 'added value', whereas the relevant test for assessing the appropriateness of a reduction of the fine, established in point 21 of that notice, is the test of 'significant added value'. The applicant does not even attempt to establish how the documents on which it relies might have facilitated the Commission's task 'significantly'.

203 It follows that the applicant has failed to establish that the Commission's conclusion set out in paragraph 188 above is vitiated by a manifest error of assessment.

204 Accordingly, the Court must reject this complaint.

– The Commission's responsibility for the applicant's delay in supplying documents by comparison with the other undertakings concerned

205 The applicant complains that the Commission was the cause of the late submission of its application under the Leniency Notice.

206 In the first place, the applicant claims that the Commission failed to fulfil its obligation to inform the applicant of the investigation for more than a year after having informed the other cartel participants.

207 In that regard, the Court notes that the applicant does not claim any breach of its rights of defence resulting from its allegedly being informed late about the investigation. On the other hand, it submits, in essence, that its chances of obtaining a reduction of the fine for its cooperation with the Commission were compromised.

208 In that regard, it should be recalled that the first measure of inquiry sent to the applicant in the context of the investigation, namely a request for information, is dated 29 July 2004 (see paragraph 10 above). Degussa submitted its application for immunity on 20 December 2002 and the other undertakings concerned (Atofina, Barlo, and Lucite) were necessarily informed about the investigation on 25 March 2003, the date on which inspections at their premises commenced (see paragraph 7 above). Moreover, on 3 April and on 11 July 2003, Atofina and Lucite submitted their respective applications under the Leniency Notice which were successful (see paragraphs 8 and 28 above).

209 Thus, the applicant's situation differs from that of all the other addressees of the contested decision which were eligible for a reduction of their fine under the Leniency Notice, since the applicant was the subject of a first measure of inquiry 16 months after those undertakings. As is apparent from the foregoing (see for example paragraph 183 above), the time at which an application under that notice is submitted may be decisive in terms of the prospects of obtaining a reduction of the fine.

210 However, contrary to the applicant's claim, that consideration is not capable of invalidating the assessment of the usefulness of its cooperation with the Commission and of leading to a reduction of the fine on that basis.

211 First, the applicant does not rely on any rule of law which might give rise to an obligation for the Commission, at that stage, to inform it specifically of the investigation or to undertake measures of inquiry in respect of the applicant, in order in particular to enable it to submit an application under the Leniency Notice in due time.

212 Moreover, at the hearing, the applicant expressly acknowledged, in reply to a question put by the Court (i) that it had been possible for it, just like for any other undertaking concerned, to submit an application under the Leniency Notice at the appropriate time and (ii) that the material in the file showed that it was in a position to know, well before the first measure of inquiry in its respect, that an investigation into the methacrylates industry was ongoing (see also paragraphs 216 and 217 below).

213 Moreover, the Court would point out in particular that it is clear from Articles 11 and 14 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), in force until 30 April 2004, and from Articles 18 to 20 of Regulation No 1/2003, applicable after that date, that the Commission 'may' undertake measures of inquiry, such as requests for information or inspections. As the Commission contends, no provision obliges it to undertake such measures at the same time in respect of all the undertakings concerned.

214 In addition, in the present case, in reply to a written question put by the Court, the Commission confirmed that, upon receipt of a letter from Lucite of 7 April 2003, that is shortly after the inspections of 25 March 2003, it was aware of the applicant's possible involvement in the case. However, the Commission stated that, for the immediate purposes of the investigation, it was not considered necessary to contact the applicant at that point in time. Given that the business unit which committed the infringement, ICI Acryclics, had been transferred to Lucite, the Commission assumed that Lucite was better placed at that stage to answer any questions on the cartel as it had access to the records and employees concerned.

215 Since that assessment was not contested by the applicant at the hearing, it appears that the decision not to undertake any measures of inquiry with respect to the applicant before 29 July 2004 was based on objective factors.

216 Second, and in any event, in reply to a written question put by the Court, the Commission produced two documents demonstrating that the existence of the investigation in question was made public by the Commission on 14 April 2003 and by Lucite on 17 June 2003, that is before Lucite submitted its application under the Leniency Notice on 11 July 2003 and well before the applicant submitted its application to that effect on 18 October 2004.

217 In those circumstances, the applicant cannot claim that the Commission's conduct was the cause of the late submission of its application under the Leniency Notice. Moreover, at the hearing, in reply to a question put by the Court, the applicant acknowledged, in the light of the aforementioned documents, that it was in a position to know that an investigation was ongoing. It therefore stated that its complaints against the Commission were henceforth focused rather on the manner in which the Commission had acted in its contacts with Lucite (see paragraphs 219 et seq. below).

218 It follows that the argument based on the applicant's allegedly being informed late about the existence of the investigation must be rejected.

219 In the second place, the applicant takes issue with the Commission for having informed Lucite that the applicant was not aware of the investigation and for having warned Lucite against informing the applicant about it.

220 Moreover, at the hearing, the applicant submitted that the manner in which the Commission had acted in its contacts with Lucite, notably in its letter to Lucite of 8 May 2003, constituted a breach of the principles of sound administration and equal treatment. The Commission allegedly informed Lucite that the applicant had not yet submitted an application under the Leniency Notice and therefore allegedly infringed the principle of equal treatment between the undertakings concerned with respect to the application of that notice. Relying on the approach adopted by the General Court in *Hoechst* v *Commission*, paragraph 148 above, the applicant therefore requests a reduction of the fine on account of the breach of the aforementioned principles.

221 In that regard, the Court would point out, first of all, that, in its pleadings, the applicant did not expressly invoke breach of the principles of sound administration and equal treatment in the present context. However, it strongly criticised the manner in which the Commission had acted in its contacts with Lucite, stating in particular that the Commission's conduct had caused the applicant 'not to know about the investigation on [an] equal footing with the other [cartel participants]' and that the Commission had 'interfered in the race to [the applicant's] detriment'. In those circumstances, it must be stated that the arguments put forward at the hearing constitute the amplification of a plea put forward in the originating application and which is closely connected therewith and must therefore be declared admissible under Article 48 of the Rules of Procedure of the General Court (see, to that effect, the order of the President of the Third Chamber in Case C-430/00 P *Dürbeck* v *Commission* [2001] ECR I-8547, paragraph 17, and the judgments in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 278, and Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156), as the applicant maintained at the hearing. Furthermore, having been requested to submit observations in that respect, the Commission did not raise any objection against the admissibility of that line of argument.

222 Next, it should be pointed out that, according to settled case-law, where the European Union institutions have a power of appraisal in order to be able to fulfil their tasks, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische*

Universität München [1991] ECR I-5469, paragraph 14, and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86). That obligation arises under the principle of sound administration (see, to that effect, *Volkswagen* v *Commission*, paragraph 53 above, paragraph 269, and *Hoechst* v *Commission*, paragraph 148 above, paragraph 129).

223 As regards the principle of equal treatment, the Commission cannot, when assessing the cooperation provided by undertakings, ignore that general principle of European Union law, which, according to consistent case-law, is breached when comparable situations are treated differently or when different situations are treated in the same way, unless such treatment is objectively justified (see *Hoechst* v *Commission*, paragraph 148 above, paragraph 130 and the case-law cited).

224 It is therefore appropriate to examine the Commission's conduct in its contacts with Lucite in the light of those principles.

225 The applicant's line of argument in that respect is based on an exchange of correspondence between the Commission and Lucite during the administrative procedure.

226 Thus, by letter of 7 April 2003, that is shortly after the inspection of 25 March 2003 and before it submitted its application under the Leniency Notice, Lucite first of all informed the Commission that the applicant had been the owner of the 'business under investigation' during most of the period to which the inspection decision of 17 March 2003 refers and stated that any liability of Lucite could relate only to the period starting from October 1999. Lucite then asked 'whether the Commission ha[d] contacted ICI plc or intend[ed] to do so in connection with its investigations'. Lucite stated that, '[i]f not, [it would seek] confirmation from the Commission whether it would have any objection if [it] contacted ICI plc and, in due course, g[i]ve ICI plc access to Lucite employees and documents relevant to ICI Acrylics for the purpose of enabling ICI plc to prepare its defence'.

227 By letter of 8 May 2003, the head of unit responsible for the case replied as follows:

'… I would like to inform you that we do not take a position as regards the question whether Lucite contacts ICI plc in this matter. I would however like to draw your attention to the fact that conditional immunity has already been granted in this case and that as a consequence other companies involved in the proceedings can only apply for leniency under the [Leniency Notice]. Furthermore a grant of leniency can only be given to one individual company. A combined leniency application by two or more companies is therefore not possible …'

228 In the applicant's submission, the aforementioned letter of the Commission informed Lucite that the applicant was not aware of the investigation. Moreover, the applicant submits that Lucite understood the letter and subsequent oral discussions as warnings from the Commission against contacting the applicant.

229 In support of that interpretation, the applicant also refers to later written communications of Lucite, subsequent to its submission of an application under the Leniency Notice, on 11 July 2003, and after the applicant was formally informed by the Commission of the existence of the investigation by the request for information of 29 July 2004 (see paragraph 10 above).

230 Thus, in an email of 12 August 2004 sent to the applicant, Lucite's lawyer stated inter alia: 'As I mentioned when we spoke, there have been comments made during the course of the investigation which indicate that the Commission is not keen for Lucite to discuss the matter with ICI.'

231 Similarly, the applicant relies on an email of 3 September 2004, sent by Lucite's lawyer to the Commission administrator dealing with the case, in which that administrator stated that 'ICI has requested certain documents and assistance from Lucite which Lucite is not contractually obliged to give'. Lucite also stated that it 'is reluctant to comply with such requests without written confirmation of the Commission's position — particularly in light of Lucite's request for a reduction in the amount

of any fine' and that this was 'in part because of the impression which Lucite had received from previous telephone calls and contacts with the Commission that the Commission had not contacted ICI and did not wish Lucite to do so (albeit that the Commission had indicated formally in its letter of 8 May 2003 that it did not take a position on the issue)'.

232 In a letter of 7 September 2004 to Lucite, the Commission stated that it saw no objection to Lucite granting the applicant access to its staff and documents. At the same time, it firmly disputed having given any instructions to Lucite relating to contacts with the applicant.

233 Lastly, in response to the Commission's letter of 7 September 2004, Lucite, in a letter of even date to the Commission, first recalled the content of the Commission's letter of 8 May 2003 and then went on to state as follows:

'In the course of telephone calls and written contacts with the Commission (which we can detail for you if necessary), it was clear to Lucite that the Commission had decided not to contact ICI plc until now.

On the basis of these factors and in the spirit of complete and continuous cooperation with the Commission's investigation under the terms of the Leniency Notice, Lucite concluded — as we believe it was meant to conclude — that the Commission would not have welcomed contact by Lucite with ICI plc in connection with the ongoing investigation, notwithstanding that, as you point out in your letter of today, the Commission did not issue any formal "instructions" on the matter.'

234 Contrary to the applicant's contention (see paragraph 220 above), the aforementioned exchanges, and in particular the Commission's letter of 8 May 2003, do not permit the conclusion that the Commission acted in breach of the principles of sound administration or equal treatment.

235 In particular, it is clear from those exchanges, as the Commission rightly contends, that it gave no formal instructions to Lucite with regard to the appropriateness of contacting the applicant regarding the investigation. In the letter of 8 May 2003, the Commission stated expressly that it was taking no position on that issue. Moreover, Lucite itself acknowledges, in its written communications, that the Commission did not issue any instructions and refers only to its 'impression' that 'the Commission would not have welcomed contact by Lucite with [the applicant]'.

236 Moreover, Lucite's general reference to telephone conversations or other contacts with the Commission (see paragraphs 231 and 233 above) are insufficient to establish, in view of the Commission's denial (see paragraph 232 above) and in the absence of other evidence, that such instructions were in fact given to Lucite.

237 Similarly, the Commission did not indicate to Lucite, contrary to the applicant's contention, whether the applicant had already been contacted by the Commission regarding the investigation, or whether it had already submitted an application under the Leniency Notice.

238 It is true that the wording of the letter of 8 May 2003 could have been reasonably understood by Lucite as meaning that it was not in Lucite's interest to contact the applicant regarding the investigation, in order to give the applicant access to Lucite employees and documents relevant to ICI Acrylics for the purpose of enabling the applicant to prepare its defence. The Commission did not merely state that it 'was taking no position' on that issue, but continued its letter by stating, in essence, the conditions in which Lucite might qualify for a reduction of the fine, whilst making it clear that leniency could be granted only to one individual company. On that basis, Lucite might also have assumed that the applicant was not, at that stage, aware of the existence of the investigation and had not submitted a leniency application.

239 Moreover, the subsequent written communications by Lucite (see paragraphs 230, 231 and 233 above) confirm clearly that that was indeed its understanding of the Commission's position expressed in the Commission's letter of 8 May 2003.

240 However, those considerations do not permit the conclusion that the principles referred to by the applicant were breached.

241 The applicant does not challenge the Commission's assessment, set out in its letter of 8 May 2003, that leniency could be granted only to one individual company and that a combined leniency application by two companies was therefore not possible. Accordingly, it must be stated that, in that letter, the Commission merely indicated to Lucite the manner in which the Leniency Notice would be applied.

242 In the light of the wording of that notice, Lucite must itself have suspected that had it contacted the applicant, its chances of obtaining a reduction of the fine might have been jeopardised. That emerges, moreover, from its letter of 7 April 2003 (see paragraph 226 above) where it specifically requests the Commission's position on that question. Similarly, in the light of the inherent logic of the Leniency Notice, which encourages each undertaking to cooperate with the Commission before the other undertakings concerned, Lucite, by analysing its strategy in the context of the investigation, had, in any event, to work on the assumption that the applicant was its potential competitor in the 'race' for leniency.

243 In those circumstances, it cannot be argued that, by the aforementioned contacts with Lucite, the Commission 'interfered in the race to [the applicant's] detriment', as the applicant submits (see paragraph 221 above). Indeed, in the light of the Leniency Notice, Lucite could reasonably have been aware of the information communicated to it.

244 Thus, Lucite's decision not to contact the applicant regarding the investigation must be regarded as the result of its perception of its own interest in the light of the Leniency Notice. It is apparent from the foregoing that it is only if the Commission had expressly authorised Lucite to contact the applicant, whilst providing guarantees to Lucite that that would not have any impact on its chances as regards leniency, that Lucite's decision might have been different. However, the applicant does not claim that the Commission was required to provide Lucite with such assurances, in the light of the principles of sound administration and equal treatment on which it relies or, indeed, of the Leniency Notice.

245 Thus, the circumstances of the present case can be clearly distinguished from those of *Hoechst* v *Commission*, paragraph 148 above, relied on by the applicant, in which the breach of the principles of sound administration and equal treatment resulted from comments which were openly discriminatory against the company concerned in the context of the application of the Leniency Notice (see, to that effect, *Hoechst* v *Commission*, paragraph 148 above, paragraph 136). As is apparent from the foregoing, it has not been established that such a situation occurred in the present case.

246 Accordingly, the Court must reject the applicant's line of argument alleging breach of the principles of sound administration and equal treatment.

247 In addition, the applicant cannot usefully rely on the Commission's conduct in its contacts with Lucite in order to challenge the application, in the contested decision, of the Leniency Notice in its respect.

248 The Court would point out, first, that the application of the Leniency Notice is based on an assessment of the objective usefulness of the evidence submitted for the purposes of discovering and establishing the infringement and, second, that it seeks to provide an incentive to cartel members to cooperate with the Commission without being prompted to do so. The Commission cannot be held responsible for the limited extent of the applicant's cooperation or for its tardiness. Those factors are by contrast attributable to the applicant itself, as is apparent from the documents before the Court, or to the objective factual situation in which the applicant found itself, as a result of the transfer of ICI Acrylics to Lucite. In particular, the Court would recall that the applicant acknowledges in the present case that it was in a position to know about the investigation at least as of 14 April 2003 (see paragraphs 212, 216 and 217 above).

249 Moreover, it is not established that the contested decision would have differed in content in that respect if the Commission had, in its letter of 8 May 2003, merely not taken any position on Lucite's application. It should be borne in mind, In particular, that the applicant does not challenge the Commission's assessment in its letter of 8 May 2003 that a joint application for leniency by the applicant and Lucite was not in any event possible.

250 It follows that the first part of the plea must be rejected in so far as it seeks to support the application for annulment of Article 2 of the contested decision.

Second part of the plea, concerning the refusal to recognise the merits of the applicant's cooperation outside the scope of the Leniency Notice

251 In the alternative, the applicant claims that it is entitled to a reduction of the fine outside the Leniency Notice, in consideration of its significant voluntary cooperation throughout the investigation. The applicant submits that it provided effective and useful cooperation by providing information going beyond what the Commission had requested pursuant to Article 18 of Regulation No 1/2003, such as, in particular, inculpatory materials that were cited in the contested decision against the applicant in relation to PMMA solid sheet.

252 It should be borne in mind in that regard that, in Section 3, sixth indent, of the Guidelines, the Commission includes as a mitigating circumstance effective cooperation by the undertaking in the proceedings outside of the scope of the Leniency Notice.

253 In the present case, the Commission found, in recital 392 of the contested decision, that, pursuant to the aforementioned provision, it had considered whether cooperation by one of the undertakings concerned had enabled it to establish the infringement with less difficulty. In recital 393 of the contested decision, it stated that, having regard to the very limited scope and value of their cooperation and the challenges on matters of fact made outside that limited cooperation, there were no other circumstances which would give rise to a reduction in the amounts of the fines outside the scope of the Leniency Notice which, in secret cartel cases, could in any event only be of an exceptional nature.

254 On that latter point, the Commission cited its Decision C(2005) 4012 final of 20 October 2005 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw tobacco Italy), in which the Commission withdrew the conditional immunity granted to an undertaking on the ground that it had subsequently failed to fulfil its obligation to cooperate by which it was bound under the Leniency Notice. The Commission none the less granted that undertaking a reduction of the fine on the basis of mitigating circumstances within the meaning of the Guidelines, in order to take account of the substantial contribution that it had made to the investigation.

255 Moreover, in the case specifically of the applicant, the Commission also stated, in recital 419 of the contested decision, that the applicant did not qualify for any reduction of the fine for cooperation outside the Leniency Notice.

256 In the first place, the applicant submits that the Commission's assessment is incorrect in so far as the Commission limited the possibility of a reduction of the fine outside the Leniency Notice to 'exceptional circumstances' (recital 393 of the contested decision).

257 The Court must reject that argument.

258 The application of Section 3, sixth indent, of the Guidelines cannot lead to the Leniency Notice being deprived of its useful effect. It is clear from that notice that it defines the framework for rewarding undertakings which are or were parties to secret cartels affecting the European Union for their cooperation in Commission investigations. It follows that undertakings may, as a rule, obtain a reduction in the amount of the fine in return for their cooperation only when they satisfy the conditions laid down in that notice.

259 Moreover, the Court notes that the applicant did indeed submit an application under the Leniency Notice and that its cooperation fell within the scope of that notice, but that it was considered insufficient to justify a reduction of the fine. The present case is therefore significantly different from that in Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, on which the applicant relies. In that latter case, the undertaking concerned supplied the Commission with information relating to acts in respect of which it would not in any event have had to pay a fine and which therefore, according to the Court, did not fall within the scope of the Leniency Notice. It was in those circumstances that the Court held that that undertaking none the less merited a reduction of the fine under Section 3, sixth indent, of the Guidelines, given that, in particular, its cooperation had enabled the Commission to establish that the infringement had lasted longer than it had previously believed to be the case (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraphs 294 to 298, 306 and 311). Contrary to the applicant's contention, the Court did not therefore recognise in that judgment that an undertaking's cooperation may be rewarded even if does not satisfy the significant added value test for the purposes of the Leniency Notice.

260 In addition, the Court must also reject the applicant's argument that, in essence, a reduction of the fine is justified merely because an undertaking communicates information going beyond that whose production the Commission could request pursuant to Article 18 of Regulation No 1/2003, such as, in particular, inculpatory materials.

261 It has been held that the cooperation of an undertaking in the investigation does not entitle it to a reduction in its fine where that cooperation went no further than the cooperation incumbent upon it under Article 18 of Regulation No 1/2003 (see, to that effect, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and *Groupe Danone* v *Commission*, paragraph 61 above, paragraph 451). However, the reverse is not necessarily true. Even inculpatory material may be of only limited use to the Commission, in particular by reference to earlier submissions by other undertakings. It is the usefulness of information which is the decisive factor in the assessment of the application for a reduction of the fine for cooperation with the Commission (see the case-law referred to in paragraphs 181 to 183 above).

262 It follows that the Commission was correct in finding that the application of Section 3, sixth indent, of the Guidelines must be exceptional.

263 In the second place, the applicant claims that, in any event, the 'exceptional circumstances' criterion was satisfied in the present case. The applicant states that it made extensive efforts in order to submit contemporaneous documents, which were subsequently cited in the contested decision, although it had sold ICI Acrylics five years before the start of the investigation, it had no knowledge of the facts of the investigation and was excluded from the investigation until a very late stage and was placed at a disadvantage in the leniency process for 'no legitimate reason'.

264 In that regard, it is sufficient to note that, as is apparent from the foregoing, the applicant has failed to invalidate the Commission's assessment that, out of a total of 168 documents provided to the Commission, some were of use in terms of background information only, for example, on some aspects of implementation of the cartel, but none enabled the Commission to prove the facts, in view of the information already in its possession (recital 419 of the contested decision).

265 The reply to the question whether the circumstances of the present case are so 'exceptional' that they justify a reduction of the fine outside the scope of the Leniency Notice must take account of the quality and objective usefulness of the information provided for the investigation (see, to that effect, the case-law set out in paragraphs 181 to 183 above).

266 It is apparent from the foregoing that the usefulness of the information supplied by the applicant was very limited since, in particular, it did not enable the Commission to establish the existence, extent or duration of the infringement (see, to that effect and by analogy, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 259 above, paragraphs 302 and 311).

267 In those circumstances, the matters raised by the applicant and restated in paragraph 263 above cannot justify a reduction of the fine on the basis of its cooperation with the Commission. Moreover, the applicant is wrong to submit that the late submission of its application under the Leniency Notice was attributable to the Commission's conduct (see paragraphs 212, 216 and 217 above).

268 Lastly, it is necessary to examine the applicant's argument that, by refusing to take the applicant's cooperation into account, the Commission breached the principle of equal treatment, since it treated the applicant in the same way as the cartel participants which had not cooperated, although the latter were not in comparable situations.

269 In this respect, it should be observed that, in the context of the appraisal of the cooperation shown by undertakings, the Commission is not entitled to disregard the principle of equal treatment (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 259 above, paragraph 308 and the case-law cited).

270 That principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63 and the case-law cited).

271 The applicant has failed to establish a breach of that principle in the present case.

272 First, the applicant does not challenge the Commission's assertion that it treated the applicant in the same way as all the other cartel participants that submitted an application under the Leniency Notice, by assessing the evidence provided by each of them.

273 Second, the applicant fails to establish that it was in a situation different from that of Barlo, namely the only addressee of the contested decision which did not submit such an application and which, like the applicant, did not receive any reduction of the fine in respect of cooperation with the Commission. On the contrary, the documents before the Court show that, just like Barlo, the applicant did not provide information whose usefulness would have justified a reduction of the fine. It must therefore be stated that the applicant was in a comparable situation to Barlo, in the light of the objective pursued by the reduction of the fine which it claims in this plea, and that it received, in this respect, the same treatment.

274 Moreover, and in so far as is relevant, it is apparent from Case T-208/06 *Quinn Barlo and Others* v *Commission* [2011] ECR II-7953, paragraph 274, that Barlo also cooperated, to a certain extent, with the Commission, although that cooperation did not justify a reduction of the fine.

275 It follows that the second part of the plea must be rejected in so far as it seeks to support the application for annulment of Article 2 of the contested decision.

276 Moreover, for the aforementioned reasons, the matters raised by the applicant in the fifth plea do not justify a reduction of the fine for its cooperation with the Commission, on the basis of the exercise of the Court's unlimited jurisdiction.

277 Accordingly, in the light of the foregoing, the Court must reject the fifth plea in its entirety.

Sixth plea, raised at the hearing in respect of the Court's unlimited jurisdiction, alleging that the duration of the proceedings has been excessive

278 The applicant claims that the duration of the administrative procedure and the judicial proceedings as a whole have exceeded a reasonable period of time, in breach of its fundamental rights enshrined in particular in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. The applicant states that the first measure adopted in relation to it in this case dates back to 29 July 2004 and that, on the day of the hearing, on 8 November 2011, it was still awaiting delivery of the Court's judgment.

279 Moreover, the applicant specifically criticises the duration of the proceedings before the Court between the end of the written procedure and the decision to open the oral procedure. The applicant states that it is not aware of any circumstances justifying that duration.

280 Consequently, relying on the judgment in *Baustahlgewebe* v *Commission*, paragraph 53 above, and the Opinion of Advocate General Kokott in the judgments of 25 October 2011 in Case C-109/10 P *Solvay* v *Commission* [2011] ECR I-10329 and Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, the applicant submits that the excessive length of the proceedings should lead to a reduction of the fine imposed on it in the contested decision.

281 The Commission claims that certain circumstances may justify the length of the proceedings. In any event, the Commission submits that this plea cannot be directed against the contested decision and that the length of the administrative procedure cannot be considered excessive. It also observes that the applicant's arguments are not sufficiently clear.

282 In this respect, it should be recalled that Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

283 As a general principle of European Union law, such a right is applicable in the context of proceedings brought against a Commission decision. That right has, moreover, been reaffirmed in Article 47 (relating to the principle of effective judicial protection) of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraphs 178 and 179 and the case-law cited).

284 Moreover, according to settled case-law, the principle of reasonable time is also applicable in the context of administrative procedures relating to competition policy before the Commission (see Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 35 and the case-law cited). It has been reaffirmed as such in Article 41(1) of the Charter of Fundamental Rights of the European Union, according to which every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

285 Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union thus contain two expressions of one and the same principle of procedural law, namely that a person is entitled to expect a decision within a reasonable time.

286 In the present case, although the applicant claims that that principle has been infringed, it does not claim that the duration of the proceedings had any effect on the content of the contested decision or that it might have affected the result of this case. In particular, it does not claim that that duration had any effect on its ability to defend itself, either during the administrative or the judicial proceedings. Moreover, it is not seeking annulment of the contested decision on account of the alleged infringement.

287 By contrast, the applicant requests that the Court take into account the excessive length of the proceedings in the exercise of its unlimited jurisdiction and to reduce the fine on that ground, as the Court of Justice did in *Baustahlgewebe* v *Commission*, paragraph 53 above.

288 The Court observes that *Baustahlgewebe* v *Commission*, paragraph 53 above, upon which the applicant relies, concerned an appeal brought against a judgment in which the General Court had imposed a fine on the appellant for infringement of the competition rules, in exercise of the unlimited jurisdiction which it enjoys for that purpose and which the Court of Justice itself may exercise when it sets aside such a judgment of the General Court and rules on the action (Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 206).

289 In paragraph 33 of *Baustahlgewebe* v *Commission*, paragraph 53 above, the Court of Justice noted the appellant's right to fair legal process within a reasonable period and in particular to a decision on the merits of the allegations of infringement of competition law made against it by the Commission and of the fines imposed on it (*FIAMM and Others* v *Council and Commission*, paragraph 288 above, paragraph 207).

290 After holding that such a period had, in that case, been exceeded by the General Court, the Court of Justice decided, for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, that in the circumstances the requisite reasonable satisfaction could be granted by setting aside and varying, solely in relation to determination of the amount of the fine, the judgment of the General Court (*Baustahlgewebe* v *Commission*, paragraph 53 above, paragraphs 47, 48 and 141, and *FIAMM and Others* v *Council and Commission*, paragraph 288 above, paragraph 208).

291 The Court takes the view that that approach is applicable by analogy in the present case.

292 It must be recalled that, in the present case, the Court has unlimited jurisdiction, under Article 31 of Regulation No 1/2003, pursuant to Article 261 TFEU, and that the applicant claims that the Court should exercise that unlimited jurisdiction.

293 As has already been held, that unlimited jurisdiction authorises the Court to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine imposed (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 97 above, paragraph 692; *Prym and Prym Consumer* v *Commission*, paragraph 112 above, paragraph 86, and *JFE Engineering and Others* v *Commission*, paragraph 54 above, paragraph 577).

294 Thus, if an infringement of the principle of reasonable time were to be established in the present case, including, if applicable, on account of the duration of the legal proceedings before the Court, the latter would be able, by variation of the contested decision, to order the applicants to pay a sum from which reasonable satisfaction on account of the duration of the proceedings could, where appropriate, be subtracted (see, to that effect and by analogy, *FIAMM and Others* v *Council and Commission*, paragraph 288 above, paragraph 210).

295 Such exercise of the Court's unlimited jurisdiction would be necessary inter alia for reasons of procedural economy and in order to guarantee an immediate and effective remedy against such an infringement of the principle of reasonable time (see, to that effect and by analogy, *Baustahlgewebe* v *Commission*, paragraph 53 above, paragraph 48).

296 It follows that the Court has jurisdiction in the present case to adjudicate on the applicant's express request for a reduction of the fine in respect of the excessive duration of the proceedings, including in so far as that request concerns the duration of the proceedings before the Court (see also, to that effect, the Opinion of Advocate General Kokott in Case C-109/10 P *Solvay* v *Commission*, paragraph 280 above, points 243 and 275, and in Case C-110/10 P *Solvay* v *Commission*, paragraph 280 above, points 86 and 118).

297 Moreover, the Court emphasises that this plea concerns the overall duration of the proceedings in relation to the applicant, namely the combined duration of the administrative and judicial proceedings. In those circumstances, even if this plea was put forward only at the hearing, it cannot be regarded as inadmissible on the ground that it is out of time, including in so far as it concerns the duration of the administrative procedure. The overall duration of the proceedings constitutes a new matter of fact justifying, pursuant to Article 48(2) of the Rules of Procedure, the introduction of that plea in the course of proceedings.

298 In that regard, it should be borne in mind that the duration of the proceedings criticised by the applicant ran from 29 July 2004, the date of the first measure of inquiry sent to the applicant in the context of the Commission's investigation, until 8 November 2011, the date of the hearing in this case. The duration is therefore approximately seven years and four months.

299 The reasonableness of that period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the person concerned and of the competent authorities (*Baustahlgewebe* v *Commission*, paragraph 53 above, paragraph 29, and *FIAMM and Others* v *Council and Commission*, paragraph 288 above, paragraph 212).

300 The Court would point out that that overall duration criticised by the applicant can be divided into two phases which are clearly separate, namely the administrative procedure before the Commission and the proceedings before the Court.

301 First, with respect to the administrative procedure, the applicant has failed to explain how its duration could as such be considered excessive.

302 In any event, in the case of the applicant, that duration (approximately one year and ten months, between 29 July 2004 and the date of the adoption of the contested decision, on 31 May 2006) cannot be regarded as excessive in the circumstances of the present case. It is sufficient to note, in this respect, that the investigation involved a large number of undertakings and required the examination of a large number of issues of fact and law. Moreover, the description of the procedure of the Commission in recitals 79 to 93 of the contested decision does not reveal any unjustified periods of inactivity.

303 In the second place, it is appropriate to examine the duration of the judicial proceedings in the light of the relevant circumstances of the present case (see paragraph 299 above).

304 With respect to the issue of the importance of the case for the applicant, it must be stated that it does not put forward any arguments in this regard.

305 In any event, it should be recalled that, in the present case, the applicant is not seeking annulment of Article 1 of the contested decision, in so far as it holds the applicant liable for infringement of Article 81 EC. Thus, the applicant has not requested that the Court adjudicate on the merits of the allegations made against it by the Commission and the case does not therefore relate to the issue of whether or not there was an infringement of the competition rules (see, to that effect and by analogy, *Baustahlgewebe* v *Commission*, paragraph 53 above, paragraphs 30 and 33, and *Der Grüne Punkt — Duales System Deutschland* v *Commission*, paragraph 283 above, paragraph 186).

306 Thus, the only matter at stake in this case for the applicant is the fine imposed on it pursuant to the contested decision. However, the Court emphasises that the applicant has not put forward any argument enabling the importance of that factor for it to be assessed.

307 Moreover, even though, in its form of order, the applicant seeks the annulment of Article 2(c) of the contested decision (see paragraph 36 above), it must be stated that the pleas relied on in support of this action, even if they were all founded, would not be capable of resulting in the fine being simply set aside, but only in a reduction of the fine.

308 It has not therefore been established that the case is of significant importance for the applicant.

309 As regards the applicant's conduct, this did not contribute significantly to the duration of the proceedings.

310 With respect to the conduct of the competent authorities and the complexity of the case, the Court finds that the duration of the period between the end of the written procedure on 11 April 2007 and the date on which the oral procedure opened, on 15 September 2011, (approximately four years and five months) is considerable.

311 None the less, that duration can be explained by the circumstances and complexity of the case.

312 Thus, it should be recalled that, in the contested decision, the Commission found that 14 companies, making up 5 undertakings for the purposes of competition law, infringed Article 81 EC by a complex of anti-competitive agreements and concerted practices in the methacrylates industry (see paragraphs 1 to 4 above). The applicant's action is one of five actions against the contested decision, which were brought in two different languages of the case.

313 Those actions raised a significant number of factual and legal issues, which required thorough investigation by the Court. This was reflected inter alia in measures of organisation of procedure adopted in each of those cases, and the reopening of the oral procedure in one of them.

314 Moreover, the connexity of the subject-matter of those actions required that their examination was in part parallel. None the less, with the exception of a closer connexity between two of those actions (Cases T-206/06 and T-217/06), each of those actions raised different factual and legal issues and synergies were therefore limited. Five judgments have thus been delivered by the Court, this one being the last of that group, the others being the judgments of 7 June 2011 in Case T-206/06 *Total and Elf Aquitaine* v *Commission*, not published in the ECR, *Arkema France and Others* v *Commission*, paragraph 171 above, of 15 September 2011 in Case T-216/06 *Lucite International and Lucite International UK* v *Commission*, not published in the ECR, and *Quinn Barlo and Others* v *Commission*, paragraph 274 above.

315 Moreover, the thorough investigation of this case has inter alia enabled this judgment to be delivered within a relatively short period after the oral procedure was closed on 15 December 2011, notwithstanding the linguistic constraints imposed on the Court by reason of the Rules of Procedure.

316 Thus, the overall duration of the judicial proceedings has been five years and nine months.

317 Given that the applicant has not put forward any argument as regards the importance for it of this case, and in view of the matters set out in paragraphs 305 to 308 above, which indicate that the case did not, by its nature or its importance for the applicant, require that it be dealt with particularly expeditiously, that duration is not capable, in the circumstances of the present case, of justifying the reduction of the fine sought.

318 That finding applies a fortiori with respect to the overall duration of the administrative procedure and the judicial proceedings which is the subject of this plea (see paragraphs 297 and 298 above). The overall duration cannot be regarded as excessively long in view of the circumstances examined above.

319 Accordingly, the Court must reject this plea and dismiss the action in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Imperial Chemical Industries Ltd to pay the costs.

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 5 June 2012.

[Signatures]

Table of contents

Background to the dispute 1

Procedure and forms of order sought 4

Law 5

First plea: the evidence of the applicant's participation in the infringement relating to PMMA moulding compounds is insufficient 5

Second plea: failure of the contested decision to state reasons as regards the 'basic amount' of the fine . 13

Third plea: the Commission failed to fulfil its obligation to apportion the 'basic amount' between the applicant and Lucite 14

Fourth plea: the increase of the starting amount of the fine for deterrence is inappropriate 18

First part of the plea: failure by the Commission to take account of the applicant's actual financial capacity 18

Second part of the plea: breach of the principles of proportionality and equal treatment 21

Fifth plea: the refusal to grant a reduction of the fine to take account of the applicant's cooperation with the Commission is unjustified 23

First part of the plea, concerning the refusal to grant a reduction of the fine under the Leniency Notice 23

– The incorrect assessment of the added value of the evidence in the application under the Leniency Notice 23

– The Commission's responsibility for the applicant's delay in supplying documents by comparison with the other undertakings concerned 26

Second part of the plea, concerning the refusal to recognise the merits of the applicant's cooperation outside the scope of the Leniency Notice 32

Sixth plea, raised at the hearing in respect of the Court's unlimited jurisdiction, alleging that the duration of the proceedings has been excessive 34

Costs 38