Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

20 May 2015 *

(Competition — Agreements, decisions and concerted practices — European market for animal feed phosphates — Decision finding an infringement of Article 101 TFEU — Allocation of sales quotas, coordination of prices and conditions of sale and exchange of commercially sensitive information — Applicant's withdrawal from the settlement procedure — Fines — Obligation to state reasons — Gravity and duration of the infringement — Cooperation — Failure to apply the likely range of fines indicated during the settlement procedure)

In Case T-456/10,

Timab Industries, established in Dinard (France),

Cie financière et de participations Roullier (CFPR), established in Saint-Malo (France),

represented by N. Lenoir and M. Truffier, lawyers,

applicants,

v

European Commission, represented by C. Giolito, B. Mongin and F. Ronkes Agerbeek, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2010) 5001 final of 20 July 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/38866 — Animal feed phosphates), and, in the alternative, for reduction of the fine imposed on the applicants in that decision,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of D. Gratsias, President, O. Czúcz, A. Popescu, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2014,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 By Decision C(2010) 5001 final of 20 July 2010 relating to a proceeding under Article 101 of the [TFEU] and Article 53 of the EEA Agreement (Case COMP/38866 — Animal feed phosphates) ('the contested decision'), the European Commission found that the applicants, Timab Industries ('Timab') and Cie financière et de participations Roullier (CFPR) ('CFPR'), had infringed Article 101 TFEU and, since 1 January 1994, Article 53 of the EEA Agreement by participating, between 16 September 1993 and 10 February 2004, in a single and continuous infringement consisting in the sharing of a large part of the European market for animal feed phosphates ('AFP') by the allocation of sales quotas and customers to the participants in the cartel, and in the coordination of prices and, to the extent necessary, conditions of sale (Article 1 of the contested decision).

2 As described in recital 17 of the contested decision, Timab is a subsidiary of 'Roullier group' of which CFPR is the holding company. Timab produces and sells various chemical products, namely AFP.

3 On 28 November 2003, the Kemira group applied to the Commission for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the leniency notice'). The application covered the period from 1989 to 2003 (recital 33 of the contested decision).

4 On 10 and 11 February 2004, the Commission carried out inspections in France and Belgium at the premises of a number of undertakings whose activities involved AFP. Timab was among the entities who were the subject of those inspections (recital 35 of the contested decision).

5 On 18 February 2004, Tessenderlo Chemie NV applied for immunity under the leniency notice with respect to the entire period of the infringement (1969 to 2004) (recital 36 of the contested decision).

6 On 27 March 2007, Quimitécnica.com-Comércia e Indústria Química SA and its parent company José de Mello SGPS SA applied for immunity under the leniency notice (recital 37 of the contested decision).

7 On 14 October 2008, the applicants also lodged an application for immunity under the leniency notice, completed on 28 October 2009 (recital 39 of the contested decision).

8 By letters of 19 February 2009, the Commission informed the participants in the cartel, including Timab, of the initiation of proceedings for the adoption of a decision under Chapter III of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), and gave them a period of two weeks within which to inform it in writing whether they were willing to take part in settlement discussions within the meaning of Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18) (recital 40 of the contested decision).

9 The preparation of the settlement resulted in several bilateral meetings between the Commission and the undertakings concerned during which the substance of the objections and the evidence underpinning them were presented. Following those meetings, the Commission determined the (minimum and maximum amounts of the) range of potential fines. At a meeting held on 16 September 2009, Timab was notified of the estimate relating to it.

10 Subsequently, the Commission gave the undertakings concerned time to submit formal proposals for a settlement pursuant to Article 10a(2) of Regulation No 773/2004. All the participants in the cartel submitted their proposals for a settlement within the allotted time-limit, except for the applicants, who decided to withdraw from the settlement procedure (recital 43 of the contested decision).

11 On 23 November 2009, the Commission adopted a set of six statements of objections addressed to the applicants on the one hand, and to each of the participants in the cartel accepting the settlement on the other. All the participants who were sent statements of objections, with the exception of the applicants, replied that the statement of objections corresponded to the content of their proposals and that, accordingly, their commitment to follow the settlement procedure was not called into question (recitals 44 and 45 of the contested decision).

12 The applicants had access to the file, responded to the statement of objections on 2 February 2010 and took part in a hearing which was held on 24 February 2010 (recital 45 of the contested decision).

13 On 20 July 2010, the Commission adopted the contested decision. That decision was addressed to the applicants.

14 On the same day, the Commission adopted Decision C(2010) 5004 final, relating to the same case ('the separate decision'), whose addressees were the parties who had agreed to take part in the settlement procedure and made a proposal for a settlement, namely the Kemira group (Yara Phosphates Oy, Yara Suomi Oy and Kemira Oy), Tessenderlo Chemie, the Ercros group (Ercros SA and Ercros Industrial SA), the FMC group (FMC Foret SA, FMC Netherlands BV and FMC Corporation) and Quimitécnica.com-Comércia e Indústria Química and its parent company José de Mello SGPS.

15 In essence, it is apparent from the contested decision that the main European producers of AFP agreed to share a large part of the European market for AFP by allocating amongst themselves sales quotas by region and customer. They further coordinated prices, and, where necessary, conditions of sale. The purpose of the original agreement, concluded on 19 March 1969 between the top five producers of AFP, at the time, was to solve a situation of overcapacity in the European market. The arrangement also provided for an annual review of sales quotas. A monitoring mechanism was subsequently put in place in order to supervise the market agreement and to resolve conflicts in the event of significant deviations from the quotas agreed on the basis of a compensation system. The constituent arrangements of the cartel were named CEPA (Centre d'étude des phosphates alimentaires — Centre for the Study of feed phosphates). In order to ensure the functioning and the permanence of the cartel, the agreement is alleged to have resulted in additional specific agreements and other regional sub-arrangements. The participation of the French producers in CEPA was confirmed as from 1970. From 1978 onwards, the cartel participants reacted to a critical market situation by reorganising into three sub-arrangements. In 1991-1992, the participants in the cartel contemplated a return to a single structure (Super CEPA) encompassing the five countries of Central Europe (Austria, Belgium, Germany, the Netherlands and Switzerland), Denmark, Finland, Hungary, Ireland, Norway, Poland, Sweden and the UK. The discussions are alleged to have been held at two levels: the 'central meetings' or meetings 'at European level', during which general policy decisions were taken, and 'expert meetings', during which more in-depth discussions are alleged to have been held at national or regional level by the participants in the cartel which were active in that country or specific region. That single structure was linked to operators in France, where a collusive mechanism existed at national level.

16 With respect more specifically to the applicants, it is apparent from the contested decision that Timab was integrated into the Super CEPA regional framework as well as the French part of the cartel, when the undertaking began to export large quantities outside France. In September 1993, it is alleged to have started participating in the Super CEPA arrangements. At the same time as the meetings of the Super CEPA, it took part in meetings concerning France and Spain (paragraphs 123, 131, 138 and 143 of the contested decision).

17 For the purposes of the calculation of the amount of the fine imposed on each undertaking, the Commission relied on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines').

18 First, the Commission defined the value of the relevant sales as corresponding to the sales of AFP made by the undertaking in the territory of the Member States of the European Union and of the Contracting Parties to the EEA Agreement affected by the infringement. Instead of using the value of sales made by an undertaking during the last full business year of its participation in the infringement, as is normally provided for under point 13 of the 2006 Guidelines, the Commission found it more appropriate, in this case, to use the actual sales made by the undertakings while they were taking part in the infringement, taking account in particular of the exceptionally long duration of the cartel, its geographical scope, the fact that some of the territories affected by the practices in question came under the jurisdiction of the European Union and of Article 101 TFEU and Article 53 of the EEA Agreement only from the time of the accession of the countries concerned to the European Union or to the EEA, and the fact that the value of the sales made by the parties has varied over the years during their participation (recital 321 of the contested decision).

19 Secondly, the Commission observed that, in view of the gravity of the infringement committed, it was appropriate to set the proportion of the value of the sales of the products at issue to be taken into account for the calculation of the basic amount of the fine at 17%, and to do so for all the participants in the cartel (recitals 324 to 328 of the contested decision).

20 Thirdly, for undertakings for whom historical data corresponding to the actual sales by country was not available, and with their agreement, the value of the relevant sales was applied and sales made during the last full business year of the infringement were multiplied by the duration of the participation of the undertaking concerned, in accordance with point 24 of the 2006 Guidelines (recitals 321 and 331 of the contested decision).

21 Fourthly, the Commission took the view that the facts of the case justified including in the basic amount of the fine an increase equal to 17% of the average annual value of the sales made during the period of the infringement in order to ensure deterrence, in accordance with point 25 of the 2006 Guidelines, and for all participants in the cartel (recitals 332 to 335 of the contested decision).

22 Fifthly, the Commission did not accept any aggravating or mitigating circumstances in respect of any of the participants in the cartel (paragraphs 337 to 347 of the contested decision).

23 Sixthly, applying the limit of 10% of the total turnover on the fines imposed pursuant to Article 23(2) of Regulation No 1/2003, the Commission reduced the basic amount of the fine with respect to some participants. Since the basic amount of the applicants' fine did not exceed 10% of total turnover in 2009, the Commission did not make an adjustment.

24 Seventhly, with respect to the application of the leniency notice, the Commission decided that it was appropriate to grant Kemira, as well as Yara Phosphates Oy and Yara Suomi Oy, the latter two being part of the same undertaking as Kemira, a 100% reduction in the amount of the fine under point 8(a) of the leniency notice (recitals 349 and 350 of the contested decision). On the basis of point 23 of the leniency notice, the Commission also granted Tessenderlo Chemie a reduction of 50% for the period from 31 March 1989 onwards and held that that company was not liable to pay any fines for the period from 19 March 1969 to 31 March 1989 (recital 353 of the contested decision). A 25% reduction in the amount of the fine was granted to Quimitécnica.com-Comércia e Indústria Química and to its parent company José de Mello SGPS (recital 355 of the contested decision). Finally, the Commission granted the applicants a reduction of 5% in the amount of the fine (recital 359 of the contested decision).

25 Eighthly, in the light of the non-application of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation No 1/2003 in cartel cases (OJ 2008 C 167, p. 1) ('the settlements notice'), no reduction due to the initiation of a settlement procedure was granted to the applicants. In a separate decision, the Commission rewarded the recipients of that decision for entering into a settlement by reducing the amount of the fine to be imposed on them by 10% (recitals 361 and 362 of the contested decision).

26 Ninthly, the applicants' application for a reduction in the amount of the fine as a result of an inability to pay (point 35 of the 2006 Guidelines) was rejected, whereas that of [*confidential*] was partially upheld (recitals 372 to 375 of the contested decision).

27 As has already been noted in paragraph 1 above, the Commission found, in Article 1 of the contested decision, that the applicants had infringed Article 101 TFEU and, since 1 January 1994, Article 53 of the EEA Agreement by taking part, between 16 September 1993 and 10 February 2004, in a single and continuous infringement covering most of the territory of the EU Member States and of the Contracting Parties to the EEA Agreement, whose purpose was to share the European market for AFP through the allocation of sales quotas and customers to participants in the cartel, to coordinate prices and, to the extent necessary, conditions of sale.

28 Under Article 2 of the contested decision, the Commission imposed jointly and severally on Timab and CFPR a fine of EUR 59 850 000 for that infringement.

Procedure and forms of order sought

29 By application lodged at the Court Registry on 1 October 2010, the applicants brought the present action.

30 By letter lodged at the Court Registry on 5 November 2010, the applicants requested the Court to adopt a measure of organisation of procedure ordering the Commission to provide it with four groups of documents relating to the contested decision or to the separate decision in order to substantiate some of their pleas in law.

31 On 6 January 2011, the Commission filed its defence.

32 By a measure of organisation of procedure dated 1 February 2011, the Court, on the basis of Article 64 of its Rules of Procedure, asked the Commission to produce the documents requested by the applicants.

33 By a measure of inquiry dated 16 March 2011, the Court, on the basis of Articles 65(b) and 66(1) of the Rules of Procedure and applying the second paragraph of Article 67(3) of those rules, ordered the Commission to produce the documents that it had not presented in the context of the measure of organisation of procedure referred to in paragraph 32. The Commission complied with that measure of inquiry within the prescribed period.

34 By a measure of organisation of procedure dated 28 June 2011, the Court asked the Commission to provide some clarification on the documents mentioned in paragraph 33 and allowed the Commission to hear some of the undertakings concerned on the possibly confidential nature of the data relating to them contained in the documents.

35 Subsequently, certain documents were served on the applicants, with the stipulation that they could not be used for purposes other than those for which they had been sent and that, consequently, those documents and the figures contained therein should not be made public. Some of the documents produced by the Commission were removed from the file and returned to that institution.

36 The reply was lodged at the Court Registry on 22 March 2012. The rejoinder was lodged at the Court Registry on 21 June 2012.

37 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of its Rules of Procedure, requested the Commission to lodge certain documents and put some questions to it, asking it to reply in writing. The Commission complied with the requests within the prescribed period.

38 Prior to the hearing, the applicants' representatives, having signed a confidentiality agreement, were given the opportunity to consult at the Court Registry part of the confidential version of the separate decision, one of the documents requested as part of the investigative measure.

39 The parties presented oral argument and answered questions put to them orally by the Court at the hearing which took place, in part, in camera, on 11 July 2014.

40 At the hearing, the applicants stated that they were withdrawing their pleas alleging breach of the principle of non-retroactivity of the 2006 Guidelines, of the taking account of the excessive length of the administrative procedure as a mitigating circumstance, of a breach of the principle of equal treatment and of the leniency notice with respect to their cooperation in comparison with that of Quimitécnica.com-Comércia e Indústria Química, and, in connection with the plea alleging infringement of Article 23 of Regulation No 1/2003, their arguments expounded in the reply with respect to the relationship between the application of the 10% reduction pursuant to the settlement and that of the 10% ceiling provided for in Article 23 of that regulation, which was noted in the minutes of the hearing.

41 The applicants claim that the Court should:

— annul the contested decision;

— alternatively, annul Article 1 of the contested decision in that the Commission stated that they had taken part in practices relating to the conditions of sale and in a system of compensation;

— alternatively, and in any event, amend Article 2 of the contested decision and substantially reduce the amount of the fine that was imposed jointly and severally on them;

— order the Commission to pay the applicants' costs.

42 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

43 In support of their application, the applicants rely on a number of pleas in law that can be divided into three groups. The first group of pleas relates to the settlement procedure and, in particular, to the fact that the applicants withdrew from that procedure; the second group of pleas relates to certain practices which constitute elements of the cartel at issue, namely the compensation mechanism and the conditions of sale; and, finally, the third group relates to several aspects of the calculation of the amount of the fine.

The claim for annulment of the contested decision

The settlement procedure

44 As part of this group of pleas, the applicants put forward a series of arguments relating (i) to infringements of the rights of the defence, of the rules governing the settlement procedure, of the principle of the protection of legitimate expectations and of the principle of sound administration, and (ii) to misuse of powers.

45 The applicants claim, in essence, that the Commission applied to an undertaking that withdrew from the settlement procedure a fine higher than the maximum figure of the range envisaged during the settlement discussions.

46 The applicants allege several infringements of their rights of defence, the first arising from errors of law and of assessment of the facts by the Commission, the second from a failure to observe the right not to incriminate oneself and the third from a breach of the principle of equality of arms.

47 First, the Commission is alleged to have misinterpreted the applicants' application for immunity under the leniency notice and their response to the request for information.

48 They deny having radically changed strategy after having learned of the range of fines. They claim only to have applied points 11 (agreement to participate in settlement discussions) and 16 (decision, in full knowledge of the facts, to enter into a settlement or not) of the settlements notice, as they did not recognise the infringement as assessed by the Commission. In addition, their application for immunity under the leniency notice is only factually descriptive, without any characterisation as to the single or otherwise nature of the infringement. The error in the characterisation of the facts by the Commission, which may in no way be attributed to the applicants, flows from an inadequate analysis of the file in the light of the Commission's duty to examine carefully and impartially the cases submitted to it. The rare documents mentioning Timab by name with respect to the facts which occurred prior to 16 September 1993 all enable the conclusion that it did not take part in the CEPA meetings.

49 Secondly, with respect to the failure to observe the right not to incriminate oneself, the applicants refer to the 'right', enshrined in point 16 of the settlements notice, for an undertaking 'to make an informed decision on whether or not to settle'. That option offered to undertakings is based, according to the applicants, on the exercise of the rights of the defence and on the right not to incriminate oneself. The penalty for withdrawing from the settlement therefore infringes the right not to incriminate oneself, which flows from the rights of the defence.

50 Thirdly, as regards the principle of equality of arms, the applicants submit that they could not foresee that the Commission would strongly decrease the duration of the infringement and, at the same time, impose a significantly increased fine upon them. The asymmetry of information, which is alleged to have characterised the procedure, disadvantaged the applicants and thus clearly infringed the principle of equality of arms and their rights of defence.

51 Next, the applicants allege an infringement of the principle of the protection of legitimate expectations and of the principle of sound administration, and a misuse of powers.

52 Having regard to the principle of the protection of legitimate expectations, the applicants submit that the Commission was not entitled to take a decision that thwarted their expectations, which were based on precise assurances they had received from the Commission as to the content of the decision that it was going to adopt.

53 With regard to the principle of sound administration, the applicants assert that they could not foresee the reasoning followed by the Commission in the contested decision, particularly in the light of the hearing of 24 February 2010 which followed the statement of objections, and of the meeting of 7 June 2010. At that meeting, the possibility of a decreased reduction for cooperation was raised, but not the cancelling of the reduction for mitigating circumstances nor, a fortiori, the reasons for such cancellation.

54 Finally, the Commission is alleged to have misused its powers by deciding to impose a heavier penalty for refusal to settle.

55 The Commission disputes the arguments put forward by the applicants.

56 It should be noted that, in the context of the present application, the applicants take the view that they have been 'penalised' for having withdrawn from the settlement procedure by a fine which is greater than that which they were entitled to expect. The aim of their defence against the objections raised by the Commission during the standard administrative procedure is to obtain recognition of the existence of separate infringements and, accordingly, a reduction in the amount of the fine. In addition, according to the applicants, the amount of the fine should in no event be higher than that corresponding to the upper limit (increased by 10%) in the range of fines which had been notified to them with a view to a settlement.

57 Accordingly, their complaints relate mainly to the fact that the amount of the fine imposed upon them is much higher than that originally foreseen. Notwithstanding their critical remarks with respect to the settlement procedure, their complaints, such as those alleging infringement of the rights of the defence, of the principles of equality of arms, of the protection of legitimate expectations and of sound administration, and of an alleged misuse of powers, in essence relate to the standard administrative procedure which led to the adoption of the contested decision.

– Preliminary observations

58 As a preliminary point, the Court considers it useful to recall briefly the content of the settlement procedure before examining the complaints raised in the context of the first group of pleas in law.

59 The settlement procedure was established by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ 2008 L 171, p. 3). That procedure was clarified in the settlements notice.

60 The aim of the new procedure is to simplify and speed up administrative procedures and to reduce the number of cases brought before the EU judicature, and thus to enable the Commission to handle more cases with the same resources.

61 In essence, the settlement procedure provides that undertakings which are the subject of investigations, which face incriminating evidence, and which have decided to enter into settlement discussions, are to admit their involvement in the infringement, to waive, under certain conditions, their right to have access to the administrative file and their right to be heard, and to agree to receive the statement of objections and the final decision in an agreed official language of the European Union (settlements notice, point 20). Furthermore, if the statement of objections reflects their proposal for a settlement, the undertakings are required to respond to it within the period allowed, confirming that that statement corresponds to the contents of their submissions and that they therefore remain committed to following the settlement procedure (settlements notice, point 26).

62 In return, the Commission is to grant them a 10% reduction in the amount of the fine which would have been imposed upon them under the standard procedure by applying its guidelines on fines and the leniency notice (settlements notice, points 30 to 33).

63 While cooperation as part of the so-called 'leniency' policy and in the context of the settlement procedure may be complementary, the decision to initiate the settlement procedure is exclusively a matter for the Commission, unlike the former type of cooperation, the initiative for which lies with the applicant company.

64 It is apparent from recital 4 of Regulation No 622/2008 that the Commission must take account of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as the number of parties involved, foreseeable conflicting positions on the attribution of liability, and the extent of contestation of the facts. It is also apparent from that recital that the Commission may take account of concerns other than those relating to possible efficiency gains, such as the possibility of setting a precedent. It follows that the Commission has a wide discretion as to the identification of cases that may lend themselves to a settlement.

65 Furthermore, while the purpose of the leniency policy is to reveal the existence of cartels and to facilitate the Commission's work in that regard, the purpose of the settlement policy is to serve the effectiveness of the procedure in dealing with cartels. Thus, the settlement procedure may allow the Commission to deal with cartel cases more quickly and efficiently by following a simplified procedure.

66 The settlement procedure is conducted in essence in the following manner. The procedure is initiated by the Commission with the agreement of the undertakings concerned (settlements notice, points 5, 6 and 11). The written declaration by which the undertaking agrees to take part in settlement discussions so that it may subsequently, where relevant, make a proposal for a settlement, does not mean that it admits having participated in any infringement or that it accepts liability for such infringement (settlements notice, point 11).

67 Once the procedure is initiated, undertakings which are subject to investigations and which take part in the settlement procedure are informed by the Commission, during bilateral discussions, of the essential elements 'such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections' (settlements notice, point 16). That mechanism allows the parties to express their views on the objections which the Commission could raise against them and to make an informed decision on whether or not to settle (settlements notice, point 16).

68 Following the notification of that information, the undertakings concerned may opt for the settlement procedure and submit a proposal for a settlement in which, in essence, they explicitly concede their liability with respect to the infringement, accept the range of fines and confirm that they do not envisage requesting access to the file or to be heard again in an oral hearing, unless the Commission does not reflect their proposal for a settlement in the statement of objections and the decision (settlements notice, point 20).

69 Following that recognition of their liability and the confirmations provided by the undertakings concerned, the Commission sends them the statement of objections and then adopts a final decision. That decision is based in essence on the fact that the parties have unequivocally acknowledged their liability, have not disputed the statement of objections, and have kept to their commitment to achieve a settlement (settlements notice, points 23 to 28).

70 If the undertaking concerned decides not to enter into a settlement, the procedure leading to the final decision is governed by the general provisions of Regulation No 773/2004, instead of those governing the settlement procedure. The same applies even if the Commission takes the initiative to terminate the settlement procedure (settlements notice, points 19, 27 and 29).

71 Where the settlement does not involve all the participants in an infringement, for example, as in this case, where an undertaking withdraws from the settlement procedure, the Commission adopts, on the one hand, following a simplified procedure (the settlement procedure), a decision addressed to the participants in the infringement who have decided to enter into a settlement and reflecting the commitment of each of them and, on the other hand, according to the standard procedure, a decision addressed to participants in the infringement who have decided not to enter into a settlement.

72 However, even in such a hybrid case, involving the adoption of two decisions with different addressees and following two separate procedures, at issue are participants in one and the same cartel, so that the principle of equal treatment must be observed. It is important to note that, according to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 14 September 2010 in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, ECR, EU:C:2010:512, paragraph 55 and the case-law cited).

73 As is apparent from the foregoing, the settlement procedure is an alternative to the — adversarial — standard administrative procedure, distinct from it, and presenting certain special features, such as an advance statement of objections and the notification of a likely range of fines.

74 However, the guidelines for the calculation of the fines to be imposed remain fully applicable in that context. This means that, in determining the amount of the fine, there cannot be any discrimination between the participants in the same cartel with respect to the information and calculation methods which are not affected by the specific features of the settlement procedure, such as a 10% reduction in the event a settlement is entered into (see, to that effect, judgment of 19 July 2012 in *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, ECR, EU:C:2012:479, paragraph 58 and the case-law cited).

– The increase in the amount of the fine in relation to the notified range

75 In the present case, the applicants decided to discontinue settlement discussions.

76 As they have rightly pointed out, they were perfectly entitled to do so. It should be noted in that regard that the settlement procedure is a voluntary procedure (see paragraph 120 below) and is, moreover, distinct from the standard procedure. Point 19 of the settlements notice provides that, when an undertaking withdraws from the settlement procedure, that is to say, if it does not make a settlement submission, the procedure leading to the final decision must follow the general provisions, and, in particular, Article 10(2) (reply to the statement of objections), Article 12(1) (oral hearing), and Article 15(1) (access to the file) of Regulation No 773/2004, instead of those governing the settlement procedure.

77 In the present case, the Commission sent the applicants, as part of the standard administrative procedure, a statement of objections, which indicated, just as the advance notification which was sent as part of the settlement procedure did, that the applicants had taken part in a single and continuous infringement between 1978 and 2004.

78 In recital 318 of the contested decision, the Commission held, after reviewing the applicants' arguments in their reply to the statement of objections and having been given a different interpretation of their statements, that it could not determine with sufficient legal certainty that the applicants were aware of, and had taken part in, the global cartel implemented as from 1978. It stated, in particular, that it could not rely on the evidence submitted by the applicants in their application for immunity under the leniency notice, evidence which was essential in order to make a finding as to their participation prior to 1993.

79 As part of the settlement procedure, the Commission had informed the applicants that they would jointly incur a fine in a maximum amount of between EUR 41 and 44 million as a result of their participation in a single and continuous infringement from 31 December 1978 until 10 February 2004 including, aside from the 10% reduction for entering into a settlement, a 35% reduction for mitigating circumstances under the 2006 Guidelines, granted for having allowed the Commission to extend the duration of their own participation in the cartel, and a 17% reduction under the leniency notice.

80 In the contested decision, adopted following the standard procedure, the Commission arrived at an amount of EUR 59 850 000 for the fine following a 5% reduction in the basic amount of the fine pursuant to the leniency notice.

81 It is true that, at first glance, such an increase in the amount of the fine, when the duration of the infringement has been reduced by nearly 15 years, may seem paradoxical.

82 However, in that regard, it should be noted that the Commission merely applied the same method of calculating the amount of the fine provided for in the 2006 Guidelines, in order to arrive at both the range of fines at the stage of the settlement procedure and the amount of the fine ultimately imposed by the contested decision and separate decision. During the settlement procedure, the details of the calculation were, in accordance with the rules governing the settlement procedure, notified and explained to each of the parties to that procedure. For the reasons referred to in paragraph 18 above, the Commission, in order to determine the basic amount of the fine, used the value of sales actually made by the undertaking in question over the years of its infringement, and set at 16% (lower end of the range) or 17% (upper end of the range) the proportion of the value of sales used in respect of the gravity by adding an additional amount calculated on the basis of the average annual amount of sales made during the period of the infringement by applying a percentage of either 16% or 17% for the lower or upper amounts of the range for deterrence.

83 While the value of sales made by the applicants for the period taken into account in the settlement procedure (1978-2004) was EUR 529 million (rounded), which resulted in an initial basic amount of EUR 90 million, the value of sales for the period applied in the contested decision (1993-2004) was EUR 341 million (rounded), which led to an initial basic amount of EUR 58 million, applying, in both cases, a gravity rate of 17%.

84 Similarly, while average sales during the infringement period applied in the settlement procedure amounted to EUR 21 million, giving an additional amount of more than EUR 3 million, the average for the period applied during the standard procedure was EUR 32.8 million, giving an additional amount of more than EUR 5 million, using a rate of 17% for deterrence.

85 Consequently, the initial basic amount to which an additional amount was added came to a final basic amount of EUR 93 million in the settlement procedure and EUR 63 million in the standard procedure.

86 Thus, the circumstance of no longer taking account of the turnover for the period from 1978 to 1993 ('the first period'), a turnover of over EUR 180 million, had the immediate effect of increasing the average amount of the value of sales, and therefore the additional amount referred to in paragraph 84

above. During the period applied in the contested decision (1993-2004) ('the second period'), turnover increased sharply, reaching EUR 341 million, taking into account that the applicants' activity increased and spread geographically during that period.

87 The final basic amount having been determined, the Commission may adjust that basic amount upwards or downwards, and do so in the light of the aggravating or mitigating circumstances which characterise the participation of each of the undertakings concerned. In the event that the leniency notice or settlements notice is applicable, that amount may be further reduced. In the present case, even if the basic amount of the fine put forward during the settlement procedure was higher than that applied in the standard procedure (see paragraph 85 above), the more significant reductions put forward during the settlement procedure led to the amount of the fine being lower. Thus, the higher additional amount resulting from the increase in average annual sales, as well as the non-application of the 35% reduction due to mitigating circumstances, the lesser reduction granted under the leniency notice (5% instead of 17%) and the non-application of the 10% reduction required by the settlements notice resulted in a higher fine than that proposed during the settlement procedure being imposed on the applicants by the contested decision.

88 The questions therefore arise as to whether, as the applicants claim, the Commission 'penalised' their withdrawal from the settlement procedure and whether the Commission was bound by the range of fines which it had notified to the applicants during the settlement procedure.

89 Those questions must be answered in the negative.

90 It should be noted in that regard that the final decision must take account of all the relevant circumstances at the time of the decision, including all the information and arguments put forward by the undertaking during the exercise of its right to be heard. Contrary to what the applicants claim, given their arguments calling into question their participation in the infringement as described in the statement of objections for the period prior to 1993, the Commission was faced with a new set of evidence: it was no longer able to rely on the applicants' declarations in their application for leniency, the new element being the abandonment of the first period (1978-1993), which had been taken into account during the settlement procedure. It follows that the Commission was required to review the file, redefine the duration taken into account and, where appropriate, to re-adjust the method for the calculation of the fine.

91 With regard to the adjustment of the method of calculation of the fine, it is not disputed that the range estimated during the settlement procedure related to the whole of the two periods (between 1978 and 2004). The effect of the abandonment of the first period (1978-1993) was a reduction in the duration of the infringement and a review of the application of the leniency notice and of the 2006 Guidelines. The Commission considered that it was no longer possible to reward self-incrimination for the period running from 1978 to 1993, a period now abandoned.

92 It should be noted, in that regard, that it is apparent from settled case-law that a reduction in the amount of the fine on grounds of cooperation during the administrative procedure is justified only if the conduct of the undertaking in question enabled the Commission to establish the existence of an infringement more easily, and, where relevant, to bring it to an end (judgments of 16 November 2000 in *SCA Holding* v *Commission*, C-297/98 P, ECR, EU:C:2000:633, paragraph 36; 10 May 2007 in *SGL Carbon* v *Commission*, C-328/05 P, ECR, EU:C:2007:277, paragraph 83; and 14 May 1998 in *BPB de Eendracht* v *Commission*, T-311/94, ECR, EU:T:1998:93, paragraph 325).

93 In the same way, it is apparent from the case-law that where an application for immunity under the leniency notice relates to a different cartel from that which the Commission is dealing with and which moreover is time-barred, there is no added value and the Commission has no obligation to reward such cooperation, since it does not facilitate the investigation. That reasoning also holds with respect

to cooperation 'outside the leniency programme' (see, to that effect, judgments of 12 December 2007 in *BASF and UCB* v *Commission*, T-101/05 and T-111/05, ECR, EU:T:2007:380, paragraph 222, and 28 April 2010 in *Oxley Threads* v *Commission*, T-448/05, EU:T:2010:166, paragraphs 129 and 130).

94 In the present case, it is apparent from the minutes of the three bilateral meetings held as part of the settlement procedure that the applicants argued, at the second meeting, that partial immunity should be granted to them for the period from 1978 to 1992 pursuant to point 23 of the leniency notice. In support of that application, they relied on the fact that, in the absence of any admissions on their part, the Commission could take into account only isolated notes regarding four meetings in 1983 and inadequate statements by Kemira and Tessenderlo Chemie. At that same meeting, the Commission conceded that their admissions had been of decisive importance in demonstrating their participation in the cartel during that period. At the third meeting held in the course of the settlement procedure, the Commission indicated that it could not grant the partial immunity requested by the applicants as their cooperation had made it possible only to determine their own participation, not to extend the duration and scope of the cartel itself. By contrast, the Commission was ready to grant a reduction for mitigating circumstances by way of reward for their cooperation outside the leniency notice. However, given that the applicants had decided not to submit a proposal for a settlement and, subsequently, in their reply to the statement of objections, disputed their participation in the single infringement before 1993, the Commission did not ultimately use, for the reasons referred to in paragraph 78 above, the first period as a period in which they participated in the infringement.

95 Therefore, the Commission correctly decided not to apply the reduction initially planned for mitigating circumstances, that is to say, the 35% reduction 'outside the leniency programme' on the basis of point 29 of the 2006 Guidelines. In the same way, the abandonment of the first period also has an impact on the 17% reduction under the leniency notice. The question whether the Commission erred in assessing the added value of the applicants' cooperation under that notification will be addressed in paragraph 170 et seq. It follows that the applicants' assertion that the Commission penalised their withdrawal from the settlement procedure must, subject to the question relating to the reward for their cooperation in the context of the leniency notice, be rejected.

96 Furthermore, it should be noted that the Commission is not bound by the range indicated during discussions as part of the settlement procedure. That is a different procedure from that which was eventually followed and which led to the adoption of the contested decision. So far as concerns the standard administrative procedure, in which liabilities have yet to be determined, the Commission is only bound by the statement of objections, which does not set a range of fines, and is required to take into consideration the new information brought to its attention during that procedure.

97 Inasmuch as by their argument the applicants allege that the Commission failed to explain the difference between the range of initial fines and the amount of the fine finally imposed in the contested decision, that line of argument must be rejected.

98 It should be noted that, according to settled case-law, the statement of objections must be couched in terms that, even if succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission and to enable them properly to defend themselves, before the Commission adopts a final decision (judgments of 31 March 1993 in *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECR, EU:C:1993:120, paragraph 42; 19 March 2003 in *CMA CGM and Others* v *Commission*, T-213/00, ECR, EU:T:2003:76, paragraph 109; and 14 April 2011 in *Visa Europe and Visa International Service* v *Commission*, T-461/07, ECR, EU:T:2011:181, paragraph 56). With respect to the amount of the fines, it is sufficient that the Commission states in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the

duration of the alleged infringement and whether that infringement was committed intentionally or negligently (see judgment of 17 May 2011 in *Arkema France* v *Commission*, T-343/08, ECR, EU:T:2011:218, paragraph 54 and the case-law cited).

99 With respect to the statement of reasons for the final decision, it is apparent from settled case-law that the Commission must give its final assessments based on the results of the whole of its investigation as they stand at the time the administrative proceedings are closed; it is not obliged to explain any differences between its final assessments in the final decisions imposing a penalty and its provisional assessments set out in the statement of objections (judgments of 17 November 1987 in *BAT and Reynolds* v *Commission*, 142/84 and 156/84, ECR, EU:C:1987:490, paragraph 70, and 10 July 2008 in *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, ECR, EU:C:2008:392, paragraphs 64 and 65). In the same way, in the context of the determination of fines for breaches of competition law, the obligation to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (judgments of 16 November 2000 in *Cascades* v *Commission*, C-279/98 P, ECR, EU:C:2000:626, paragraphs 39 to 47, and *Sarrió* v *Commission*, C-291/98 P, ECR, EU:C:2000:631, paragraphs 76 to 80).

100 Moreover, as is also apparent from the case-law, an indication, at the stage of the statement of objections, of a range of fines would be contrary to the purely preparatory nature of such an act (see, to that effect, judgments of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraph 141, and 14 December 2006 in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, ECR, EU:T:2006:396, paragraph 369).

101 From that point of view, it should be noted that a range of fines is an instrument solely and specifically related to the settlement procedure. Article 10a(2) of Regulation No 773/2004 expressly permits the Commission services to inform the participants in settlement discussions of an estimate of the fine to be imposed upon them, in the light of the method contained in the Guidelines on the calculation of fines, of the provisions of the settlements notice and of the leniency notice, where applicable.

102 The rationale behind these provisions is that, as is apparent from recital 2 of Regulation No 622/2008 and point 16 of the settlements notice, the range of fines and other items must be brought to the attention of the undertaking in question so that it can usefully comment on the evidence accepted by the Commission and thereby decide, in full knowledge of the facts, whether to settle or not.

103 If the undertaking decides to enter into a settlement, it is to make, within the period prescribed by the Commission, a proposal for a settlement, in which it acknowledges its liability for the infringement and which reflects the results of discussions to that effect, including an indication of the maximum fine that it expects the Commission to impose upon it, and that it would accept as part of the settlement procedure. Since the notification, in writing, of a statement of objections is a mandatory step before the adoption of a final decision, the Commission then submits a statement of objections reflecting the content of the proposed settlement and the undertaking concerned responds to that statement by confirming that it corresponds to the content of its proposal (see paragraph 69 above).

104 If the undertaking does not put forward a proposal for a settlement, the procedure leading to the final decision is governed by the general provisions of Regulation No 773/2004, instead of those governing the settlement procedure. As already noted above, the situation is, therefore, that of a ‘tabula rasa’, in which the liabilities are yet to be determined.

105 It also follows that the range notified during the settlement procedure is irrelevant, since it is an instrument specific to that procedure. It would therefore be illogical, and even inappropriate (see paragraph 100 above), that the Commission be required to apply, or to refer to, a range of fines falling within the scope of another procedure now abandoned.

106 Following the same logic, when the Commission resorts to the settlement procedure, subsequently abandoned, for the purpose of facilitating the settlement of disputes, it is under no more onerous obligation to state reasons than when it adopts a decision under the standard procedure.

107 Accordingly, the applicants' argument that the amount of their fines should in no case be higher than that corresponding to the upper limit of the range of fines that had been indicated to them with a view to a settlement, increased by 10% as a result of the settlements notice not being applied, cannot be accepted. Moreover, upholding such an argument would deprive the Commission of the possibility of imposing a fine adapted to new circumstances existing at the time of the adoption of the decision, and this in spite of its obligation to take account of new arguments or evidence brought to its attention during the standard administrative procedure, which may have an impact on the determination of the amount of the fine to be imposed.

– Inadequate analysis

108 Since the applicants also allege that the Commission conducted an inadequate analysis and argue that they withdrew from the settlement procedure in order to rectify the Commission's argument with respect to their alleged participation in a single and continuous infringement from 1978 onwards (see paragraph 48 above), it is appropriate to determine whether the Commission initially adequately examined Timab's file with respect to the infringement or whether it misinterpreted the information provided by the applicants.

109 As regards the interpretation of the applicants' application for immunity under the leniency notice and their responses to the requests for information, it should be noted that in the request of 14 October 2008 the applicants indicated that Timab participated in meetings with the main producers of AFP both within and outside the context of the European Chemical Industry Council (CEFIC), that the contacts between Timab executives and the managers of one or more of the competing undertakings in the production or sale of AFP began in 1978, that meetings had been held two to three times a year since 1979 and that, in 1983, four meetings had been held with respect to the putting into service by Timab of a production unit in the United Kingdom. In addition, there were other meetings for all markets in northern Europe to which Timab was not invited and with which it was therefore not involved.

110 On 15 October 2008, the applicants completed their application for immunity under the leniency notice and confirmed Timab's participation in meetings and exchanges of information with other participants in the AFP market sector since 1978 and the fact that it had put an end to those practices since the beginning of the investigations to which it had been subject in 2004. The applicants also indicated that they had already sent various items of evidence likely to add value in their replies to the questions posed by the Commission, while asking it to assess the added value of those items on the day when they were first sent in 2007, and in the light of the elements of the file available to the Commission on that date.

111 As to the first request for information, covering the period between 1989 and 2003, and the second request for information, relating to the period between 1969 and 2004, the applicants responded thereto respectively on 22 February 2007 and on 6 August 2007. Those responses confirmed that Timab had anti-competitive contacts with other participants in the AFP market, the second response indicating such contacts since 1978 with the active participants located in France.

112 Furthermore, by letter of 28 October 2008, the applicants, also in the context of their application for leniency, appended a statement by M.C., managing director of Timac SA and Chairman of Timab, legal successor of Timac, at the material time. According to that statement, the first meeting at European level to which Timab was invited was held in Madrid (Spain) at the beginning of the 1980s, in which, inter alia, Boliden, Windmill, Kemira, Ercros and Tessenderlo Chemie took part. It is

apparent from the statement that those meetings were generally held at the same rate at which CEFIC meetings — chaired by Tessenderlo Chemie — were held, at least three times per year, on the overall market and per geographic area. Timab continued to take part (at the rate of two or three meetings per year) until 2004 in meetings bringing together producers by area. Finally, according to that statement, Timab was present not only in the meetings relating to the French market, but also in those relating to markets to which it exported. At those meetings, the figures reported to CEFIC were reproduced, making it possible to reconstruct the market volume and adjust the volumes that were to be sold by the various stakeholders. The discussions also concerned the price level.

113 It is not disputed that, in their reply to the statement of objections (paragraphs 431 to 458), the applicants stated that Timab had not taken part in a single and continuous infringement from 1978 to 1993, but in two or three distinct practices. Practices predating Timab's membership of Super CEPA, on 16 September 1993, were alleged to be distinct from those implemented as part of CEPA and therefore time-barred, under Article 25 of Regulation No 1/2003. Even if the Commission were to consider that the practices in question actually formed only a single infringement, those practices had, allegedly, been interrupted for nearly two consecutive years and therefore, for that reason, were time-barred for the period prior to 16 September 1993.

114 Upon reading the applicants' application for immunity under the leniency notice and the responses to the requests for information, and in particular the response of 6 August 2007 to the second request for information, it must be found that the Commission was entitled to believe that the applicants were involved in a single and continuous infringement from 1978 onwards.

115 It should be stated, in that regard, that the prevailing principle under EU law is that evidence may be freely adduced and that the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility. No provision or any general principle of EU law prohibits the Commission from relying, as against an undertaking, on statements made by other undertakings. According to established case-law, statements made in the context of an application for immunity under the leniency notice have a probative value that is not insignificant (see, to that effect, judgment of 8 July 2004 in *JFE Engineering and Others* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, ECR, EU:T:2004:221, paragraphs 207, 211 and 212). That reasoning may be applied with respect to statements that may be used against the applicant for leniency itself. Nevertheless, if the undertaking which made an application for leniency under the leniency notice alters its statement or subsequently gives a different interpretation thereof, it will be difficult for the Commission, and then for the Court, in the absence of other evidence, to take account of that statement as a result of the decrease in its probative value. In that case, the Commission is not expected necessarily to use the undertaking's first statements.

116 In addition, after the settlement procedure had been initiated, three meetings, already mentioned in paragraph 94 above, were held. During discussions at those meetings, the Commission stated, in accordance with Article 10(2) of Regulation No 773/2004 and point 16 of the settlements notice, the facts alleged, their characterisation, the gravity and the duration of the alleged cartel. The applicants were therefore made aware of its characterisation as a 'single and continuous infringement' chosen by the Commission and of their alleged participation therein from 1978 to 2004 and had thus had the opportunity to discuss them.

117 As observed by the Commission, it should be noted that the applicants, during the preparatory exchanges for a settlement, never expressed their view that there were, in fact, at least two separate infringements, one of which was time-barred. Admittedly, in point 2 of the settlements notice, it is stated that the Commission does not negotiate the question of the existence of an infringement of EU law or the appropriate penalty. However, that notice should not be an obstacle to discussions. The settlement procedure requires, by its very nature, an exchange of views between the parties. Accordingly, it is an inherent part of such a procedure that both the undertakings and the Commission should try to reach a common understanding of the situation (see, to that effect,

point 17 of the settlements notice). If, taking account of the simplified nature of the settlement procedure, the undertaking at issue and the Commission cannot agree on a common assessment of the situation, only the standard procedure remains.

118 The applicants' complaint that the Commission erred in its investigation of their case must therefore be rejected.

– The other complaints

119 As regards the applicants' other complaints, summarised in paragraphs 49 to 54 above, relating to (i) failure to observe the right not to incriminate oneself, breach of the principle of equality of arms, breach of the principle of the protection of legitimate expectations and of the principle of sound administration, and (ii) misuse of powers, it must be stated that they are unfounded.

120 First, as regards the argument concerning the right not to incriminate oneself, it should be recalled that the cooperation of an undertaking within the meaning of the leniency notice is purely voluntary on the part of the undertaking concerned. According to the judgment of 18 October 1989 in *Orkem* v *Commission* (374/87, ECR, EU:C:1989:387, paragraphs 34 and 35), the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove. The Court of Justice has also held that while the Commission could not compel an undertaking to admit its participation in an infringement, it was not thereby prevented from taking account, when setting the amount of the fine, of the assistance given by that undertaking, of its own volition, in order to establish the existence of the infringement (see judgment of 14 July 2005 in *Acerinox* v *Commission*, C-57/02 P, ECR, EU:C:2005:453, paragraph 88 and the case-law cited). The cooperation and degree of cooperation which the undertaking wishes to offer in the administrative procedure is therefore entirely a matter for it. Both the procedure following an application for immunity under the leniency notice and that relating to the proposal for a settlement are forms of cooperation. Accordingly, the same logic applies to the settlement procedure. The proposal for a settlement by the undertaking concerned, which recognises its liability for the infringement, following preparatory discussions conducted as part of the settlement procedure, is based on the free will of that undertaking. Moreover, it is not apparent from the file that the Commission tried to influence the applicants' choice.

121 Secondly, as regards the principle of equality of arms, the applicants claim that nothing led them to expect such a paradoxical decision which was contrary to the interests of their defence (whose aim was to obtain recognition of the existence of separate infringements and to obtain, consequently, a reduction in the amount of the fine).

122 It should be noted in that regard that the Commission merely applied the 2006 Guidelines and leniency notice. As already mentioned above, the Commission was not required to reward self-incriminating statements relating to the period of 15 years that was not taken into account. It follows from the case-law cited in paragraph 93 above that, where an application for immunity under the leniency notice relates to a different cartel from that which the Commission is dealing with, there is no added value and the Commission has no obligation to reward such cooperation, since it does not facilitate the investigation. Accordingly, it must be concluded that it is foreseeable that a reward by way of leniency will be reviewed when the statement made as part of the leniency application relates in part to a period which has not been taken into consideration. In the same way, since the applicants' statement was the element which made it possible to extend the duration of their participation, the reduction 'outside the leniency programme' originally envisaged also became irrelevant.

123 Thirdly, with respect to the principle of the protection of legitimate expectations, it should be noted that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the EU authorities have caused him to entertain legitimate expectations, it being understood that no one may plead infringement of that principle unless precise, unconditional and consistent assurances, from authorised, reliable sources, have been given to him by the authorities (see judgment of 8 September 2010 in *Deltafina* v *Commission*, T-29/05, ECR, EU:T:2010:355, paragraph 427 and the case-law cited).

124 In the present case, the range of fines was indicated to the applicants as part of the settlement discussions. In addition, that range related to the period from 31 December 1978 to 10 February 2004. Admittedly, the effectiveness of the settlement procedure and the principle of the protection of legitimate expectations requires that the Commission be bound, in that procedure, by its estimate of the amount of the fine. It should be noted in that regard that it is on the basis of that assessment that a party may decide to issue a proposal for a settlement within the meaning of Article 10a(2) of Regulation No 773/2004. However, that is not the case here. The applicants withdrew from the settlement procedure. Accordingly, they may not claim a legitimate expectation that the likely range of fines would be applied. Following their reply to the statement of objections, as part of the standard procedure, the Commission reduced the period of their participation in the infringement. As has already been noted (see paragraph 91 above), that limitation of the duration of the infringement had an impact not only on the calculation of the value of sales, but also on the assessment of the added value of the applicants' contributions.

125 Fourthly, the applicants' complaint that the Commission infringed the principle of sound administration cannot be accepted either. In that regard, it should be recalled that the Commission sent a statement of objections which merely described the facts that could have an impact on the calculation of the fines (gravity and duration), which is a usual method of proceeding in the context of the standard procedure (see the case-law cited in paragraph 98 above). The Commission was not required to address the issues relating to the reduction for leniency or the elimination of the reduction for mitigating circumstances in the statement of objections, especially given that, at that stage of the proceedings, the applicants had not yet been able to submit their views on that statement. Moreover, it is apparent from the file that the Commission, having reviewed the applicants' arguments following the reply to the statement of objections and at the hearing on 24 February 2010, asked the applicants to clarify the relationship between their application for leniency and the facts prior to 1993 and indicated that the new characterisation of the infringement could have an impact on the calculation of the amount of the fines and, in particular, on the added value of Timab's cooperation.

126 Fifthly, as regards the allegation that the Commission misused its powers by using them to penalise the applicants' withdrawal from the settlement procedure, it is sufficient to note that the 2006 Guidelines and the leniency notice were applied in the same way in the contested decision as they were for the calculation of the range in the settlement procedure, the differences residing, other than with respect to the basic calculation of the fine, in the non-application of the 10% reduction provided for in the settlements notice, the information forming the basis of the assessment of the application for leniency and the non-fulfilment of the conditions for the application of a mitigating circumstance.

127 It follows from the above that since none of the complaints alleging an infringement of the rights of the defence, of the laws governing the settlement procedure, of the principles of the protection of legitimate expectations and sound administration, and a misuse of powers may be upheld, the first group of pleas must be rejected.

The practices concerned

128 As part of this plea, the applicants allege that the Commission attributed all the alleged practices to all of the undertakings without distinguishing the different periods of the infringement and the different forms of conduct. In so doing, it deprived the applicants of the right to usefully assert their arguments with respect to the unfounded objections that they participated in some of those practices, namely the compensation mechanism and the concerted fixing of conditions of sale. The Commission is also alleged to have disregarded the standard of proof and the requirement to state reasons.

129 More specifically, with respect to the compensation mechanism, the applicants submit that, contrary to the statement of objections, which excludes any participation by Timab in that mechanism, it was found in the contested decision that Timab had participated in it by requesting a review of the quotas attributed to it. In addition, the contested decision upheld a definition of compensation mechanisms (penalising non-compliance with the quotas) which is not that of the statement of objections (setting objectives a priori).

130 In the same way, with respect to the conditions of sale, the contested decision and the statement of objections are alleged not to have used the same definition, and the practices referred to in the statement of objections do not correspond to the period of the infringement found in the contested decision.

131 The Commission contends that that plea should be dismissed.

132 With respect to the complaint alleging breach of the obligation to state reasons, it should be recalled that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (judgment of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraphs 63 and 67).

133 Thus, that requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment in *Commission* v *Sytraval and Brink's France*, paragraph 132 above, EU:C:1998:154, paragraph 63).

134 In the present case, it is apparent from the contested decision that the practices relating to the compensation mechanisms and those relating to the coordination of the conditions of sale had been part of the single and continuous infringement since its origin, as the means by which the very object of the cartel was achieved (see section 4 and recitals 239 and 248 of the contested decision). In addition, it is also apparent from recitals 219 to 221 of the contested decision that the applicants participated in that infringement from 16 September 1993 onwards, in full knowledge of those practices. Finally, recitals 127, 132 to 135, 156, 159, 227 and 246 of the contested decision mention those practices with respect to the applicants. Consequently, the contested decision is sufficiently reasoned in that regard, so that it is appropriate to dismiss this complaint.

135 The complaint relating to the infringement of the rights of the defence must be rejected. First, the statement of objections outlines the compensation mechanism and the coordination of the conditions of sale which were elements of the cartel, although in a secondary way, and states that Timab was among the participants, except, with respect to the compensation mechanism, for the years from 1994 to 1996. Paragraphs 459 to 480 of the reply to the statement of objections were devoted to those elements. Accordingly, the applicants had the opportunity to comment on the evidence relied upon against them.

136 Secondly, contrary to what the applicants claim, there is no difference between the definitions used in the statement of objections and those used in the contested decision with respect to the compensation mechanism and the coordination of the conditions of sale. With respect to the compensation mechanism, the basic principles of that mechanism are described, in an identical manner, in paragraph 127 of the statement of objections and in recital 132 of the contested decision. The same is true with respect to the description of the conditions of sale, as is apparent, for example, in paragraphs 83, 100 and 106 of the statement of objections and in recitals 86, 107 and 113 of the contested decision. The fact that the compensation measures and the coordination of the conditions of sale could take different forms, such as the practice relating to cover prices, whose purpose was to ensure the allocation of a customer (compensation measure), the agreements on payment periods per customer segments, the coordination of the contractual terms or the allocation of distribution channels or the duration of contracts (conditions of sale), in no way alters that finding.

137 With respect to the evidence, it is true that the evidence relating to the compensation mechanisms and the consultation on the conditions of sale relate more to the first period (1978-1993) of the cartel, which ultimately was not used against the applicants. However, that finding does not mean that the evidence is lacking or that the applicants could not be held liable for the infringement.

138 Thus, it is apparent from recitals 134 and 246 of the contested decision that Timab negotiated quota increases when it needed to increase its volumes of supply, in particular in 1996, and that it obtained an agreement to sell the additional volume requested from France to Belgium, Germany, Austria, Switzerland and the Netherlands provided that the increase was gradual, spreading over a period of four years (1997 to 2000).

139 Moreover, it is not disputed that Timab took part in the cartel concerning the coordination of volumes and quotas, in the strategies and the pricing conditions and that, by adhering to the Super CEPA arrangements, it was aware, or, at the very least, should have been aware, of the coordination within the Super CEPA relating to the conditions of sale also, even if it was only when necessary. As is apparent from recital 173 of the contested decision, at cartel meetings relating to the years for which Timab's involvement was not disputed, other conditions of sale, such as the volumes supplied per customer, were, wherever necessary, the subject of discussions.

140 Moreover, it should be noted that those elements are not taken into account in the assessment of the gravity of the cartel. It is apparent from recital 328 of the contested decision that the Commission only took account, when assessing the gravity of the infringement, of the factors which were common to all participants in the infringement, namely the market sharing and coordination of prices.

141 It follows from the foregoing that the plea must be dismissed.

The amount of the fine

142 In the third group of pleas, the applicants submit that the Commission infringed a number of general principles of law, such as the principles of equal treatment, that penalties must be specific to offender and offence and of proportionality, and criticise several aspects of the amount of the fine and the rules applied to that amount, alleging a breach of Article 23 of Regulation No 1/2003, a manifest error of

assessment of the gravity of the impugned practices, a manifest error of assessment of the mitigating circumstances, a disproportionate decrease in the reduction for leniency and a manifest error of assessment of the ability to pay.

– Breach of Article 23 of Regulation No 1/2003

143 By this plea, the applicants submit that Article 23 of Regulation No 1/2003, the principle of proportionality and the principle that penalties must be specific to offender and offence are infringed because the fines were determined according to the degree of cooperation and not according to the gravity and duration of the infringement as provided for in Article 23 of that regulation.

144 The Commission disputes the applicants' arguments.

145 First, it should be noted that, contrary to what the applicants claim, the Commission did take into account the gravity and duration of the infringement at issue. The gravity is explained in the determination of the percentages of the value of sales which are used in determining the initial basic amount and the additional amount for deterrence, and the duration is reflected, as appropriate, either in the multiplier by the number of years or in the value of actual sales made during participation in the infringement. The fact that a reduction was granted to certain participants in the infringement for cooperation and for entering into a settlement does not affect that finding.

146 Secondly, it should be noted that the applicants have provided two tables in their pleadings. Those tables should be read in the light of an alleged breach of the principle that penalties must be specific to offender and offence and the principle of proportionality. As to the table provided by the applicants in their application, which compares the fines imposed in the contested decision on the basis of the 2006 Guidelines with the fines that could have been calculated according to the 1998 guidelines (which, according to the applicants, results in a fine twice as low for them), it should be noted that that comparison is irrelevant given that the frame of reference is only that of the 2006 Guidelines.

147 In the same way, since the table provided in the reply indicates the percentage of the fine in relation to the combined sales of each of the undertakings, which, according to the applicants, reveals disparities, it is appropriate to note that such a comparison is irrelevant. It is wrong to assume that the ratio between the overall volume of sales and the amount of the fine must be constant for all the undertakings involved in a single infringement, since the final amount of the fine reflects the specific circumstances of each undertaking, such as increases or reductions for aggravating or mitigating circumstances or in order not to exceed the limit of 10% of turnover and by way of leniency. The fact that, because of the application of the 10% ceiling provided for in Article 23(2) of Regulation No 1/2003, certain factors such as the gravity and duration of the infringement are not reflected effectively in the amount of the fine imposed on a participant in an infringement, unlike other participants which have not received a reduction on account of that ceiling, is merely a consequence of the application of that ceiling to the final amount of the fine imposed (judgment of 28 June 2005 in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:408, paragraph 279).

148 Accordingly, the plea alleging infringement of Article 23 of Regulation No 1/2003 and of the principle that penalties must be specific to offender and offence and the principle of proportionality cannot be accepted.

– Gravity

149 As part of this plea, the applicants submit that the Commission did not take account, during the assessment of the gravity of the offence, of certain elements which are important in that regard, such as the pressure on prices resulting from competition from similar products, the actual impact of the

infringement and the fact that during the 2000s, competition was real between the parties to CEPA, in particular as a result of Timab's conduct. As a result, the Commission could not set an identical percentage of the value of sales, whatever the undertakings, the duration and intensity of the practices for each of them, without infringing the principle that penalties must be specific to offender and offence. In addition, the applicants allege an infringement of the principles of equal treatment and of proportionality of the penalty with respect to the application of a multiplier of 17%. According to them, that multiplier should be less than that used for other undertakings considering the fact that they did not take part in the compensation mechanisms or in the conditions of sale. For that reason, the percentage of the additional amount should be reduced.

150 The Commission disputes the validity of that argument.

151 First, as regards the rules for calculating the amount of the fine, it should be noted that under the methodology set out in points 9 to 11 of the 2006 Guidelines, the Commission is, first, to determine a basic amount of the fine for each undertaking or association of undertakings. Second, it may adjust the basic amount of the fine upwards or downwards, having regard to the aggravating or mitigating circumstances which characterise the participation of each of the undertakings concerned.

152 In the context, more specifically, of the first stage of the methodology for calculating fines, in accordance with points 21 to 23 of the 2006 Guidelines, the multiplier for 'gravity of the infringement' is set at a level of up to 30%, regard being had to a number of factors, such as the nature of the infringement, the combined market share of all of the undertakings concerned, the geographic scope of the infringement and the question of whether or not the infringement has been implemented, it being understood that price-fixing, market-sharing and output-limitation agreements are, by their very nature, among the most harmful restrictions of competition. Point 25 of the 2006 Guidelines states that, as a deterrent, the Commission will include in the basic amount of the fine a proportion for calculating an additional amount, situated in a range of between 15% and 25% of the value of sales, taking the above factors into account.

153 It follows from paragraph 152 above that, in order to determine the gravity of the infringement and therefore the fine, the 2006 Guidelines do not attach decisive importance to the existence or absence of effects of the cartel.

154 That approach is consistent with settled case-law, according to which the effect of an anti-competitive practice is not a decisive criterion for assessing the proper amount of a fine (judgments of 2 October 2003 in *Thyssen Stahl* v *Commission*, C-194/99 P, ECR, EU:C:2003:527, paragraph 118, and 3 September 2009 in *Prym and Prym Consumer* v *Commission*, C-534/07 P, ECR, EU:C:2009:505, paragraph 96).

155 Moreover, market sharing and horizontal price-fixing cartels have always been considered to be part of the most serious infringements of competition law and may therefore, solely on the basis of their very nature, be classified as 'very serious' (see judgments of 27 July 2005 in *Brasserie nationale* v *Commission*, T-49/02 to T-51/02, ECR, EU:T:2005:298, paragraphs 173 and 174 and the case-law cited; 5 April 2006 in *Degussa* v *Commission*, T-279/02, ECR, EU:T:2006:103, paragraph 252 and the case-law cited; and 13 July 2011 in *Polimeri Europa* v *Commission*, T-59/07, ECR, EU:T:2011:361, paragraph 225).

156 In the light of those factors, the applicants' arguments as to the lack of effects of the cartel on the relevant market must be rejected.

157 Secondly, with respect to the proportion of the value of the sales of each undertaking concerned used by the Commission in the contested decision, it should be noted that the determination of the multiplier for 'gravity of the infringement' and that of the multiplier for an 'additional amount' are the subject, respectively, of recitals 323 to 326 and of recitals 332 and 333 of the contested decision.

158 It follows that, in order to justify the determination of a multiplier of 17%, the Commission relied, with respect to the multiplier for 'gravity of the infringement', on two criteria, namely the nature of the infringement and the geographical scope of the cartel. The same is true with respect to the 'additional multiplier'.

159 The Commission took account of the main objective of the overall cartel, which was to share a large part of the European market for AFP and to coordinate prices, and recalled that such coordination was by its nature a very serious breach of Article 101 TFEU and of Article 53 of the EEA Agreement. In addition, most of the territories of the Member States of the European Union and the Contracting Parties to the EEA Agreement were covered by the infringement.

160 The Court cannot accept the complaints that the Commission infringed the principles of equal treatment, proportionality and that penalties must be specific to offender and offence because it did not use a percentage of the value of sales lower than that set for the other parties, on the ground that Timab did not take part in the compensation practices or in the coordination of the conditions of sale.

161 In that regard, it must be recalled that the principle of proportionality requires that the measures adopted by the institutions must not exceed what is appropriate and necessary for attaining the objective pursued (judgments of 13 November 1990 in *Fedesa and Others*, C-331/88, ECR, EU:C:1990:391, paragraph 13; 5 May 1998 in *United Kingdom* v *Commission*, C-180/96, ECR, EU:C:1998:192, paragraph 96; and 12 September 2007 in *Prym and Prym Consumer* v *Commission*, T-30/05, EU:T:2007:267, paragraph 223). When it comes to the calculation of fines, the gravity of infringements has to be determined by reference to numerous factors and it is important not to confer on one or other of those factors an importance which is disproportionate in relation to other factors. In this context, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and to apply those factors in a way which is consistent and objectively justified (judgments of 27 September 2006 in *Jungbunzlauer* v *Commission*, T-43/02, ECR, EU:T:2006:270, paragraphs 226 to 228, and 28 April 2010 in *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, ECR, EU:T:2010:165, paragraph 171).

162 In the present case, the applicants took part in a single and continuous infringement between 1993 and 2004, which consisted in market sharing and the coordination of prices. Accordingly, the Commission could, without infringing the principles of equal treatment and proportionality, set an identical percentage of the value of sales regardless of the undertakings, the duration and intensity of the practices for each of them.

163 In the same way, the applicants may not validly rely on the case giving rise to the judgment of 19 May 2010 in *IMI and Others* v *Commission* (T-18/05, ECR, EU:T:2010:202) or that relating to the Commission decision of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C-39181 — Candle Waxes). In that regard, it is apparent from the contested decision that the compensation mechanisms or coordination of the conditions of sale are not a separate part of the cartel, but constitute ancillary conduct ('if necessary') of the infringement. That conduct was not taken into account when determining the percentage to be applied, so that no distinction could be made between the applicants and the other participants in the cartel, even if it was established that Timab had not taken part in any aspect of the coordination in question. It is apparent from the contested decision that the factors entering into the assessment of the gravity are common to all participants in the infringement, namely mainly market sharing and price coordination, and that, accordingly, the percentage of gravity is the same for all undertakings involved in the cartel.

164 Accordingly, no infringement of the principle of equal treatment, of the principle of proportionality or of the principle that penalties be specific to offender and offence may be imputed to the Commission.

– Mitigating circumstances

165 This plea is divided into two parts, by which the applicants challenge the Commission's refusal to grant them the benefit of mitigating circumstances. In that regard, they allege that the Commission infringed the principle that penalties be specific to offender and offence and made a manifest error of assessment.

166 First, according to the applicants, they were economically dependent on Tessenderlo Chemie since it controlled the supply of raw materials in the upstream market and had the means of excluding Timab from the market. By not taking into account that dependency, the contested decision is vitiated by a manifest error of assessment and infringes the principle that penalties must be specific to offender and offence.

167 According to settled case-law, dependency and the existence of threats and pressure do not constitute a mitigating circumstance since they do not justify infringements of competition rules (judgment in *Dansk Rørindustri and Others* v *Commission*, paragraph 147 above, EU:C:2005:408, paragraphs 369 and 370). In addition, it should be noted that the applicants have not provided any evidence demonstrating effective pressure from Tessenderlo Chemie.

168 Secondly, the applicants rely on their competitive conduct as a mitigating circumstance. It should be noted, as the Commission has done, that that claim appears to contradict that relating to the economic dependence on Tessenderlo Chemie. In any event, assuming that the applicants did not always respect the agreements reached within the cartel, which is by no means an exceptional circumstance in cartel cases, this does not call into question their participation therein and does not constitute a mitigating circumstance (see, to that effect, judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraphs 74 and 297 and the case-law cited).

169 Accordingly, that plea must be rejected.

– Leniency

170 As part of this plea, the applicants criticise the loss of 12 percentage points (from 17% to 5%) for cooperation as against what had been indicated to them as part of the settlement procedure. In particular, they criticise, given their cooperation, the disproportion of that reduction and the reasons given for it, namely the lack of documentary evidence and the tardiness of their explanations for the period from 1978 to 1993. According to them, the Commission altered its assessment of the added value of the cooperation relating to the events subsequent to 16 September 1993 and, as a result thereof, penalised their withdrawal from the settlement procedure.

171 In the leniency notice, the Commission sets out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction of the fine which would otherwise have been imposed upon them.

172 According to point 20 of the leniency notice, '[u]ndertakings that do not meet the conditions [for an exemption from fines] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'.

173 Point 21 of the leniency notice states that, '[i]n order to qualify [for a reduction of the fine imposed upon it under point 20 of this notice], an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

174 Point 22 of the leniency notice defines the concept of significant added value as follows:

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

175 The first subparagraph of point 23(b) of the leniency notice provides for three fine-reduction bands. The first undertaking to meet the condition laid down in point 21 of that notice is entitled to receive a reduction of between 30 and 50% in the amount of the fine, the second undertaking to a reduction of between 20 and 30%, and subsequent undertakings to a reduction of up to 20%.

176 The second point of point 23(b) of the leniency notice states that '[i]n order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 [of this notice] was submitted and the extent to which it represents added value' and that '[i]t may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission'.

177 It should be noted that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (see, to that effect, judgment in *SGL Carbon* v *Commission*, paragraph 92 above, EU:C:2007:277, paragraph 81).

178 Moreover, whilst the Commission is required to state the reasons for which it considers that information provided by the undertaking under the leniency notice constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent, by contrast, on the undertaking wishing to contest the Commission's decision in that regard to show that the information provided voluntarily was decisive in enabling the Commission to prove the essential elements of the infringement and therefore adopt a decision imposing fines (see, to that effect, judgment of 24 September 2009 in *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, ECR, EU:C:2009:576, paragraph 297).

179 In the present case, it should be recalled that the applicants made an application for leniency for the period from 1978 to 2004. In their reply to the statement of objections (see paragraph 113 above), the applicants reversed the statement they made in the context of the application with respect to the period prior to 1993.

180 As has already been noted in the first group of pleas, the abandonment of part of the period taken into account for the calculation of the reduction under the leniency notice may result in a decrease in that reduction, which moreover has not been disputed by the applicants.

181 It is therefore appropriate to consider, in light of the applicants' arguments set out in paragraph 170 above, whether the Commission erred in assessing the added value of the evidence provided by the applicants for the period after 1993.

182 With regard to the reduction for leniency granted to the applicants, it is clear from recital 357 et seq. of the contested decision that the Commission found that:

— as regards the documentary evidence, the applicants had not produced such evidence for the entire period of their participation in the cartel;

— as regards the statements, the applicants had provided the names of their representatives who were present in the pan-European meetings, the object and frequency of those meetings, and the details and confirmation of the meetings at national level (United Kingdom, Spain and France);

— in their application for leniency, the applicants had made self-incriminating statements about meetings with their competitors in the AFP industry since 1978 in relation to France, followed by the United Kingdom (in 1983) and, from the early 1980s, at the European level also;

— at the stage of the reply to the statement of objections, the applicants had alleged that the meetings conceded for the period from 1978 to 1993 were not part of the overall cartel relating to AFP;

— inasmuch as the Commission is not relying on the applicants' own statements with respect to their participation in the meetings relating to France and other regions without being aware of a pan-European cartel before 1993, the information provided in their application for leniency should be assessed only in the light of its significant value with respect to the period between 1993 and 2004;

— on the basis of those factors, a reduction of 5% for the applicants' cooperation was appropriate.

183 With respect to the documentary evidence, it should be noted that most of that which relates to participation in the cartel provided by the applicants, namely a list of CEFIC meetings between 2 June 1989 and 16 November 2005, and the minutes of those meetings, relates to the second period (1993 to 2004). However, it is apparent from the contested decision and the file before the Court that the Commission already had sufficient evidence to prove the applicants' involvement in the cartel for the second period.

184 It should be noted in that regard that the applicants' request of 14 October 2008 for immunity under the leniency notice was preceded by that of Kemira (on 28 November 2003, for immunity from fines under point 8 the leniency notice), of Tessenderlo Chemie (on 18 February 2004, the first applicant for leniency within the meaning of point 23 of the leniency notice) and of Quimitécnica.com-Comércia e Indústria Química (on 27 March 2007, the second applicant within the meaning of point 23 of that notice). Accordingly, it is logical that the evidence adduced by the applicants as part of their application for leniency including the second period (as last applicants for leniency, more than four years after the start of inspections and after the Commission had made three requests for information) has a lesser added value. The chronological order and the speed of the cooperation provided by the members of the cartel constitute fundamental elements of the system put in place by the leniency notice (judgment of 5 October 2011 in *Transcatab* v *Commission*, T-39/06, ECR, EU:T:2011:562, paragraph 380).

185 It should be noted that the history of CEFIC meetings showing the names of representatives of the undertakings who took part provided by the applicants as part of their application for leniency was also, in part, provided by Kemira, so that that information can only corroborate the evidence already in the Commission's possession. The same is true with respect to the minutes of those meetings.

186 Furthermore, with regard to Tessenderlo Chemie, it is clear from recital 352 of the contested decision that the Commission found that the evidence provided by it had significant added value within the meaning of the leniency notice. Tessenderlo Chemie, which, moreover, was the first to provide information and evidence concerning the period from 1969 to 1989, for which partial immunity under point 23 of the leniency notice was granted, provided evidence of significant quality and volume, which, by its nature and degree of precision, reinforced the Commission's ability to establish the existence of the cartel between 1 April 1989 and 10 February 2004. That evidence consists in particular of detailed descriptions of the working and of the assessment of the cartel, of contemporaneous handwritten notes of the facts related to anti-competitive bilateral and multilateral

meetings (ad hoc, as part of CEPA, Super CEPA and CEFIC), handwritten tables monitoring sales, quotas, customers and/or prices, and thus for the entire period. Therefore, the Commission granted a 50% reduction in the amount of fines for that period.

187 In the same way, with respect to Quimitécnica.com-Comércia e Indústria Química, the 'second applicant' within the meaning of point 23 of the leniency notice, it is apparent from the contested decision that that undertaking provided documentary evidence supporting its statements and that its cooperation made it possible to extend the geographic scope of the cartel to Portugal.

188 As to the applicants' statements, it should be noted that the Commission proposed, during the settlement procedure, a reduction on the basis of both point 29 of the 2006 Guidelines and of the leniency notice.

189 First of all, the applicants' statements were such as to extend the duration of their participation in the cartel, but not the duration of the cartel as such. Accordingly, since the second paragraph of point 23 of the leniency notice was not applicable, a reduction 'outside the leniency programme' was planned on the basis of point 29 of the 2006 Guidelines in order to avoid, in particular, the paradoxical effect of penalising an undertaking that had agreed to cooperate with the Commission by providing it with essential information on the duration of its participation. As has already been noted in the first group of pleas, the applicants had argued, following the statement of objections, that their statements concerning the anti-competitive conduct for the first period (1978 to 1993) were part of an infringement that was either separate or time-barred. In the same way, it has been found that the Commission did not err in not applying the 35% reduction for a mitigating circumstance that was initially planned and indicated as part of the settlement procedure.

190 Secondly, the Commission made a proposal for a 17% reduction on the basis of the leniency notice for the entire period from 1978 to 2004 and concerning all the information provided by the applicants, including the self-incriminating statements. The applicants' admissions were important in establishing, in the statement of objections, their participation in the meetings of the cartel since 1978, that is before the first documentary evidence of 1983 relating to the UK. Furthermore, those admissions confirmed the applicants' continued participation in a single infringement since 1978 until the Commission's inspections in 2004 and the European scope of their participation in the cartel from the beginning, that is, well before the 1992 documentary evidence for Spain.

191 It may therefore be inferred from the fact that the Commission finally granted a 5% discount by way of leniency for the second period (1993 to 2004) instead of a 17% reduction, which covered the period from 1978 to 2004, that it considered that the statements relating to the period used had limited added value and that the self-incriminating statements covering the first period (1978 to 1993) — the only basis on which the Commission could have found that the applicants had participated in the agreement during that period — had significant added value.

192 That assessment of the added value may be upheld.

193 With regard to the period used, it is apparent from recitals 137, 138, 143, 158 and 360 of the contested decision that the proof of the applicants' participation was not based on information provided by the applicants, but that their self-incriminating statements nevertheless made it possible to corroborate their involvement in the cartel after 1993.

194 Moreover, as has already been stated in paragraph 185 above, the documentary evidence adduced by the applicants does not contain new information of significant value but corroborates, in essence, the facts already known.

195 In those circumstances, it must be held that the Commission did not manifestly exceed its discretion in finding that the evidence provided by the applicants presented only limited added value that deserved only a 5% reduction in the amount of the fine under the leniency notice.

196 It follows from the foregoing that this plea must be rejected.

– Ability to pay and exceptional crisis

197 As part of that plea, the applicants submit that their situation is not sufficiently different from that of [*confidential*] to justify a difference in treatment. They also allege a failure by the Commission to carry out a specific examination of the social and economic parameters applicable to them and the fact that the Commission failed to draw any consequences from the contributions made by the Treaty of Lisbon as part of its analysis of the ability to pay.

198 According to point 35 of the 2006 Guidelines, in exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context, it being stated that no reduction in the amount of the fine shall be granted for that reason on the mere finding of an adverse or loss-making situation, and that 'a reduction could be granted solely on the basis of objective evidence that imposition of the fine … would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value'.

199 Thus, the conditions for granting a reduction in the final amount of the fine under point 35 of the 2006 Guidelines require that the undertaking shows, first, an inability to pay the fine, which must be proved by sufficient and precise financial data; secondly, a loss in value of the undertaking's assets as a result of the payment of the fine; and, thirdly, a particular social and economic context.

200 In recital 373 of the contested decision, the Commission rejected the request for a reduction in the amount of the fine as a result of Timab/CFPR's inability to pay, on the grounds that, first, their available cash and funds in late 2009 were sufficient and the forecasts for their available cash and funds were positive for 2010; secondly, the total fine would be limited, in comparison with the size of the undertaking at the group level; and, thirdly, that, by relying on the creditworthiness of the group, it would be possible to increase leverage by taking on more bank debt.

201 First, as regards the purported difference in treatment with respect to [*confidential*], it is necessary to recall that the principle of equal treatment constitutes a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. According to settled case-law, that principle requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see case-law cited in paragraph 72 above, and judgment of 11 July 2013 in *Ziegler* v *Commission*, C-439/11 P, ECR, EU:C:2013:513, paragraphs 132 and 166; and see judgment in *Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraph 186 and the case-law cited).

202 However, breach of the principle of equal treatment as a result of different treatment thus presupposes that the situations concerned are comparable, having regard to all the elements which characterise them. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the EU act which makes the distinction in question (judgment in *Ziegler* v *Commission*, paragraph 201 above, EU:C:2013:513, paragraph 167; see judgment in *Team Relocations and Others* v *Commission*, paragraph 201 above, EU:C:2013:464, paragraph 187 and the case-law cited).

203 As a result, following a request under point 35 of the 2006 Guidelines, each case must be examined objectively. Indeed, in this case, it must be held that the reduction in the amount of the fine of [*confidential*] and the non-reduction of the applicants' fine flow from just such an analysis conducted by the Commission under point 35 of the 2006 Guidelines, and that the Commission used the same parameters in the analysis relating to the two undertakings at issue.

204 In that regard, it is apparent from both the contested decision and the separate decision, which set out the same principles, that, in order to assess the ability to pay, the Commission conducted an economic and financial analysis of the applicants' ability to pay and of that of [*confidential*], and of the impact of a possible fine on their viability. It took account of the financial position of the undertaking at issue as well as of internal financial forecasts and relied on a number of financial ratios measuring profitability, solvency, capacity to service debt and the impact of the fine on the value of the undertaking. It also took account of the attitude of the undertaking's shareholders.

205 It is apparent that [*confidential*]'s finances were in a critical condition, while those of the applicants were healthy, which was also accepted by the applicants themselves at the hearing. In the same way, [*confidential*]'s risk profile was considered negative, and that of the applicants positive. The same is true of the other ratios applied in order to assess the merits of the request of both undertakings at issue to reduce the amount of the fine as a result of the lack of the ability to pay.

206 Accordingly, since the applicants' situation is not comparable to that of [*confidential*], the complaint alleging a difference in treatment cannot be accepted.

207 Secondly, the applicants allege that the Commission failed to conduct a specific examination of their financial situation.

208 As is apparent from the foregoing paragraphs, in order to assess the ability to pay, the Commission conducted an economic and financial analysis of the applicants' ability to pay and of the impact of a possible fine on their viability. It took account of the elements mentioned in paragraph 204 above. Accordingly, the claim that the Commission did not specifically examine the applicants' financial situation cannot be upheld.

209 Moreover, it should be noted that the applicants are not actually relying on a manifest error of assessment of their ability to pay, but rather are criticising the strict application of the criteria set out in point 35 of the guidelines. In addition, as has already been stated in paragraph 205 above, the applicants stated that their finances were in good order.

210 Furthermore, the observations made by the applicants, such as the references to the economic crisis or the financial characteristics of [*confidential*] (listed company) compared to those of the applicants (unlisted family business), do not amount to evidence that is sufficiently objective to be able to fulfil the requirements set out in paragraph 199 above.

211 Thirdly, the applicants submit that competition is no longer one of the objectives of the European Union, but is only mentioned in Protocol 27 on the internal market and competition, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, as a component of the internal market. According to them, that change, more than ever, calls on the Commission to take account, in its assessment of anti-competitive practices and associated penalties, of the situation of the individual undertakings concerned and their specificities, both financial but also economic and social, in the light of the EU objectives as defined in Article 3 TEU.

212 In that regard, it is sufficient to state that Article 3 TEU, read in conjunction with Protocol No 27 on the internal market and competition, has changed neither the purpose of Article 101 TFEU nor the rules for the imposition of fines. Therefore, the complaint that the Commission, by not taking into

account the economic and social constraints of CFPR and the significant drop in its turnover, infringed the combined provisions of Article 3 TEU and Protocol No 27 on the internal market and competition cannot be upheld.

213 It follows from the foregoing considerations that the present plea in law must be dismissed.

The claim, made in the alternative, for the variation of the amount of the fine

214 Under the third head of claim, the applicants are asking the Court to reduce the amount of the fine imposed on them. In that context, they are asking, in particular, the Court to reduce the 'gravity rate' and provide, in addition to a reduction for 'cooperation leniency', an additional reduction of the fine for 'cooperation outside the leniency programme', in the light of the fact that they do not dispute the facts from 16 September 1993 onwards.

215 As a preliminary point, it should be noted that, as regards the judicial review of Commission decisions imposing a fine for infringement of the competition rules, the review of legality is supplemented by the unlimited jurisdiction which Article 31 of Regulation No 1/2003 confers on the EU judicature, in accordance with Article 261 TFEU (see, to that effect, judgment of 8 December 2011 in *Chalkor* v *Commission*, C-386/10 P, ECR, EU:C:2011:815, paragraphs 53, 63 and 64). Under that jurisdiction, the Court, in addition to carrying out a mere review of the lawfulness of the penalty, may substitute its own appraisal for the Commission's and, consequently, where necessary, cancel, reduce or increase the amount of the fine or penalty payment imposed (see judgment of 8 December 2011 in *KME and Others* v *Commission*, C-272/09 P, ECR, EU:C:2011:810, paragraph 103 and the case-law cited; see, to that effect, judgment of 5 October 2011 in *Romana Tabacchi* v *Commission*, T-11/06, ECR, EU:T:2011:560, paragraph 265).

216 Moreover, the Court, in the exercise of its unlimited jurisdiction, must observe the principle of equal treatment, whether or not the applicants resorted, at first, to the settlement procedure.

217 First, as is clear from the above (see paragraph 160 above), there are no grounds for reducing the rate of 17% applied on account of the gravity of the infringement.

218 Secondly, regarding the request to vary the amount of the fine imposed on the applicants on the ground that they did not dispute the facts from 16 September 1993 onwards, it should be noted that the leniency notice does not provide for any reductions for not challenging the facts. In addition, as has already been noted in the plea alleging an error of assessment by the Commission of their cooperation, that institution already had in its possession sufficient evidence to establish the applicants' participation in the infringement, with the result that the evidence and statements of the applicants were of limited added value. Finally, the Court considers that, inasmuch as that cooperation has not enabled the Commission to penalise the cartel in full or in part, it is not necessary, as part of the exercise of its unlimited jurisdiction, to grant the applicants a reduction in the amount of the fine 'outside the leniency programme'.

219 Accordingly, and in the absence of other factors in the present case capable of leading to a variation of the amount of the fine imposed on the applicants, their third head of claim must be rejected as unfounded.

220 As none of the pleas put forward by the applicants in support of their claims, either for annulment or for variation, are well founded, the action must be dismissed in its entirety.

Costs

221 Under Article 87(2) of the Rules of Procedure of the General Court, 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 applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those of the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Timab Industries and Cie financière et de participations Roullier (CFPR) to pay the costs.

Gratsias Czúcz Popescu

Kancheva Wetter

Delivered in open court in Luxembourg on 20 May 2015.

[Signatures]

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