JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
20 March 2002 *

In Case T-31/99,

ABB Asea Brown Boveri Ltd, established in Zurich (Switzerland), represented by A. Weitbrecht and S. Völcker, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Oliver and É. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for, primarily, annulment of Article 3 of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1) or, in the alternative, reduction of the fine imposed on the applicant by that decision,

* Language of the case: English.

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2000,

gives the following

Judgment

Facts of the case

1 The applicant is a multinational group active in the power generation sector, the power transmission and distribution sector, the industrial and building systems sector and the transportation sector. In the ABB Asea Brown Boveri Ltd group ('the ABB group'), the district heating business involves the Danish undertaking

ABB IC Møller A/S ('ABB IC Møller'), located in Fredericia (Denmark), and other production and/or distribution undertakings in Germany, Finland, Poland and Sweden.

2 to 7 ...

8 On 21 October 1998, the Commission adopted Decision 1999/60/EC relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), corrected before publication by a decision of 6 November 1998 (C(1998) 3415 final) ('the decision' or 'the contested decision') finding that various undertakings and, in particular, the applicant had participated in a series of agreements and concerted practices within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC) (hereinafter 'the cartel').

9 According to the decision, at the end of 1990 an agreement was reached between the four Danish producers of district heating pipes on the principle of general cooperation on their domestic market. The parties to the agreement were ABB IC Møller, Dansk Rørindustri A/S, also known as Starpipe ('Dansk Rørindustri'), Løgstør Rør A/S ('Løgstør') and Tarco Energi A/S ('Tarco') (the four together being hereinafter referred to as 'the Danish producers'). One of the first measures was to coordinate a price increase both for the Danish market and for the export markets. For the purpose of sharing the Danish market, quotas were fixed and then implemented and monitored by a 'contact group' consisting of the sales managers of the undertakings concerned. For each commercial project ('project'), the undertaking to which the contact group had assigned the project informed the other participants of the price it intended to quote and they then submitted tenders at a higher price in order to protect the supplier designated by the cartel.

10 According to the decision, two German producers, the Henss/Isoplus group ('Henss/Isoplus') and Pan-Isovit GmbH, joined in the regular meetings of the Danish producers from the autumn of 1991. In those meetings negotiations took place with a view to sharing the German market. In August 1993, these negotiations led to agreements fixing sales quotas for each participating undertaking.

11 Still according to the decision, agreement was reached between all those producers in 1994 to fix quotas for the whole of the European market. This European cartel involved a two-tier structure. The 'directors' club', consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each of those undertakings in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, 'contact groups' consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 With regard to the German market, the decision states that following a meeting between the six main European producers (the applicant, Dansk Rørindustri, Henss/Isoplus, Løgstør, Pan-Isovit and Tarco) and Brugg Rohrsysteme GmbH ('Brugg') on 18 August 1994, a first meeting of the contact group for Germany was held on 7 October 1994. Meetings of this group continued long after the Commission carried out its investigations at the end of June 1995 although, from that time on, they were held outside the European Union, in Zurich. The Zurich meetings continued until 25 March 1996.

13 As a characteristic feature of the cartel, the decision refers in particular to the adoption and implementation of concerted measures to eliminate Powerpipe, the only major undertaking which was not a member. The Commission states that certain members of the cartel recruited key employees of Powerpipe and gave

Powerpipe to understand that it should withdraw from the German market. Following the award to Powerpipe of an important German project, a meeting is said to have taken place in Düsseldorf in March 1995 which was attended by the six major producers and Brugg. According to the Commission, it was decided at that meeting to organise a collective boycott of Powerpipe's customers and suppliers. The boycott was subsequently implemented.

14 In the decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

15 On those grounds, the operative part of the decision is as follows:

'*Article 1*

ABB Asea Brown Boveri Ltd, Brugg Rohrsysteme GmbH, Dansk Rørindustri A/S, Henss/Isoplus Group, Ke Kelit Kunststoffwerk GmbH, Oy KWH Tech AB, Løgstør Rør A/S, Pan-Isovit GmbH, Sigma Tecnologie Di Rivestimento S.r.L. and Tarco Energie A/S have infringed Article 85(1) of the Treaty by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the pre-insulated pipes sector which originated in about November/December 1990 among the four Danish producers, was subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market.

The duration of the infringements was as follows:

— in the case of ABB,... from about November/December 1990 to at least March or April 1996,

...

The principal characteristics of the infringement consisted in:

— dividing national markets and eventually the whole European market amongst themselves on the basis of quotas,

— allocating national markets to particular producers and arranging the withdrawal of other producers,

— agreeing prices for the product and for individual projects,

— allocating individual projects to designated producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question,

— in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to hinder its commercial activity, damage its business or drive it out of the market altogether.

...

Article 3

The following fines are hereby imposed on the undertakings named in Article 1 in respect of the infringements found therein:

(a) ABB Asea Brown Boveri Ltd, a fine of ECU 70 000 000;

...'

16 to 22 ...

Substance

23 The applicant relies in essence on five pleas in law. The first plea alleges factual errors in applying Article 85(1) of the EC Treaty. The second alleges infringement of the rights of defence. The third alleges infringement of the principle of sound administration. The fourth alleges infringement of general principles and factual errors in determining the fine. The fifth alleges that the obligation to state reasons was infringed in connection with the determination of the fine.

First plea in law, alleging factual errors in applying Article 85(1) of the Treaty

Arguments of the parties

24 The applicant criticises the Commission for failing to prove its assertions concerning the involvement of the ABB group's senior management in the cartel and concerning the use of its resources as a multinational company to reinforce the effectiveness of the cartel.

25 First, the applicant disputes the Commission's allegation that the cartel represented a strategic plan 'conceived, approved and directed at a senior level of group management'. First, the conception of the cartel cannot be attributed to the senior management of the ABB group. The most senior manager involved in the cartel was at the time the President of the Danish subsidiary Asea Brown Boveri A/S Odense ('ABB Odense'), Mr V., who only became an executive

vice-president of the group in January 1993, whereas the first agreement of the cartel was concluded at the end of 1990. Second, there is no evidence that any member of the board of directors of the group other than Mr V. was involved in the matter. Mr V. could not approve a measure which he himself had allegedly 'conceived'. Third, although Mr V. was kept informed of certain activities of the cartel after becoming an executive vice-president, he did not participate in the cartel to the extent of being able to 'direct' it. Last, within the ordinary meaning of the expression, 'group management' involves managers who are responsible for more than one business area, which was not the case for Mr V. before he was appointed an executive vice-president of the group or for the successive managing directors of ABB IC Møller.

26 Next, the Commission has adduced no evidence that the senior group management took measures to deny and conceal the infringement and to continue its operation after the Commission had commenced its investigation. The applicant refers, in that regard, to the steps taken by the senior group management *vis-à-vis* the district heating division, which showed that the senior group management was deceived by the district heating management.

27 Last, there is no evidence in the case-file that the applicant, as a multinational group, used its resources and activities outside the district heating market to reinforce the effectiveness of the cartel or to ensure the compliance of the members of the cartel. The only economic influence that the district heating division used to implement the cartel arose from its position in the market and not from any subsidy by or assistance from group management or resources.

28 In that regard, the applicant disputes the facts cited by the Commission before the Court as evidence that it used, or threatened to use, its economic power. As regards the plan to employ one of Powerpipe's key employees, who was eventually employed as a 'consultant' in the applicant's lobbying office in

Brussels, in activities unconnected with district heating, the applicant states that this was indeed a step that formed part of a common agreement between it and Løgstør. The reason why the person concerned was eventually employed outside the district heating sector was that Powerpipe had objected, invoking the clause in his contract which prohibited him from competing with his former employer. As regards the threats of legal action and the reference to 'reprisals', it is necessary to take account of the fact that ABB's legal counsel, who had signed the letter sent to Powerpipe in Annex 17 to the statement of objections, was at the time convinced, having himself been deceived by the district heating division, that Powerpipe's allegations were unfounded and that he was acting in the legitimate interest of the undertaking.

29 As explained in point 169 of the decision, it was on the basis of all those disputed allegations that the Commission, in the decision, increased the fine in order to ensure that it was sufficiently dissuasive in the light of the alleged involvement of the senior group management. Contrary to what the defendant claims, point 169 of the decision is not therefore intended to establish the applicant's responsibility as a group. The questions raised by the responsibility of the group, in particular the determination of the addressee of the decision and the relevance of the turnover of the district heating division for the purposes of Article 15(2) of Regulation No 17, are specifically dealt with elsewhere in the decision.

30 The defendant observes, as regards the involvement of ABB senior management, that the file provides ample evidence of the direct involvement in the cartel's activities of managers who must be regarded as belonging to a senior level of group management. That is the case not only of Mr V. but also of the two persons who successively held the post of managing director of ABB IC Møller, the company leading the district central heating business activity, involving more than 30 undertakings in the ABB group, including, *inter alia*, ABB Isolrohr GmbH, the main subsidiary of the group in Germany.

31 According to the defendant, the decision does not claim to demonstrate that the entire group executive committee is charged with managing the cartel, as the applicant seeks to show. The only question dealt with in the decision is whether highly placed executives, who may reasonably be regarded as occupying senior management responsibilities within the ABB group, approved and were involved in the conception and direction of the cartel. In that regard, the decision provided sufficient evidence. The applicant's attempt to minimise the involvement in the cartel of the most senior levels of management within the group serves little purpose, since the applicant does not dispute the conclusion drawn from such involvement, namely the attribution of responsibility to the whole ABB group.

32 As regards the applicant's use of its economic power as a multinational undertaking, the decision does not state that the applicant used resources attributable to business areas other than district heating. It only states the undisputed fact that the applicant put its economic power and resources as a major multinational company to work for the cartel. Even if the applicant's interpretation is accepted, the decision gave a number of examples of the use of or threats to use the applicant's economic power.

Findings of the Court

33 The Commission's allegations concerning the role played in the cartel by the highest level of group management are sufficiently supported by the evidence adduced by the Commission, in particular as regards the role played by Mr V., who was initially responsible for the ABB group's activities in Denmark as President of ABB Odense and, from November 1992, as an executive vice-president of the ABB group, and as regards the conduct of the successive managing directors of ABB IC Møller.

34 In that regard, the applicant does not dispute the Commission's assertions concerning the role played in the cartel by each of the abovementioned executives, but contends that they are not all part of the ABB group management.

35 Contrary to what the applicant claims, however, the expression 'group management' cannot be limited only to the management responsible for more than one of the group's business areas. In the structure of the ABB group as explained by the applicant, the district heating sector is not completely autonomous, since all the undertakings active in that sector operate, in commercial terms, under a director responsible for the district heating sector, who is at the same time Managing Director of ABB IC Møller, while they are also subordinate to the main ABB subsidiary in their country or region. In those circumstances, both the persons responsible for ABB's activities in a country or region and the person responsible within the ABB group for the commercial management of all district heating undertakings may be considered to form part of the ABB group management. Furthermore, it is apparent from the ABB group's annual reports that both the managers responsible for a country or a region and the managers responsible for all the undertakings active in a specific sector are referred to in the list of the 'management' of the ABB group.

36 The designation of the managing directors of ABB IC Møller as belonging to the ABB group management is not contradicted by the fact that, in the organisation of the ABB group, the district heating division is generally directly responsible to a member of the executive committee, in particular Mr V. The additional responsibility of a member of the most senior body of ABB cannot prevent the managers directly responsible within the group for all the undertakings active in a specific sector from also being considered to form part of the group management.

37 Since not only Mr V., as an executive vice-president of the ABB group, but also the successive managing directors of ABB IC Møller and also Mr V. prior to his

appointment to the Executive Committee of the ABB group, when he was responsible for ABB's activities in Denmark, performed duties at ABB group management level, the applicant cannot rely on the fact that Mr V. was the only member of the ABB group Executive Committee responsible for district heating in order to substantiate its claim that the cartel cannot have been conceived, approved and directed at senior group management level.

38 As regards the measures taken within the ABB group management to deny or conceal the existence of the cartel, even after the investigations, it should be observed, first of all, that the applicant does not deny that the managing director of ABB IC Møller represented ABB at the directors' meetings which continued until March 1996. As the applicant itself has stated, it was decided at a directors' meeting held after the Commission had carried out its investigations that the date and place of the meetings would be kept secret and that all meetings of the directors' club would be held outside the European Union (applicant's reply of 13 August 1996 to the request for information of 13 March 1996). The applicant's statement should be read in conjunction with Løgstør's statement that, after the investigations, there was 'strong pressure by ABB to maintain the agreement' and that 'all the others were afraid' (Løgstør's comments on the statement of objections). Mr V. continued to be informed of the cartel's activities even after being appointed to the ABB Executive Committee, as may be seen from ABB internal memoranda sent on 19 and 22 April and 2 July 1993 (annexes 26, 29 and 48 to the statement of objections). As regards the concerted measures against Powerpipe, it is apparent from the letters of 4 March and 2 May 1994 from Mr V. to Powerpipe, in reply to the allegations concerning ABB's anti-competitive activities of which Powerpipe was the victim, that Mr V. continued to deny the existence of such anti-competitive activities (annexes 2 and 7 to the statement of objections). In addition, it is apparent from the faxes in annexes 11, 13 and 16 to the statement of objections that in December 1994 Mr V. was involved in drafting ABB's response to the allegations of Powerpipe's lawyers, denying that the undertaking's activities were anti-competitive. Consequently, both the managing director of ABB IC Møller and Mr V. were involved, as members of the ABB group senior management, in the attempts to deny or conceal the cartel.

39 It follows from the foregoing that the Commission was correct to find, in points 121 and 169 of the decision, that the applicant's participation in the cartel was conceived, approved and directed at a senior level of ABB group management, as were the measures to deny or conceal the existence of the cartel and to continue its operation after the investigation. The assertion that group management had already instructed the district heating division in November 1995 to comply with the competition rules cannot invalidate that finding.

40 As regards the applicant's use of its economic power and its resources as a multinational company, it is sufficient to observe that the decision cites a number of facts, not disputed by the applicant, which testify to the applicant's use of its economic power, in particular during its attempts to obtain shareholdings in other undertakings present in the sector (points 37, 46, 48, 91 and 106 of the decision).

41 In addition, it is apparent from the file, as stated in point 156 of the decision, that the applicant's efforts to eliminate Powerpipe and to secure the interests of the cartel were exerted through companies outside the district heating sector.

42 In that regard, it should be observed, first of all, as regards the recruitment of one of Powerpipe's key employees, that it is apparent from the ABB internal memorandum in annex 27 to the statement of objections that the initial plan was to employ that person in a Spanish subsidiary of ABB which had no connection with the district heating sector. Even though it had been impossible to employ that person in the district heating sector owing to his contractual obligations, the fact remains that the members of the applicant's staff who, within the district heating sector, were making arrangements for his employment must have known that other undertakings in the ABB group were prepared to lend their support.

43 Second, the district heating division's activities against Powerpipe were continued and supported by persons in undertakings which, according to the structure of the ABB group, did not form part of the district heating division. First of all, it follows from the correspondence in annexes 9, 11, 13, 15 and 16 to the statement of objections that the position adopted by ABB during contacts with Powerpipe was coordinated not only with Mr V. and the managing director of ABB IC Møller but also with a person in the German subsidiary Asea Brown Boveri AG Mannheim. Similarly, the letters in annexes 144 and 146 to the statement of objections show that a member of the management of that German subsidiary intervened, in March 1995, in relation to the award of the Leipzig-Lippendorf project, to advise the awarding body not to award it to Powerpipe. Last, the fax in annex 159 to the statement of objections shows that the person hired from Powerpipe, even after being employed in an ABB transport division in Belgium, continued to monitor Powerpipe's activities with a view to keeping the managing director of ABB IC Møller informed of those activities. Although it is true that the person concerned had been active in the district heating sector and that ASA Brown Boveri AG Mannheim was an undertaking acting in Germany as the parent company of the ABB undertakings active in the German district heating market, the fact remains that the activities against Powerpipe were continued by members of the staff of ABB undertakings whose business was not district heating.

44 It must therefore be concluded that the Commission was correct to find, in point 169 of the decision, that the applicant systematically used its economic power and resources as a major multinational company to reinforce the effectiveness of the cartel and to ensure that other undertakings complied with its wishes.

45 The plea must therefore be rejected.

46 to 90 ...

Third plea in law, alleging infringement of the principle of sound administration

Arguments of the parties

91 The applicant states that the requirements of good administrative practice, objectivity and impartiality should form the guidelines for dealing with competition cases. However, it maintains that the Commission's principal case officer exhibited a fundamental bias against the applicant throughout the proceeding, a bias which found its manifestation in the decision as adopted by the College of Commissioners. To that effect, the applicant cites a number of facts which, it alleges, show bias on the part of the principal case officer.

92 First, in the spring of 1996, at the end of a meeting with representatives of Løgstør, that official assured them that Løgstør had nothing to fear, since ABB was the principal target of the investigation.

93 Second, at the beginning of the oral hearing on 24 November 1997, the same official gratuitously singled out the applicant for special opprobrium, when he said: 'ABB prides itself on its reputation as Europe's most respected company... It may be that after the events of this case become generally known they are going to have to work very hard indeed to ensure that reputation is maintained.' At the hearing the official also asked the applicant a number of pointless questions which could only be regarded as an attempt to embarrass it in that forum.

94 Third, on 9 November 1998, even before the Commission had served the text of its decision on ABB IC Møller, that official made derogatory remarks in the

course of a presentation at a conference on competition law. During his presentation on the pre-insulated pipes case, he observed that the acronym ABB would take on a new meaning: 'A Bad Business'. The Director-General of the Directorate-General for Competition later apologised for that incident. In that regard, the defendant's explanation that 'A Bad Business' was the title of an article previously published in *The Parliament* is irrelevant, since the standard of conduct of a journalist cannot be compared to that of Commission officials discussing a case in their official capacity.

95 It is of no avail to argue that that incident took place after the decision had been adopted, since it is mentioned not as a procedural defect but as evidence of persistent bias on the part of the principal case officer throughout the procedure leading to the contested decision.

96 According to the applicant, the decision of the College of Commissioners was influenced by the bias of the case officer. Thus, certain defects in the decision can probably be explained by that official's zeal in singling out the applicant for punishment. On that point, the applicant observes, first of all, that the decision treats ABB as the only multinational involved although three other undertakings, Oy KWH Tech AB ('KWH'), Pan-Isovit and Sigma Tecnologie di rivestimento Srl ('Sigma') also form part of large international groups and although, in Pan-Isovit's case, the file shows that members of its senior management participated in the cartel. Furthermore, the decision contains unsupported and misleading errors concerning the participation of members of ABB senior group management which were designed to influence the College of Commissioners against the applicant and to induce them to impose an extremely high fine on it. Having regard to the evidence adduced of the bias of the case officer and to the expression of that bias in the decision, it is for the Commission to show that the bias had no effect on the decision adopted by the College of Commissioners.

97 The defendant observes that, even if the facts mentioned are correct, it cannot find any bias in them. As regards the remarks to which the applicant refers, the remark made at the conference was made after the decision had been adopted and cannot therefore have affected its contents or its validity: and not only was the remark 'A Bad Business' merely the title of an article published previously, but that article had been expressly referred to during the conference.

98 In any event, the applicant has failed to point to any illegality in the decision that would result from the alleged bias. The findings of the Commission in the decision and the fines imposed on the participants in the cartel are the consequence of their own behaviour and are justified by facts and circumstances which are fully supported by the file.

Findings of the Court

99 The guarantees conferred by the Community legal order in administrative proceedings include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86, Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 34, and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision* v *Commission* [1996] ECR II-649, paragraph 93).

100 In that context, it is clear from the minutes of the hearing that while being heard on 24 November 1997 the applicant was subject to a derogatory remark concerning its reputation and to a series of tendentious questions about facts which it no longer disputed, all on the part of a Commission official dealing with the case which led to the contested decision. It is not disputed that, at a conference on issues of competition law held on 9 November 1998, the same

official expressed his views using a quotation casting discredit on the applicant's activities.

101 It is true that those remarks show regrettable behaviour and language on the part of a member of the team responsible, within the Commission, for dealing with the present case. That is confirmed, moreover, by the fact that the Commission's Director-General for Competition apologised to the applicant following the remark made at the conference on 9 November 1998.

102 However, such remarks, however regrettable they may be, are not of such a kind as to cast doubt on the degree of care and impartiality with which the Commission conducted its investigation into the infringement committed by the applicant. The same would apply to the comment which the same official is alleged to have made to representatives of Løgstør, if it were proved, although the applicant has adduced no evidence that that comment was made.

103 Furthermore, as regards the remark made at the conference on 9 November 1998, even though the decision had not yet been served on the applicant when that conference took place, it had already been adopted. It follows from the case-law that the validity of a decision cannot be affected by acts subsequent to its adoption (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 15 and 16).

104 In so far as the applicant claims to see evidence of bias against it in the general remarks made by that official, regrettable conduct on the part of a member of the team dealing with a case does not in itself vitiate the legality of the decision adopted in that case. Even if that official did infringe the principle of sound

administration, the contested decision was not adopted by the official in question but by the College of Commissioners.

105 In any event, the matters raised by the applicant are not of such a kind as to demonstrate that if the official concerned was biased against the applicant, that bias was reflected in the actual decision. First, as regards the allegation that senior ABB group management participated in the cartel, it is sufficient to refer to paragraphs 33 to 44 above, where it was established that the allegation is supported by the evidence gathered by the Commission. Second, as regards the fact that the Commission considered that ABB was the only multinational undertaking involved in the case, it must be pointed out that since the Commission did not find sufficient evidence to attribute the infringement to the groups to which KWH, Pan-Isovit and Sigma belong, it is for the applicant, which maintains that the involvement of such groups is evident from the file, to adduce the necessary evidence. However, the applicant has merely claimed, without adducing any evidence, that the senior management of the group to which Pan-Isovit belonged at the material time was informed of and approved the activities of the cartel. As regards the groups to which KWH and Sigma belonged, the applicant has referred to no evidence in the file capable of demonstrating that they were involved in the cartel. In that regard, since the Commission relied on a range of evidence in order to attribute the infringement to the ABB group, as may be seen from points 156 and 169 of the decision, it is not sufficient, in order to extend the responsibility of other participants to their parent companies, to state that they are part of an international group and that they themselves have international activities.

106 Furthermore, when it is established that an undertaking has been involved in a cartel at the level of the group to which it belongs, even evidence of a premature manifestation by the Commission of its conviction that the group in question was involved is not of such a kind as to deprive the actual evidence of such involvement of its reality.

107 For all those reasons, the plea alleging infringement of the principle of sound administration must be rejected.

Fourth plea in law, alleging infringement of general principles and errors of assessment in setting the fine

108 By its fourth plea, the applicant claims that there has been an infringement of the general principles relating to the protection of legitimate expectations, proportionality and equal treatment, and criticises the Commission for incorrectly assessing the duration of the infringement and the aggravating circumstances, the mitigating circumstances and the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the leniency notice').

109 to 225 ...

Misapplication of the leniency notice

— Arguments of the parties

226 The applicant claims that the Commission should have applied the reduction of 50% to which it was entitled under the leniency notice, since it satisfied both

conditions laid down in section D of that notice. As regards the condition that 'before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of an infringement', the Commission itself acknowledges that the applicant assisted materially in establishing the relevant facts, including facts concerning the origins of the cartel in Denmark at the end of 1990, for which the Commission did not have any evidence. As regards the condition that 'after receiving the statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations', the applicant was in fact the only major participant in the cartel not to dispute the facts on which the Commission based its allegations.

227 According to the applicant, the two conditions in section D cannot be regarded as complementary, otherwise there would be no incentive for an undertaking that does not satisfy the conditions in sections B and C of the leniency notice to cooperate with the Commission before the statement of objections is sent. Because it satisfied both conditions set out in section D, the applicant should have obtained a reduction of at least 50%. It is difficult to imagine how the applicant could have been more candid and cooperative or how its candour and cooperation could have been more valuable to the Commission.

228 The applicant challenges the ground stated in the decision for awarding a reduction of only 30% of its fine, in particular the assertion that it began to cooperate only after receiving a request for information in March 1996, nine months after being informed that the Commission had commenced an investigation. First, as regards the point at which it began to cooperate, both conditions of section D of the notice were indeed satisfied. The first condition requires only that cooperation must have taken place before the statement of objections is sent, without reference to the scope of the letters sent pursuant to Article 11 of Regulation No 17. As regards the second condition, the point at which cooperation begins is irrelevant. Second, the decision is inconsistent with

the application of the leniency notice in Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy surcharge) (OJ 1998 L 100, p. 55, 'the alloy surcharge decision'). In that case, undertakings were given a reduction of 40% for their cooperation and their admission of unlawful conduct, although they only cooperated 21 months after learning that the Commission was to carry out an investigation and one year after the Commission had drafted the statement of objections in that case.

229 Last, the applicant observes that it suffered discrimination in so far as it was given a reduction of only 30% of its fine. The same reduction was granted to Løgstør and to Tarco, although those undertakings had disputed much of the evidence of decisive facts that the applicant had admitted. The unequal treatment of the applicant by the Commission is also evident from the fact that the Commission awarded Ke Kelit Kunststoffwerk GmbH a reduction of 20% solely for not having contested the essential facts in the statement of objections. In that regard, the Commission's argument that the applicant cannot rely, in support of its claim, on an unlawful act committed in favour of another is unfounded, since the applicant does not maintain that the participants whose fines were not increased were treated unlawfully.

230 The defendant contends that a reduction of 30% takes objective and due account of the applicant's cooperation in the investigation. It is not true that the decision states only one reason for not granting the maximum reduction, namely the fact that ABB had cooperated only nine months after the investigation. The extent of the reduction depends, however, on the extent to which the cooperation of an undertaking assisted the Commission's investigation. In point 174, the decision stated that the applicant's contribution in establishing the facts did not relate to all the aspects of the cartel and that the Commission also had other evidence of the existence of the cartel before 1994. As regards the fact that the applicant never disputed the facts, although it is not mentioned in point 174 of the decision, it is properly acknowledged in points 26, 119 and 169 of the decision.

231 As regards the applicant's cooperation, the defendant further observes that although the applicant was the first to express its intention to cooperate, it was not the first to provide evidence of the origin of the cartel in 1990. As regards that period, the decision states only that the Commission had not obtained sufficient evidence 'during its investigations' at the premises of the participants. In any event, the Commission obtained a considerable amount of evidence of the cartel as a whole during its investigations. The applicant's attempt to split the infringement into two contradicts the uncontested fact that the cartel constituted a single continuous infringement. The defendant further states that the applicant never provided documentary evidence other than that found at its premises during the investigations.

232 Next, the defendant challenges the calculation method whereby the applicant arrives at a 50% reduction. The 30% reduction granted to the applicant correctly reflects its contribution to the investigation and also the fact that it did not dispute the facts. The defendant states that the two conditions in section D of the notice are largely complementary, since the second condition is in most cases implicit in the first. It is impossible to claim, therefore, that not contesting the facts could lead to a significant increase in the reduction granted to ABB for having helped the Commission to establish the facts. In any event, not contesting the facts justifies only a small reduction when there is little that an undertaking could reasonably contest without contradicting indisputable evidence or eliminating its own contribution to the investigation under the first part of section D of the notice.

233 As regards the alleged discrimination, last, the defendant again asserts that the applicant has not shown that the Commission's assessment of its cooperation in the investigation was manifestly incorrect. The assessment of the reductions to be granted to the other undertakings properly reflects the situation of each undertaking. Although Løgstør may have contested a part of the interpretation of the facts, such as the existence of a continuous cartel throughout the whole period covered by the investigations, it provided essential evidence relating to many important aspects of the case, including the continuation of the cartel after the investigation. Tarco was the first undertaking to provide documentary

evidence of the origin of the cartel in 1990. In any event, even though the reduction granted to other participants in the cartel might be described as overgenerous, observance of the principle of equal treatment must be balanced against observance of the principle of legality, under which no person may rely, in support of his claim, on an unlawful act committed in favour of another.

— Findings of the Court

234 It should be observed at the outset that in the leniency notice the Commission defined the conditions in which undertakings which cooperate with it during the investigation into a cartel may be exempt from a fine or receive a reduction in the fine which they would otherwise have had to pay (see Section A 3 of the leniency notice).

235 It is not disputed that the applicant's case does not fall within the scope of Section B of that notice, which refers to cases where an undertaking has informed the Commission about a secret cartel before the Commission has undertaken an investigation (in which case the fine may be reduced by at least 75%), or within that of Section C of that notice, which concerns an undertaking which has disclosed the secret cartel after the Commission has undertaken an investigation which has failed to provide sufficient grounds for initiating the procedure leading to a decision (in which case the fine may be reduced by between 50% and 75%).

236 The applicant's case comes under section D of the leniency notice, which states that '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would had been imposed if it had not cooperated'. The notice specifies that:

'Such cases may include the following:

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

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

237 In that context, it should be observed, first, that the Commission cannot be criticised for having refused to grant the applicant the full 50% reduction available under section D of the leniency notice by relying, in particular, on the fact that it was necessary to wait until the requests for information had been sent out before the applicant cooperated (third and fourth paragraphs of point 174 of the decision).

238 It is settled case-law that a reduction in the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned made it easier for the Commission to establish an infringement and, as

the case may be, to put an end to it (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36, Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 393; Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 271, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 325). Since, even outside the situations coming under section C of the notice, cooperation on the part of an undertaking before the Commission has issued a request for information may make the Commission's investigation easier, it was perfectly permissible for the Commission not to grant the maximum reduction envisaged by section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information on 13 March 1996, although the investigations at ABB IC Møller's premises had commenced on 29 June 1995.

239 As regards a comparison between the present case and the Commission's previous practice, the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368).

240 However, it is appropriate to consider whether the Commission, in granting the applicant the same 30% reduction as the reduction granted to Løgstør and Tarco, observed the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25, and *BPB de Eendracht* v *Commission*, cited above, paragraph 309).

241 In that regard, the Commission cannot be criticised for having failed to differentiate the extent to which the applicant cooperated from that to which Løgstør and Tarco cooperated in submitting evidence to the Commission. Although it is true that the information provided by ABB did assist materially in the establishment of the relevant facts, in particular as regards the origins of the cartel in Denmark in late 1990, Tarco was the first to provide evidence (Tarco's reply of 26 April 1996 to the request for information of 13 March 1996). Otherwise, it is apparent from the case-file that the information provided by the applicant in its replies to the request for information was considerable but, as regards its contribution to establishing the infringement, no greater than that given by other undertakings, having regard to the evidence available to the Commission after the investigations. Thus, as regards the continuation of the cartel after the investigations, evidence was provided by Løgstør (Løgstør's reply of 25 April 1996 to the request for information of 13 March 1996), while the applicant, after acknowledging in its reply of 4 June 1996 that the infringement was continuing, did not provide more detailed information until its reply of 13 August 1996. As regards the measures against Powerpipe, the Commission was unable to rely on information provided by ABB, but had to rely on the information provided by Powerpipe and on other documents evidencing the approval and implementation of such an arrangement. It follows that the Commission was correct not to differentiate between the reductions for cooperation granted to the applicant, to Løgstør and to Tarco in so far as their communication of evidence to the Commission was concerned.

242 However, the Commission should have differentiated the reduction for cooperation to be granted to the applicant from the reductions granted to Løgstør and to Tarco on the ground that the applicant, after receiving the statement of objections, no longer disputed the findings of fact or their interpretation by the Commission. Having regard to the finding that, on the one hand, the applicant's cooperation in communicating evidence was not significantly different from that given by Løgstør or by Tarco and, on the other hand, the Commission made no further reference, when assessing the applicant's cooperation in point 174 of the decision, to the fact that the applicant did not contest the truth of the facts, the

latter circumstance was not taken into account in calculating the reduction to be granted to the applicant for cooperation.

243 In that regard, the Commission expressly acknowledged, in point 26 of the decision, that on the basis of its observations on the statement of objections, the applicant distinguished itself from the other undertakings in so far as the majority of the undertakings minimised the duration of the infringement and the role they had played and denied having participated in any scheme to damage Powerpipe, with the exception of the applicant, which did not dispute the main facts described by the Commission or the conclusions which it drew. The Commission also stated that, in their observations on the statement of objections, Løgstør and Tarco claimed that there had been no cartel outside the Danish market before 1994 and that, in addition, there had been no continuous cartel, and they denied having participated in or implemented any action designed to eliminate Powerpipe (second paragraph of point 26 and fifth paragraph of point 27 of the decision).

244 Since the Commission did not observe the principle of equal treatment in so far as it should have taken into consideration, when assessing the applicant's cooperation, the fact that the applicant did not dispute the main facts, it must be held that the Commission incorrectly set at 30% the reduction to be granted to the applicant for its cooperation during the administrative procedure.

245 The plea must therefore be upheld in so far as it criticises the Commission for not having granted a reduction greater than 30% of the fine.

246 to 259 ...

Conclusions

260 It follows from the foregoing considerations, in particular paragraphs 240 to 245 above, that the Commission erred in fixing the fine to be imposed on the applicant at ECU 70 000 000.

261 For that reason, the Court, in the exercise of its unlimited jurisdiction within the meaning of Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, considers it proper to reduce the fine imposed by Article 3(a) of the decision, expressed in euro by application of Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), to EUR 65 000 000.

Costs

262 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. Since the action has been only marginally successful, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission and to order the Commission to bear 10% of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Orders that the fine imposed on the applicant by Article 3(a) of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) be reduced to EUR 65 000 000;**

2. **Dismisses the remainder of the application;**

3. **Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;**

4. **Orders the Commission to pay 10% of its own costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung
Registrar

P. Mengozzi
President