JUDGMENT OF THE COURT (First Chamber)

18 May 2006 *

In Case C-397/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged on 19 September 2003,

Archer Daniels Midland Co., established in Decatur (United States),

Archer Daniels Midland Ingredients Ltd, established in Erith (United Kingdom),

represented by C.O. Lenz, Rechtsanwalt, E. Batchelor, L. Martin Alegi and M. Garcia, Solicitors, with an address for service in Luxembourg,

appellants,

* Language of the case: English.

the other party to the proceedings being:

Commission of the European Communities, represented by R. Lyal, acting as Agent, and by J. Flynn QC, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric (Rapporteur), E. Juhász and E. Levits, Judges,

Advocate General: A. Tizzano,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 November 2004,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2005,

gives the following

Judgment

1 By their appeal, Archer Daniels Midland Co. ('ADM Company') and its European subsidiary, Archer Daniels Midland Ingredients Ltd ('ADM Ingredients'), ask the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597; 'the judgment under appeal') in so far as it dismissed their action for annulment in part of Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24; 'the contested decision').

2 By the judgment under appeal, the Court of First Instance inter alia reduced the fine imposed on ADM Company and ADM Ingredients jointly and severally and rejected the main pleas of the applications for annulment of the contested decision.

Legal context

3 Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), entitled 'No punishment without law', provides in paragraph 1:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

4 Under Article 4 of Protocol No 7 to the ECHR, entitled 'Right not to be tried or punished twice':

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

...

3. No derogation from this Article shall be made under Article 15 of the Convention.'

5 Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ English Special Edition 1959-62, p. 87), provides that:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each

of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) or Article [82] of the Treaty; ...

...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

6 The Commission notice, entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3; 'the Guidelines'), states:

'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

7 Under Section 1A, fourth and sixth indents, of the Guidelines:

'It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

...

Where 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.'

Facts

8 The facts underlying the action before the Court of First Instance are set out in the judgment under appeal as follows:

'1 The applicants, [ADM Company] and its European subsidiary [ADM Ingredients], operate in the cereals and oil seed processing sector. They entered the lysine market in 1991.

2 Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs, such as cereals, which contain insufficient natural lysine; this enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals. Feedstuffs to which synthetic lysine is added may also substitute for feedstuffs which do contain a sufficient quantity of lysine in the natural state, such as soybean.

3 In 1995, following a secret investigation by the Federal Bureau of Investigation (FBI), searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 ADM Company, together with Kyowa Hakko Kogyo Co. Ltd ("Kyowa Hakko Kogyo"), Sewon Corp. Ltd, Cheil Jedang Corp. ("Cheil") and Ajinomoto Co. Inc., were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the American Department of Justice, the companies were fined by the judge in charge of the case. Kyowa Hakko Kogyo and Ajinomoto Co. Inc. were each fined USD 10 million, ADM Company was fined USD 70 million and Cheil USD 1.25 million. The fine imposed on Sewon Corporation Ltd was, it says, USD 328 000. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

4 In July 1996, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, "the

Leniency Notice"), Ajinomoto Co. Inc. offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area (EEA).

5 On 11 and 12 June 1997 the Commission carried out investigations at the European premises of ADM Company and Kyowa Hakko Europe GmbH ("Kyowa Europe") pursuant to Article 14(3) of Regulation No 17 ... Following those investigations, Kyowa Hakko Kogyo and Kyowa Europe informed the Commission of their wish to cooperate and gave it certain information concerning, in particular, a chronology of the meetings which had taken place between lysine producers.

6 On 28 July 1997 the Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to ADM Company and ADM Ingredients, to Sewon Corp. Ltd and its European subsidiary Sewon Europe GmbH (hereinafter together referred to as "Sewon") and to Cheil concerning their conduct in the amino acids market and certain cartel meetings specified in the requests for information. Following a letter from the Commission dated 14 October 1997, reminding them they had not answered, ADM Ingredients replied to the Commission's request for information concerning the lysine market. ADM Company offered no reply.

7 On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to ADM Company and ADM Ingredients (hereinafter together referred to as "ADM") and the other companies concerned, namely, Ajinomoto Co. Inc. and its European subsidiary Eurolysine SA (hereinafter together referred to as "Ajinomoto"), Kyowa Hakko Kogyo and Kyowa Europe (hereinafter together referred to as "Kyowa"), Daesang Corp. (formerly Sewon Corp.) and its European subsidiary Sewon Europe GmbH, and Cheil, for infringement of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area ("the EEA Agreement"). In its statement of objections the Commission charged the companies in question

with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes from September 1990 (in the case of Ajinomoto, Kyowa and Sewon), March 1991 (Cheil) and June 1992 (ADM) to June 1995. On receiving the statement of objections, the applicants informed the Commission that they did not substantially contest the facts.

8 On 17 August 1999, after a hearing of the companies held on 1 March 1999, the Commission sent them a supplementary statement of objections concerning the duration of the cartel, in which it alleged that Ajinomoto, Kyowa and Sewon had taken part in the cartel since at least June 1990, Cheil since at least the beginning of 1991 and the applicants since 23 June 1992. The applicants replied to this supplementary statement of objections on 6 October 1999, confirming that they did not substantially contest the facts.

9 On completion of this administrative procedure, the Commission adopted [the contested decision]. [It] was served on the applicants by letter of 16 June 2000.

10 The [contested decision] includes the following provisions:

"*Article 1*

[ADM Company] and its European subsidiary [ADM Ingredients], Ajinomoto Company Incorporated and its European subsidiary Eurolysine SA, Kyowa Hakko Kogyo Company Limited and its European subsidiary Kyowa Hakko Kogyo Europe GmbH, Daesang Corporation and its European subsidiary Sewon

Europe GmbH, as well as [Cheil] have infringed Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement by participating in agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA.

The duration of the infringement was as follows:

(a) in the case of [ADM Company] and [ADM Ingredients] from 23 June 1992 to 27 June 1995;

(b) in the case of Ajinomoto Company Incorporated and Eurolysine SA from at least July 1990 to 27 June 1995;

...

Article 2

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

(a) [ADM Company] and

[ADM Ingredients],

jointly and severally liable, a fine of EUR 47 300 000

(b) Ajinomoto Company, Incorporated and

Eurolysine SA,

jointly and severally liable, a fine of EUR 28 300 000

..."

11 In calculating the amount of the fines, the Commission applied the method set out in the Guidelines ... and the Leniency Notice.

12 First, the basic amount of the fine, determined by reference to the gravity and duration of the infringement, was fixed at EUR 39 million for ADM Company, EUR 42 million for Ajinomoto Co. Inc., EUR 21 million for Kyowa Hakko Kogyo, EUR 19.5 million for Cheil and EUR 21 million for Sewon (paragraph 314 of the [contested decision]).

13 In fixing the starting amount of the fines, determined by reference to the gravity of the infringement, the Commission began by finding that the undertakings concerned had committed a very serious infringement, having regard to its nature, its actual impact on the lysine market in the EEA and the extent of the relevant geographical market. Then, observing that the total turnover figures achieved by each undertaking in the last year of the infringement revealed considerable disparity of size between the undertakings which had committed the infringement, the Commission went on to apply differential treatment.

Consequently, the starting amounts of the fines were set at EUR 30 million for ADM Company and Ajinomoto Co. Inc. and EUR 15 million for Kyowa Hakko Kogyo, Cheil and Sewon (paragraph 305 of the [contested decision]).

14 In order to reflect the duration of each undertaking's involvement in the infringement and determine the basic amount of their respective fines, the starting amounts were then increased by 10% per annum, giving an increase of 30% in the case of ADM Company and Cheil and 40% in the case of Ajinomoto Co. Inc., Kyowa Hakko Kogyo and Sewon (paragraph 313 of the [contested decision]).

15 Secondly, on account of aggravating circumstances, the basic amount of the fines imposed on ADM Company and Ajinomoto Co. Inc. was increased by 50%, that is to say EUR 19.5 million for ADM Company and EUR 21 million for Ajinomoto Co. Inc., on the ground that each had played a leading role in the infringement (paragraph 356 of the [contested decision]).

16 Thirdly, on account of mitigating circumstances, the Commission reduced by 20% the increase in Sewon's fine on account of the duration of its infringement, on the ground that Sewon had played a passive role in the cartel from the beginning of 1995 (paragraph 365 of the [contested decision]). The Commission also reduced by 10% the basic amount of the fine imposed on each of the undertakings concerned, on the ground that they had all put an end to the infringement as soon as a public authority intervened (paragraph 384 of the [contested decision]).

17 Fourthly, the Commission allowed a "significant reduction" in the fines, pursuant to Section D of the Leniency Notice. The fines on Ajinomoto Co. Inc and Sewon were reduced by 50% of the amount they would have had to pay if they had not cooperated with the Commission, the fines on Kyowa Hakko

Kogyo and Cheil were reduced by 30% and, lastly, the fine on ADM Company by 10% (paragraphs 431, 432 and 435 of the [contested decision]).'

The action before the Court of First Instance and the judgment under appeal

9 On 25 August 2000, the applicants brought an action before the Court of First Instance against the contested decision.

10 By their action, they sought the annulment of that decision, which imposed a fine on them, or a reduction of that fine.

11 By the judgment under appeal, the Court of First Instance:

— set the amount of the fine imposed on the applicants jointly and severally at EUR 43 875 000;

— dismissed the remainder of the action;

— ordered the applicants to bear their own costs and to pay three quarters of the Commission's costs and ordered the Commission to bear one quarter of its own costs.

Forms of order sought by the parties before the Court of Justice

12 The appellants claim that the Court should:

— set aside the judgment under appeal in so far as it dismisses the application brought by ADM in respect of the contested decision;

— annul Article 2 of the contested decision in so far as it pertains to ADM;

— in the alternative, as regards the second indent, modify Article 2 of the contested decision to reduce further or cancel the fine imposed on ADM;

— in the further alternative, as regards the second and third indents, refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice as to the law;

— in any event, order the Commission to bear its own costs and pay ADM's costs relating to the proceedings before the Court of First Instance and the Court of Justice.

13 The Commission contends that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.

The pleas in law

14 In support of their appeal, the appellants allege:

— infringement of the principle of non-retroactivity by upholding the Commission's retroactive application of the Guidelines;

— infringement of the principle of equality:

— by upholding the Commission's discrimination as to the method of setting fines applied to contemporaneous competition law infringements depending on whether the Commission adopts its decision before or after publication of the Guidelines;

— by upholding an equal starting point for the fine on ADM and Ajinomoto, notwithstanding the fact that Ajinomoto's market share in the EEA is almost twice the size of ADM's;

— infringement of the principle of *non bis in idem* by holding that the Commission was not required to set off or take into account fines paid by ADM to other authorities in respect of the same actions;

— infringement of the duty to state reasons:

— in finding that the Commission was not required to take account of fines paid by ADM in third countries notwithstanding the fact that the Commission's fine was based, inter alia, on ADM's worldwide turnover and therefore penalises ADM on the basis of its sales in countries where ADM has already been fined;

— in finding that the fine was reasonable notwithstanding the Commission's failure to take into account ADM's EEA lysine sales;

— distortion of the evidence by finding that the Commission had proven actual economic impact, while that evidence does not analyse price levels in the absence of collusion and therefore cannot show that prices were higher than they otherwise would have been;

— infringement of the principle that the Commission must follow self-imposed rules by permitting the Commission to infringe the Guidelines;

— infringement of the principle of proportionality, as interpreted by the Court of Justice and the Court of First Instance, which requires that fines bear some relationship to relevant turnover.

The appeal

The first plea, alleging infringement of the principle of non-retroactivity

15 By its first plea, the appellants allege that in paragraphs 39 to 61 of the judgment under appeal the Court of First Instance infringed the principle of non-retroactivity by upholding the Commission's retroactive application of the Guidelines.

16 They submit that the fine would have been lower than that imposed in accordance with the Guidelines if the earlier practice had been followed.

17 In the judgment under appeal, the Court of First Instance rejected that argument on the ground of a reasoning the wording of which is the same as that used in its judgments which gave rise to the judgment of the Court of Justice in 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.

18 In paragraphs 202 to 206 of that judgment, the Court of Justice summarised the findings of the Court of First Instance as follows:

'202 The Court of First Instance held, first of all and correctly, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the ECHR as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed.

203 The Court of First Instance then held that the Guidelines remain within the legal framework governing the determination of the amount of fines, as defined, before the infringements took place, in Article 15 of Regulation No 17.

204 The method of calculating fines set out in the Guidelines continues to be based on the principles prescribed in that provision, since the calculation is still made on the basis of the gravity and the duration of the infringement and the fine cannot exceed a maximum of 10% of overall turnover.

205 The Guidelines therefore do not alter the legal framework of the penalties, which continues to be defined solely by Regulation No 17. The Commission's previous decision-making practice is not part of the legal framework.

206 Last, according to the Court of First Instance, there is no retroactive increase in the fines even though the Guidelines may in certain cases entail an

increase in the fines. That follows from the margin of discretion in fixing the amount of the fines which the Commission enjoys under Regulation No 17. The Commission may thus, at any time, adjust the level of fines to the needs of its competition policy, on condition that it remains within the limits set out in Regulation No 17, ...'

19 As the Court of Justice held in paragraphs 207 and 208 of *Dansk Rørindustri and Others* v *Commission*, the premiss of the Court of First Instance that the Guidelines do not form part of the legal framework that determines the amount of fines, which consists exclusively of Article 15 of Regulation No 17, so that the application of the Guidelines to infringements committed before they were adopted cannot run counter to the principle of non-retroactivity, is incorrect.

20 A change in an enforcement policy, in this instance the Commission's general competition policy in the matter of fines, especially where it comes about as a result of the adoption of rules of conduct such as the Guidelines, may have an impact from the aspect of the principle of non-retroactivity (*Dansk Rørindustri and Others* v *Commission*, paragraph 222).

21 However, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 109, and *Dansk Rørindustri and Others* v *Commission*, paragraph 227).

22 It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines (*Dansk Rørindustri and Others* v *Commission*, paragraph 228).

23 Consequently, in the present case, the undertakings must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past (*Dansk Rørindustri and Others* v *Commission*, paragraph 229).

24 That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines (*Dansk Rørindustri and Others* v *Commission*, paragraph 230).

25 As in the *Dansk Rørindustri and Others* v *Commission* case, it must be concluded that the Guidelines and, in particular, the new method of calculating fines contained therein, on the assumption that this new method had the effect of increasing the level of the fines imposed, were reasonably foreseeable for undertakings such as the appellants at the time when the infringements concerned were committed and that, in applying the Guidelines in the contested decision to infringements committed before they were adopted, the Commission did not breach the principle of non-retroactivity (*Dansk Rørindustri and Others* v *Commission*, paragraphs 231 and 232).

26 Consequently, the Court of First Instance did not err in law in rejecting the plea of annulment alleging infringement of the principle of non-retroactivity.

27 In the light of the entirety of the foregoing, the first plea of the appeal must be rejected.

The second plea, alleging infringement of the principle of equality

28 The appellants' second plea in law has two parts. ADM alleges that the Court of First Instance infringed the principle of equality, first, by upholding the Commission's discrimination as to the method of setting fines applied to contemporaneous competition law infringements depending on whether the Commission adopted its decision before or after publication of the Guidelines (paragraphs 69 to 75 of the judgment under appeal) and, second, by upholding an equal starting point for the fines on ADM and Ajinomoto, notwithstanding the fact that Ajinomoto's market share in the EEA is almost twice the size of ADM's (paragraphs 207 and 211 to 214 of the judgment under appeal).

29 The first part of the second plea is closely linked to the first plea in that the allegedly discriminatory treatment arises from the fact that, after a certain date, the Guidelines applied.

30 As was held in paragraph 21 of the present judgment, the Commission may at any time decide to raise the amount of the fines by comparison with that imposed in the past.

31 For that reason, in paragraph 110 of *Musique Diffusion Française and Others* v *Commission*, the Court of Justice rejected a plea based, inter alia, on the argument that the method used by the Commission was discriminatory because the facts of that case had arisen at the same time as those of other cases in which the Commission had adopted a decision before that in the present case, imposing significantly lower fines.

32 Accordingly, the first part of the second plea cannot succeed.

33 In relation to the second part of the second plea, the appellants' argument is based on the premiss that, where several undertakings were involved in the same infringement, the starting amounts of the fines can be differentiated only on the basis of turnover from sales of the relevant product within the EEA. That premiss is false.

34 As is clear from paragraphs 243 and 312 of *Dansk Rørindustri and Others* v *Commission*, differentiation in the starting amounts of the fine on the basis of criteria other than the relevant turnover is permitted.

35 The Court of First Instance did not err in law in holding, in paragraph 212 of the judgment under appeal, on the basis of findings of fact that are for it to make, that ADM's total turnover, which remains an indicator of the size and economic power of the undertaking, clearly shows that ADM is twice as large as Ajinomoto, which both compensates for the fact that it has a lesser influence in the EEA lysine market than Ajinomoto and explains why the starting amount of the fine is set at a sufficiently deterrent level.

36 Consequently, the second part of the second plea, and therefore that plea as a whole, must be rejected.

The third plea, alleging breach of a corollary of the principle of non bis in idem

Arguments of the parties

37 By their third plea, as clarified at the hearing, the appellants submit that there has been a breach of a corollary of the principle of *non bis in idem* in that the Court of First Instance held in paragraphs 85 to 104 of the judgment under appeal that the Commission was not required to compensate for or take account of the fines paid to other authorities which sanctioned the same conduct.

38 That plea is divided into three parts.

39 The appellants submit, first of all, that the Court of First Instance erred in law in interpreting too narrowly the principle of *non bis in idem* and Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281. They submit that amongst the fundamental principles there is a corollary of the principle of *non bis in idem* which requires that concurrent sanctions in respect of the same facts must be taken into account. It is a fundamental principle of Community law which exists independently of any convention. The appellants submit that in *Boehringer Mannheim* v *Commission* the Court was concerned with a third country and held that the fundamental principles of justice applied in cases of that type. It accords with the principles of the sound administration of justice and proportionality that subsequent sanctions take account of those which have already been imposed in any jurisdiction in respect of the same conduct. To hold otherwise would run the risk of imposing an excessive sanction on the undertakings concerned and thereby impose a fine on them that is disproportionate to the need for a deterrent effect and/or retributive justice.

40 Next, the appellants submit that the conclusion set out in paragraphs 101 and 102 of the judgment under appeal, that they have not shown that the facts constituting the infringement sanctioned by the Commission and by third countries are identical, constitutes a distortion of the evidence, a breach of Article 36 of the Statute of the Court of Justice for failure to state reasons, and a breach of their right of defence.

41 Lastly, the appellants submit that the Court of First Instance erred in finding, in paragraph 103 of the judgment under appeal, that, even if the facts were the same, there would be no entitlement to set off since ADM had not demonstrated that the penalties imposed in the non-member countries concerned the application or effect of the cartel within the EEA, and in finding that those penalties were calculated on the basis of ADM's turnover in the United States and Canada. It is necessary merely to identify the acts sanctioned by the Commission and by the authorities of the non-member countries. ADM established that its acts and the cartel sanctioned by the Commission and the authorities of the non-member countries concerned exactly the same worldwide cartel.

42 As for the first part of the third plea advanced by the appellants, the Commission submits that in *Boehringer Mannheim* v *Commission* the Court did not decide the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member country where the facts with which the Commission charges an undertaking are the same as those alleged by the first authorities. It considers that there are good reasons for finding that the principle of natural law advanced in Case 14/68 *Wilhelm and Others* [1969] ECR 1, and *Boehringer Mannheim* v *Commission*, only applies within the European Union. All jurisdictions within the European Union should, at least with regard to competition law, comply with the settled case-law of the Court of Justice, and the jurisdiction of the Member States and of the Community institutions overlaps. There is no link or overlap of that type between the United States of America and the European Community.

43 In respect of the second part of the third plea advanced by the appellants, the Commission submits that the Court of First Instance found, by referring to the *Boehringer Mannheim* v *Commission* judgment, that the Community and American authorities were concerned with the conduct of the cartel members in their respective territories. In that judgment the Court distinguished between agreements giving rise to a cartel and the application of that cartel in their respective territories.

44 As regards the third part of the third plea, the Commission submits that ADM erred in its reading of paragraph 103 of the judgment under appeal. The Court of First Instance in fact addressed the question whether the judgments in the United States and Canada concerned conduct identical to that sanctioned by the Commission in the contested decision.

45 The Commission considers that, unless the actions complained of by the Community and American authorities have the same subject-matter and take place in the same territory, they cannot be considered to be identical. The actions complained of by the Commission and the American authorities are not identical and there is no basis for ADM submitting that those authorities intended to sanction them for the implementation of the agreements within the EEA.

Findings of the Court

— The first part of the third plea

46 As they made clear at the hearing, the appellants do not plead the principle of *non bis in idem* as such. They do not therefore allege that the Commission was wrong to

initiate the proceeding or that it had no power to impose a fine. They submit rather that there is amongst the fundamental principles of justice a corollary to the principle of *non bis in idem*, namely that concurrent penalties concerning the same facts should be taken into account.

47 It should be borne in mind, as a preliminary point, that, in the context of an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 81 EC and Article 15 of Regulation No 17 and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (*Dansk Rørindustri and Others* v *Commission*, paragraph 244 and the case-law cited).

48 In the present case, in paragraph 98 of the judgment under appeal, the Court of First Instance pointed out that it is clear from paragraph 3 of *Boehringer Mannheim* v *Commission* that the Court did not decide the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member country where the facts with which the Commission charges an undertaking are the same as those alleged by the first authorities but that the Court regarded the identity of the facts alleged by the Commission and by the authorities of the non-member country as a precondition of that question.

49 In that regard, the Court of First Instance did not err in law. In *Boehringer Mannheim* v *Commission*, the Court did not decide that question because it had not been established that the actions of the applicant complained of by the Commission on the one hand and the American authorities on the other were identical.

50 Next, referring to paragraph 11 of *Wilhelm and Others*, the Court of First Instance held in paragraph 99 of the judgment under appeal that it was in view of the

particular situation which arises from the close interdependence between the national markets of the Member States and the common market and from the special system for the division of jurisdiction between the Community and the Member States with regard to cartels on the same territory, namely the common market, that the Court, having acknowledged the possibility of dual sets of proceedings and having regard to the possibility of double sanctions flowing from them, held it to be necessary, in accordance with a requirement of natural justice, for account to be taken of the first decision imposing a penalty.

51 In paragraph 100 of the judgment under appeal, the Court of First Instance held that such a situation did not exist in the present case and that, given that the appellants point to no express provision of a convention requiring the Commission, when determining the amount of a fine, to take into account penalties already imposed on the same undertaking in respect of the same conduct by the authorities or courts of a non-member country such as the United States of America or Canada, they cannot validly complain that, in the present case, the Commission failed to fulfil any such alleged obligation.

52 Even if that reasoning were erroneous and the sanction imposed by the authorities of a non-member country was a factor to be taken into account in assessing the facts of the present case in setting the amount of the fine, the plea alleging that the Commission failed to take account of the fines already imposed in non-member countries can only succeed if the actions of ADM complained of by the Commission on the one hand and by the authorities of the United States and Canada on the other were identical.

53 In paragraphs 101 to 103 of the judgment under appeal, the Court of First Instance examined whether, in the alternative, the applicants adduced evidence of such identity of actions. It is therefore necessary to examine the other parts of the third plea, which refer to those paragraphs.

54 The principle of sound administration, which the appellants also plead in the context of the first part of the third plea, is irrelevant in this context.

— The second part of the third plea

55 As regards the Court of First Instance's finding that it had not been established that the actions of ADM complained of by the Commission and by the authorities of the United States and Canada are identical, the appellants plead first of all a distortion of the evidence. They submit that the fact that the breaches concerning lysine and citric acid were distinct is clearly apparent from the documents concerning the court-approved settlement both in the United States and Canada, States in which the breaches were treated as separate criminal charges against ADM. Neither those documents nor any other evidence supports the conclusion that the separate agreements in question form part of 'a larger group of agreements and concerted practices'.

56 However, the Court of First Instance did not find that the infringements in respect of lysine and citric acid respectively were not distinguishable from each other. At the beginning of paragraph 103 of the judgment under appeal, it did indeed voice doubts as to whether the finding in respect of the lysine cartel may be regarded as distinct from that in respect of the citric acid cartel. It nevertheless presumed that to be the case.

57 In so far as the Court of First Instance found that the judgments in the United States and Canada applied to a larger group of agreements and concerted practices, it cannot be found that that Court distorted the evidence. The reference in paragraph 102 of the judgment under appeal to 'judgments delivered in the United States and Canada [which] related to a larger group of agreements and concerted practices' must be read in the light of paragraph 5 of *Boehringer Mannheim* v *Commission* which refers to a 'wider body of facts' and to which the Court of First Instance referred in the preceding paragraph. It must therefore be understood as meaning that those judgments also apply to the cartel in respect of citric acid, which is not in issue in the contested decision.

58 The complaint alleging a distortion of the evidence must therefore be rejected.

59 The appellants next allege that in its statement of reasons the Court of First Instance discounted the supplementary evidence they adduced to establish that the proceedings were identical, thereby breaching Article 36 of the Statute of the Court of Justice.

60 It should be noted in that connection that the duty on the Court of First Instance under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice to state reasons for its judgments does not require the Court of First Instance to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the Court of Justice with sufficient material for it to exercise its power of judicial review (see, to that effect, 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 372).

61 The Court of First Instance did not breach its duty to state reasons in respect of the supplementary evidence submitted by ADM. Its statement of reasons is based on the premiss that, in order to demonstrate that the facts found are the same, the applicants should have established that the judgments in the United States and Canada had been directed towards applications or effects of the cartel other than those which occurred in those States and, in particular, in the EEA. In finding that that had not been established, the Court of First Instance implicitly found that the supplementary evidence submitted by the applicants was lacking in that regard.

62 It follows that the complaint alleging a breach of Article 36 of the Statute of the Court of Justice cannot be upheld.

63 Lastly, the appellants submit that since, in its pleadings and in the contested decision, the Commission clearly acknowledged that the actions sanctioned in the course of the proceedings in the non-member countries were precisely the same as those set out before the Court of First Instance, it ought to have given them the opportunity to be heard in respect of the contrary finding.

64 It should be noted in that regard that, whilst the Commission indeed stated that the infringement committed in the EEA resulted from the existence of a worldwide cartel, it nevertheless did not find that the facts which it found in respect of the applicants and which the United States and Canadian authorities found in respect of them were the same.

65 It is clear from paragraph 183 of the contested decision that the Commission complains that ADM and the other undertakings to which that decision was addressed infringed Article 81 EC and Article 53 of the EEA Agreement in that they, within the EEA and by agreement, fixed lysine prices, controlled the supply and allocated sales volumes to each other, and exchanged information on their sales volumes in order to monitor the sales volume allocations they agreed upon. In paragraph 311 of that decision, the Commission noted that, according to the information provided by the authorities of the United States and Canada, the criminal law fines imposed by those authorities on the undertakings concerned by that decision only took account of the anti-competitive effects that the collusion under scrutiny in that decision had produced in the area of their jurisdictions.

66 It follows that for the Commission this was the application of one cartel in different territories. Consequently, the Commission's findings enabled the appellants effectively to put forward their point of view in that regard.

67 Accordingly, the complaint alleging an infringement of the right to be heard is unfounded.

— The third part of the third plea

68 Paragraph 103 of the judgment under appeal forms part of the Court of First Instance's analysis of the identity of the facts found in respect of the appellants.

69 It should be noted in this regard that, where the sanction imposed in a non-member country covers only the applications or effects of the cartel on the market of that State and the Community sanction covers only the applications or effects of the cartel on the Community market, the facts are not identical.

70 Whilst in paragraph 103 of the judgment under appeal the Court of First Instance emphasised that the fines in question were calculated on the basis of turnover in the United States and Canada respectively, that was to support its finding that the fines sought to sanction the application of the cartel in those territories, and not that of the EEA.

71 According to the Court, ADM did not show that, in addition to the applications or effects of the cartel in question in the United States and Canada respectively, the sanctions imposed in those States covered the applications or effects of that cartel in the EEA.

72 The primary complaint advanced by the appellants under the third part of the third plea is therefore unfounded.

73 In the alternative, they submit that the Commission is under a duty to take account of the fines paid to other authorities and calculated on the basis of turnover in the United States and Canada, in a case where, as in the present case, the Commission takes account of the worldwide turnover of the appellants in lysine in calculating the fine to impose on them. In so doing, that institution calculates that fine on the basis of the appellants' turnover in the States in which they have already paid a fine and adds it to their turnover in the EEA market.

74 However, in the contested decision, the worldwide turnover was used only to determine the relative size of the undertakings concerned in order to take account of the effective capacity of those undertakings to cause significant damage to the lysine market in the EEA.

75 That complaint must therefore be rejected.

76 Since all of the appellants' complaints against the Court of First Instance's finding that they did not establish the identity of the facts are unfounded, the third plea must therefore be rejected.

The fourth plea, alleging a breach of the duty to state reasons

77 The fourth plea is made up of two parts.

78 By the first part of that plea, which refers to paragraphs 85 to 94 of the judgment under appeal, the appellants submit that the Court of First Instance breached Article 36 of the Statute of the Court of Justice in holding that the Commission was not under a duty to take account of fines paid by them in non-member countries, even though the fine imposed by the Commission is based inter alia on their worldwide turnover and that, consequently, the appellants were sanctioned on the basis of their turnover in States in which they had already been ordered to pay fines.

79 By the second part of their fourth plea, which refers to paragraphs 198 to 206 of the judgment under appeal, the appellants complain that the Court of First Instance breached Article 36 of the Statute of the Court of Justice in finding that the fine is reasonable notwithstanding the Commission's failure to fulfil its obligation to take account of the turnover of those appellants for lysine in the EEA.

80 As regards the requirements inherent in the duty of the Court of First Instance to state reasons, reference should be made to paragraph 60 of the present judgment.

81 In the present case, the statement of reasons in the judgment of the Court of First Instance is sufficient as regards the two aspects in question. First, in paragraphs 85 to 103 of the judgment under appeal, the Court of First Instance set out a detailed statement of its reasons for finding that the Commission was not required to take account of fines paid by ADM in non-member countries. Second, in paragraphs 198 to 206 of the judgment under appeal, it set out its reasons for rejecting the appellants' argument that the fine was disproportionate to their turnover on the market for lysine in the EEA.

82 Consequently, the fourth plea in law must be rejected.

The fifth plea, distortion of the evidence

83 By their fifth plea, which refers to paragraphs 142 to 171 of the judgment under appeal, the appellants submit that the Court of First Instance distorted the evidence in finding that the Commission had proved that there was actual economic impact.

84 More specifically, the appellants claim that the Court of First Instance distorted the evidence in finding that the Commission had demonstrated to the requisite legal standard that the prices were higher than they would have been in the absence of collusion. The Commission's evidence, the existence of which the Court of First Instance noted in paragraphs 154 to 160 of the judgment under appeal, merely shows the prices charged without analysing the likely prices in the absence of the cartel.

85 It should be noted in this connection that the appraisal of the facts by the Court of First Instance does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, in particular, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78).

86 The appellants have not shown that the evidence was distorted. Their criticism of the reasoning of the Court of First Instance is unfounded. As Advocate General Tizzano pointed out in point 124 of his Opinion, it is clear from a reading of the contested decision and the judgment under appeal that the Commission produced a number of items of evidence on the price increases caused by the cartel and that evidence was minutely examined by the Court of First Instance. In rejecting the appellants' arguments seeking to demonstrate that it was not proven that the prices charged were higher than those which would have been charged under an oligopoly acting in the absence of an infringement, the Court of First Instance did not infer from the evidence something which it clearly did not show.

87 Consequently, the fifth plea must be rejected.

The sixth plea, alleging a breach of the principle that the Commission must comply with self-imposed rules

88 By their sixth plea, the appellants criticise the Court of First Instance for infringing, in paragraphs 191 to 206 of the judgment under appeal, the principle that the Commission must comply with self-imposed rules.

89 The Court of First Instance found that the Commission merely took account of the total turnover of the appellants for all product lines and of the worldwide turnover for lysine in fixing the starting amount and that, consequently, it failed to fulfil its obligation to take account of the relevant turnover. Notwithstanding the Commission's failure to comply with its own Guidelines, the Court of First Instance found that the fine was legal because it did not infringe the principle of proportionality. It is not open to the Court of First Instance, at least without setting out its reasons, to allow the Commission to breach the Guidelines. To allow the Commission to breach the Guidelines only where it was proportionate to do so would breach the principles of legal certainty and sound administration and would discriminate between the appellants and other undertakings to which the Guidelines were duly applied.

90 For those reasons, the Court of First Instance should have used the method set out in the Guidelines by taking account of ADM's relevant turnover in fixing the correct level of fines. By failing in its duty in that regard, it breached the principle that the Commission must comply with self-imposed rules.

91 It should be noted in that regard that, whilst rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders, may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraphs 209 and 210).

92 It cannot therefore be complained that the Court of First Instance allowed the Commission to misapply the Guidelines. After finding, in paragraph 197 of the judgment under appeal, that by relying on ADM's worldwide turnover, without taking into consideration its turnover in the EEA lysine market, the Commission disregarded the fourth and sixth paragraphs of Section 1.A of the Guidelines, the Court of First Instance itself assessed whether the fine was set at an appropriate level.

93 However, where, in a case in which a factor for assessing the infringement in question has not been duly taken into account by the Commission, the Court of First Instance has held there to be a breach of the Guidelines and disposed of the case under its unlimited jurisdiction, the principles of equality and legal certainty require that it determine, first of all, whether, in taking account of that factor, the fine nevertheless remains within the framework established by those Guidelines. The principle of proportionality applies only after such an assessment.

94 Therefore, the Court of First Instance erred in law in solely applying the test of proportionality.

95 However, it is implicit in the assessment, in paragraphs 203 to 205 of the judgment under appeal, of ADM's turnover from sales of lysine in the EEA that, if the

Commission had correctly applied the Guidelines by taking account of that turnover, the fine would not have been different.

96 The sixth plea must therefore be rejected.

The seventh plea, alleging a breach of the principle of proportionality

Arguments of the appellants

97 By their seventh plea, the appellants complain that the Court of First Instance breached the principle of proportionality as interpreted by the Court of Justice and the Court of First Instance. In paragraphs 199 to 202 of the judgment under appeal, it wrongly rejected the argument that the principle of proportionality requires that there be a certain relationship between the fine and the relevant turnover and from which it follows that a fine of 115% of that turnover, as in the present case, is disproportionate. The appellants base their calculation on their turnover on the EEA lysine market during the final year of the infringement.

98 They consider that, contrary to the Court of First Instance's finding in paragraph 200 of the judgment under appeal, the judgment in Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641 contains a general principle that the penalty be proportionate to the undertaking's size on the product market in respect of which the infringement was committed.

99 The appellants submit that the facts of the present case are identical to those in the case giving rise to the judgment of the Court of First Instance in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, in which it reduced the fine on the ground that the Commission had not sufficiently taken account of the relevant turnover. The fact that in *Parker Pen* v *Commission* it was the final fine which was reduced and not the starting amount of the fine determined for gravity is irrelevant. There was no separate calculation of the starting amount in that case. Moreover, the fine imposed on the appellants was disproportionate to the relevant turnover, whether the final amount of the fine or the starting amount determined for gravity is taken into account.

Findings of the Court

100 According to the Court's case-law, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. It is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure (*Musique Diffusion Française and Others* v *Commission*, paragraph 121, and *Dansk Rørindustri and Others* v *Commission*, paragraph 243).

101 By contrast, Community law contains no general principle that the penalty be proportionate to the undertaking's size on the product market in respect of which the infringement was committed.

102 In paragraph 200 of the judgment under appeal, the Court of First Instance rejected the applicants' argument in the following terms:

'... it is clear from case-law that the limit established by Article 15(2) of Regulation No 17 relating to the overall turnover of an undertaking is precisely intended to prevent fines from being disproportionate in relation to the size of the undertaking (*Musique Diffusion Française* v *Commission*, cited above, paragraph 119). Provided that the final amount of the fine does not exceed 10% of ADM's total turnover in the last year of the infringement, it cannot, therefore, be regarded as disproportionate simply because it is higher than the turnover which ADM achieved in the relevant market. It should be observed that the applicants have referred to the judgment ... *KNP BT* v *Commission* ..., in paragraph 61 of which the Court stated, obiter dictum, as follows: "Article 15(2) of Regulation No 17 ... aims to ensure that the penalty is proportionate to the undertaking's size on the product market in respect of which the infringement was committed". In addition to the fact that, in the same paragraph, the Court went on to refer expressly to paragraph 119 of the judgment in *Musique Diffusion Française*, it must also be emphasised that this formula of words, not taken up in subsequent case-law, belongs in the particular context of the case which gave rise to the judgment in *KNP BT* v *Commission*. In that case, the applicant essentially complained that the Commission took account of the value of sales internal to the group in order to determine its market shares. Nevertheless, the Court held that to be valid for the reasons stated. Therefore it cannot be inferred from this that the penalty imposed on ADM is disproportionate.'

103 That statement of reasons is not vitiated by any error of law.

104 As regards *Parker Pen* v *Commission*, it is clear from paragraph 94 thereof that the Court of First Instance merely applied the rules set out in paragraph 121 of *Musique Diffusion Française and Others* v *Commission*, and set out in paragraph 100 of the present judgment.

105 Moreover, it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed for infringements of Community law (*Dansk Rørindustri and Others* v *Commission*, paragraph 245 and the case-law cited).

106 Consequently, the seventh plea must be rejected.

107 It follows from the foregoing that the appeal must be dismissed.

Costs

108 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, 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 Commission has applied for costs against ADM Company and ADM Ingredients and they have been unsuccessful in their pleas, they must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd to pay the costs.**

[Signatures]