JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
8 July 2004 *

In Case T-44/00,

Mannesmannröhren-Werke AG, established in Mülheim an der Ruhr (Germany), represented by M. Klusmann, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Erhart and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 2003/382/EC of 8 December 1999 relating to a procedure under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003 L 140, p. 1), or, alternatively, a reduction in the amount of the fine imposed on the applicant,

* Language of the case: German.

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

composed of: N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 19, 20 and 21 March 2003,

gives the following

Judgment

Facts and procedure [1]

1 The present case concerns Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003 L 140, p. 1; 'the contested decision').

...

1 — The grounds of the present judgment relating to the background to the dispute are not reproduced. They are set out at paragraphs 2 to 33 of the judgment of the Court of First Instance in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501.

Procedure before the Court

34 By seven applications lodged at the Registry of the Court of First Instance between 28 February and 3 April 2000, Mannesmann, Corus, Dalmine, NKK, Nippon, Kawasaki and Sumitomo brought actions against the contested decision.

35 By order of 18 June 2000, the Court, after hearing the parties, decided to join the seven cases for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance. Following the joinder of the cases, the applicants in the seven cases were able to consult all the files relating to the present proceedings at the Court Registry. Certain measures of organisation of procedure were also adopted.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure. The parties presented oral argument and answered the questions put by the Court at the hearing on 19, 20 and 21 March 2003.

Forms of order sought by the parties

37 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the amount of the fine imposed on it;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The claim for annulment of the contested decision

39 In support of its claim for annulment, the applicant puts forward, first of all, a series of pleas challenging the lawfulness of the administrative procedure. Next, it claims that there has been an infringement of Article 81(1) EC in that the Commission failed to establish to the requisite legal standard the infringement found in Article 1 of the contested decision and that found in Article 2 of the contested decision.

Pleas alleging procedural irregularities

Plea alleging infringement of the rights of the defence in that the Commission refused to allow the applicant access to certain materials in the file

— Arguments of the parties

40 The applicant maintains that it did not have access to the entire administrative file. The Commission did not allow it to peruse the documents submitted by the EFTA

Surveillance Authority, claiming that those documents were internal documents, without giving any further explanation or examining their content. Mannesmann submits that it was thus deprived of certain exculpatory documents.

41 Mannesmann further criticises the Commission for having failed to observe the procedure described in Point II A of Commission Notice 97/C 23/03 on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3; 'the notice on access to the file'). Under that notice, the hearing officer is required to check the classification of the documents in the file and, where necessary, to ascertain that they are properly classified as internal documents. That obligation to check the documents is independent of any initiative on the part of the undertakings. Mannesmann thus maintains that it is not in a position to determine whether or not the statement of objections and the administrative file contain all of the exculpatory evidence.

42 Moreover, Mannesmann criticises the Commission's failure to communicate to it a list of all the documents in the file, in order to enable it to request access to certain documents (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraphs 89 and 93 to 95, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraphs 99 and 103 to 105). The Commission is also required, in Mannesmann's submission, to identify the internal documents on that list (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491; 'the *Cement* judgment', paragraphs 168 and 186). The Commission has thus infringed the rights of the defence. Such an infringement cannot be 'regularised' before the Court of First Instance (*Solvay* v *Commission*, cited above, paragraph 98).

43 At the hearing, Mannesmann invoked, by analogy, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

44 The Commission replies that it is settled case-law that it is not required to give access to its internal documents (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389; and the *Cement* judgment, paragraph 420). Because of their nature, those documents cannot be relied on as evidence of an infringement (see point I A 3 of the notice on access to the file). In any event, Mannesmann has not shown that the contested decision is based on documents to which it did not have access.

45 The Commission contends that there is no doubt that the documents in question must be classified as internal documents. Under point II A 2(c) of the notice on access to the file, correspondence between the Commission and another public authority, such as the EFTA Surveillance Authority, is covered by the concept of internal documents.

46 As regards compliance by the hearing officer with his obligation to check the documents in the file, Mannesmann adduces no evidence to support its allegations. The Commission further states that Mannesmann did not avail itself of the opportunity presented in point II A 2 of the notice on access to the file to request the hearing officer to certify that the documents in question were internal documents.

47 Last, the Commission rejects the argument that it is required to communicate to the undertakings a list of the internal documents in the file.

— Findings of the Court

48 Point II A 2 of the notice on access to the file is worded as follows:

'In order to simplify administration and increase efficiency, internal documents will, in future, be placed in the file of internal documents relating to cases under investigation (non-accessible) containing all internal documents in chronological order. Classification in this category is subject to the control of the Hearing Officer, who will if necessary certify that the papers contained therein are "internal documents".

The following, for example, will be deemed to be internal documents:

...

(c) correspondence with other public authorities concerning a case ([19]);

...'

49 Footnote 19 in the notice on access to the file states:

'It is necessary to protect the confidentiality of documents obtained from public authorities; this rule applies not only to documents from competition authorities,

but also to those from other public authorities, Member States or non-member countries ... A distinction must be made, however, between the opinions or comments expressed by other public authorities, which are afforded absolute protection, and any specific documents they may have furnished, which are not always covered by the exception. ...'

50 It follows from the wording of point II A 2 of the notice on access to the file that, contrary to Mannesmann's assertion, the control carried out by the hearing officer in order to ascertain that the documents in the file are internal documents is not a routine step in the administrative procedure. Since, according to the wording of that point, the hearing officer 'will' carry out such a control 'if necessary', it must be concluded that where the classification of certain documents as 'internal documents' is not or, as the case may be, is no longer in dispute, there is no need for him to carry out such a control. To interpret the provision otherwise would entail a disproportionate increase in the Commission's workload in the administrative procedure and would run counter to the stated objective of that method of classification, which was adopted '[i]n order to simplify administration and increase efficiency'. It is therefore necessary to determine whether, in the administrative procedure, Mannesmann requested the hearing officer to verify that the documents communicated to the Commission by the EFTA Surveillance Authority and classified as internal documents were indeed internal documents.

51 In that regard, Mannesmann submitted a request for access to the documents in question by letter of 12 March 1999, annexed to the application. However, that request was refused by the Commission by letter of 22 March 1999, also annexed to the application, on the ground that those documents were internal documents within the meaning of point II A of the notice on access to the file (see, in particular, point II A 2 of that notice).

52 That Commission stated in its defence, without being contradicted on that point by Mannesmann, that Mannesmann did not subsequently dispute the refusal to grant

access contained in the letter of 22 March 1999 by requesting the hearing officer to ascertain that the Commission's reply to its request was accurate and well founded. Mannesmann merely stated in its reply that it was not required to submit a fresh request to the hearing officer. It follows from a passage in the hearing officer's report cited by the Commission in its answer to a written question put by the Court that 'no question relating to the rights of the defence in the strict sense and, in particular, no question relating to access to the file was raised ...' by the parties.

53 Since Mannesmann, after receiving the letter of 22 March 1999, did not request that the classification of the documents in pages 1 to 350 of the Commission's administrative file be verified, there was no need for the hearing officer to carry out such a verification in this case. Where the Commission rejects in writing a request for access to certain documents in a file on the ground that they are internal documents, it is then for the person requesting access to resubmit his request by challenging the internal nature of the documents if he wishes the hearing officer to examine the question.

54 As regards Mannesmann's complaint that the Commission did not provide it with a list of all the documents in its file, including the internal documents, it does not follow from the case-law invoked by Mannesmann in support of its argument that the Commission's failure to supply such a list to the parties at the stage of the administrative procedure constitutes in itself a breach of the rights of the defence. In *Solvay* v *Commission*, paragraph 42 above (paragraphs 89 and 93 to 95) and *ICI* v *Commission*, paragraph 42 above (paragraphs 99 and 103 to 105), the Court examined only the question of the necessary balancing of the right of access to exculpatory and inculpatory documents and the protection of the undertakings' business secrets, not with the protection of internal documents. Furthermore, although it follows from the *Cement* judgment, paragraph 42 above (paragraphs 5, 168 and 186), that the Court requested the Commission, in the context of a measure of organisation of procedure, to produce a description of the internal documents the content of which had not been specified, even summarily, on the list supplied to the parties at the stage of the administrative procedure, it did not infer from that circumstance that the Commission had infringed the rights of the defence.

55 In any event, the rights of the defence are infringed by virtue of a procedural irregularity only in so far as that irregularity had a definite impact on the possibilities for the undertakings implicated to defend themselves (see, to that effect, the *Cement* judgment, paragraph 42 above, paragraphs 852 to 860).

56 In the present case, the Court requested the Commission, in the context of a measure of organisation of procedure, to produce a list indicating the content of pages 1 to 350 of its administrative file. It is apparent from that list that all the documents in question appear to be internal documents and not inculpatory or exculpatory documents, in the sense that they could not establish that one or other of the undertakings in question did or did not commit an infringement, so that neither the hearing officer's failure to ascertain that they were internal documents nor the Commission's refusal to produce a list containing a description of the documents was capable of affecting Mannesmann's ability to defend itself and thus of infringing its rights of defence. In fact, Mannesmann did not maintain at the hearing, after receiving a copy of that list, that certain of the documents on the list were not actually internal documents, contrary to its contention before receiving that copy.

57 In light of the preceding paragraph, the argument which Mannesmann put forward at the hearing on the basis of an analogy with Regulation No 1049/2001 must also be rejected. Even on the assumption that Mannesmann were able to demonstrate that it had a right of access to the documents in question, the fact of having access to them would not have put it in a better position to defend itself in the procedure conducted by the Commission. Consequently, that argument cannot in any event provide a ground for annulling the contested decision.

58 Furthermore, both Regulation No 1049/2001 and Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on access by the public to the documents of the Commission (OJ 1994 L 46, p. 58), which it replaces, provide that a person requesting access must carry out certain specific procedural steps, in particular an initial formal application and a confirming application in the event of refusal, in

order to rely on their substantive provisions. As Mannesmann did not follow that procedure in this case, it cannot circumvent it by seeking the application by analogy of those substantive provisions.

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

The alleged insufficiency of the period for replying to the statement of objections

— Arguments of the parties

60 Mannesmann claims that it was not given sufficient time to reply to the statement of objections. It submits that the Commission failed to take the particular features of the case into account when it set the period for replying to the statement of objections, which began to run on 11 February 1999, the date on which the addressees of the contested decision had access to the file, and ended on 20 April 1999. In spite of the size of the file, and although certain documents were in uncommon languages, the Commission rejected its request for further time on 22 March 1999, without giving particular reasons for doing so. Furthermore, owing to the fact that there was a related enquiry, Mannesmann was obliged to defend itself in two cases at very short notice. Of all the addressees of the contested decision, Mannesmann was the only one to be in such a situation. It therefore maintains that it was the victim of discriminatory treatment.

61 The Commission rejects those allegations. It contends that all the addressees of the contested decision had two months from the date of notification, 3 February 1999, within which to prepare their replies. At Mannesmann's request, moreover, the Commission, by letter of 22 March 1999, postponed until 20 April 1999 the date by

which the observations in reply to the statement of objections had to be lodged. A measure of that kind is not covered by the requirement to state reasons laid down in Article 253 EC. The Commission maintains that the period of approximately two and a half months which Mannesmann had to prepare its reply was sufficient. In that regard, it refers, in particular, to the *Cement* judgment, paragraph 42 above (paragraphs 654 and 655).

— Findings of the Court

62 It should first of all be noted that Article 11(1) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), which was applicable on the date on which the statement of objections was sent to the applicant, and Article 14 of Commission Regulation (EC) No 2842/98 on the hearing of parties in certain procedures based on Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18), which was applicable after 31 January 1999, both of which seek to ensure that the addressees of a statement of objections have a sufficient period for the effective exercise of their rights of defence, provide that in setting that period, which is to be at least two weeks, the Commission is to have regard to the time required to prepare the observations and to the urgency of the case. The period set must be assessed specifically in relation to the difficulty of the particular case (the *Cement* judgment, paragraph 42 above, paragraph 653 and the case-law cited there).

63 As the Commission stated in its defence, it follows from paragraph 207 of its *XXIIIrd Report on competition policy*, of 1993, that in cases of average importance, a general period of two months will be granted, and, for complicated cases, a period of three months, an extra period being allowed where necessary to take holiday periods into account. On the other hand, it is stated at the end of that paragraph that, unlike practice in the past, those fairly long periods will not 'normally' be extended.

64 In the present case, the Commission, by its letter of 21 January 1999 to which the statement of objections was annexed, granted the applicant a period of two months from the date of notification of the statement of objections, in application of Regulation No 99/63. When Mannesmann requested a further two months by letter of 12 March 1999, the Commission, by its letter of 22 March 1999, granted a further period of 17 days to reply to the statement of objections, in addition to the two-month period granted in its initial letter of 21 January 1999 accompanying the statement of objections.

65 As regards the starting date to be taken into account for the purpose of calculating the period which the addressees of the statement of objections were given to formulate their observations, it should be observed that all the most important documents in the file, 32 in all, were annexed to the statement of objections. In those circumstances, it must be held that the addressees of the statement of objections were able to begin to analyse it immediately it was notified to them, on 3 February 1999 in Mannesmann's case, as the Commission states, and not as from the date on which they had access to the entire file, on 11 February 1999, as Mannesmann claims. It follows that by granting a further period until 20 April 1999 the Commission extended by 17 days the period initially granted.

66 Although the present case involved a voluminous file, numbering more than 15 000 pages, the Commission was right to state that a file of that size is not out of the ordinary in investigations in competition matters. The present case cannot be assimilated, as regards factual complexity, to the *Cement* case, paragraph 42 above, in which the statement of objections was addressed to 76 undertakings and associations of undertakings (paragraphs 3, 4 and 654 of the *Cement* judgment) and in which a period of four months in all was granted, following two extensions, for the undertakings in question to formulate their observations on the statement of objections. In this case, Mannesmann has put forward no specific evidence capable of showing that the present case was particularly important and/or complex.

67 As for Mannesmann's argument that it was required to reply to statements of objections in two parallel cases (Cases IV/E-1/35.860-B and IV/E-1/35.860-A), the Commission states in its defence that the two cases in question were 'closely linked and overlap[ped] on many points, as regards both the objections and the documents concerned'. In addition, the Commission emphasised that the two statements of objections were also addressed to Corus and to the Japanese producers. It is significant that Mannesmann did not challenge those observations from a factual aspect, but merely questioned, in its reply, the Commission's reason for not sending a single statement of objections to the undertakings concerned if the links between the two cases were so close, an observation which is wholly irrelevant in the present context. The Court therefore finds that the cases forming the subject-matter of the two statements of objections presented a significant number of similarities, so that the fact that Mannesmann was required to submit observations in both cases at the same time did not place a significant additional burden on that undertaking.

68 In light of the foregoing, the overall period of two and a half months allowed to Mannesmann was sufficient to allow it to formulate its observations and, accordingly, to defend itself effectively (see, by way of example, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 94 to 99).

69 As regards Mannesmann's argument that it was the victim of a breach of the principle of equal treatment, the Court considers that, provided that the periods allowed are sufficient to enable the parties to defend themselves, they may be set on a standard basis and do not need to be proportionate to the preparatory work required in each individual case.

70 In that regard, it should be borne in mind, by way of analogy, that the fifth paragraph of Article 230 EC provides that an action for annulment is to be brought within two months, a period which, according to a consistent line of decisions, cannot be extended no matter what the circumstances and failure to observe which has the

automatic consequence that the action will be inadmissible, with the sole limited exception of a case of *force majeure* (see, to that effect, order of the Court of First Instance in Case T-218/01 *Laboratoire Monique Rémy* v *Commission* [2002] ECR II-2139, confirmed on appeal by order of the Court of Justice of 30 January 2003 in Case C-176/02 P *Laboratoire Monique Rémy* v *Commission*, not published). In those circumstances, the setting of standard periods cannot be regarded as capable of constituting in itself a breach of the principle of equal treatment in Community law (see also, to that effect, the *Cement* judgment, paragraph 42 above, paragraph 654).

71 Thus, the fact that other addressees of the statements of objections in the present case were given the same time to reply to a single statement of objections as Mannesmann was given to reply to two statements of objections cannot be regarded as unlawful, since the period granted to Mannesmann has been held to be sufficient.

72 Last, as regards the alleged failure to state reasons for the refusal to allow Mannesmann a further two months within which to submit its observations, it has consistently been held that the requirement to state reasons must be assessed in the light of the circumstances of the 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. In that regard, 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 253 EC 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 (Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 81, and the case-law cited there).

73 In that regard, the *XXIIIrd Report on competition policy* provides, at paragraph 207, that in principle a period of two months will be allowed to reply to the statement of objections in cases of average importance (see paragraph 63 above). It must be inferred, therefore, that by granting a period of two months in the present case, the

Commission necessarily took the view that the present case was of 'average' importance and that the period granted was therefore sufficient, in principle, to enable the addressees of the statement of objections to submit observations. It is in the light of that finding that the reasons for the decision refusing to grant the extra time requested must be examined.

74 In the present case, it must be held that the Commission's refusal to allow the additional period of two months which the applicant requested did not require a particular statement of reasons. As the Commission had adopted a position on the importance of the case, in accordance with paragraph 207 of the *XXIIIrd Report on Competition Policy*, it should be observed that, by allowing Mannesmann an extra 17 days, while stating that it was 'not possible' to allow the two months which it requested, the Commission implicitly confirmed its initial analysis. The extra time allowed must, in the light of the Commission's restrictive policy towards extending the periods for replying to statements of objections, set out in paragraph 27 of the *XXIIIrd Report on Competition Policy*, be regarded as a concession granted to Mannesmann by the Commission. It follows that Mannesmann cannot derive a ground for annulment from the failure to give particular reasons for the decision refusing to allow it the extra time sought.

75 It follows from all of the foregoing that all the criticism which Mannesmann has raised against the Commission's refusal to grant it the extra time which it had sought must be rejected.

The use of the sharing key document as inculpatory evidence

— Arguments of the parties

76 Mannesmann claims that the key sharing document is inadmissible as evidence. It states that the Commission relied principally on that document in order to establish

the existence of the infringements referred to in Articles 1 and 2 of the contested decision. As the Commission did not disclose the identity of the author of the document, its authenticity and probative value must be treated with caution.

77 The Commission should, at very least, have stated the circumstances in which it obtained that document, which is invoked as direct evidence of an unlawful act. In accordance with the principles inherent in a State subject to the rule of law, it is only where that information is given that the person against whom the evidence is invoked will be able to plead his defence properly (Case 85/76 *Hoffmann-La Roche* [1979] ECR 461).

78 None of the undertakings concerned recognised the authenticity of that document, contrary to what had been found in Case 145/83 *Adams* v *Commission* [1985] ECR 3539, where the credibility of the Commission's informer was not in doubt. As the Commission has failed to demonstrate the authenticity of the sharing key document, it cannot use it against Mannesmann. That breach of the rights of the defence constitutes a ground for annulling the contested decision.

79 Even if that document could be lawfully used, Mannesmann disputes its probative value. First, the sharing key document is contradicted by other evidence gathered during the investigation. Thus, at recital 86 to the contested decision, the Commission expressed the view that the sharing-key document expressly contradicted Vallourec's statements, whereas those statements contributed significantly to establishing the facts. Second, the sharing key document is contradicted by the fact that Siderca and Tubos de Acero de México SA probably supplied tubes in Europe. It is therefore impossible to establish in what way the document can constitute evidence of the infringement.

80 The Commission observes that, under Article 287 EC, it is required to observe the principle of professional secrecy and that, at the risk of inhibiting its own action, it must guarantee the anonymity of its informants. Any interest which firms might have in ascertaining the origin of certain documents must be weighed against the public interest in the discovery of illegal cartels and in the protection of informants (*Adams* v *Commission*, paragraph 78 above, paragraph 34). In the present case, the rights of the defence have been respected. In the Commission's submission, Mannesmann has not shown how the fact that the document is anonymous infringes its rights of defence.

— Findings of the Court

81 First of all, the Court notes that in the grounds of the contested decision dealing with the existence of the infringement found in Article 1, the Commission relies to a large extent on Mr Verluca's statement of 17 September 1996 (see, in particular, recitals 56 to 58, 60 to 62 and 131), as supplemented by his statement of 14 October 1996 and by the document entitled 'Investigation at Vallourec' (together referred to hereinafter as 'Mr Verluca's statements'). Although the Commission also relies in this context, especially in recitals 85 and 86 to the contested decision, on the sharing key document, that document must be regarded as being of less importance in the general scheme of the contested decision than Mr Verluca's statements.

82 It is therefore necessary to reject outright Mannesmann's argument that the Commission relied principally on that document in order to establish the existence of the infringement referred to in Article 1 of the contested decision. As regards the existence of the infringement found in Article 2 of the contested decision, Mr Verluca's statements and the sharing key document are of only very indirect relevance.

83 At recital 85 to the contested decision, the Commission states that the sharing key document was handed to it on 12 November 1997 by a person not involved in the proceedings. It relies on that document, in particular, to support its description of developments in the relations within the Europe-Japan Club from the end of 1993. According to the informant, the source of the document was a commercial agent of one of the participants in the club. The Commission contends that the document shows that the contacts established with the Latin American producers were partly successful; and the Commission states that the table in the document shows the division of the markets in question between the European, Japanese and Latin American producers. In particular, the document makes provision for a 100% market share for the European producers in Europe and for a 100% market share for the Japanese producers in Japan. As regards the other markets, the European producers had, in particular, a share of 0% in the Far East, 20% in the Middle East and 0% in Latin America.

84 It should be stated at the outset, as regards the admissibility of the sharing key document as evidence of the infringement referred to in Article 1 of the contested decision, that the principle that prevails in Community law is that of the unfettered evaluation of evidence and that it is only the reliability of the evidence that is decisive when it comes to its evaluation (Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867 at II-869, II-954; see also, to that effect, judgments in Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraph 29, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and Tecnagrind* v *Commission* [2002] ECR II-4547, paragraph 223). It may also be necessary for the Commission to protect the anonymity of informants (see, in that regard, *Adams* v *Commission*, paragraph 78 above, paragraph 34) and that circumstance cannot suffice to require the Commission to disregard evidence in its possession.

85 Consequently, although Mannesmann's arguments may be relevant to the evaluation of the reliability and therefore the probative value of the sharing key document, that document cannot be regarded as inadmissible evidence which must be removed from the file.

86 Furthermore, in so far as Mannesmann derives from its arguments concerning the admissibility of that document a complaint in respect of its credibility, it must be held that its credibility is necessarily reduced by the fact that the context in which it was drafted is largely unknown and because the Commission's assertions in that regard cannot be verified (see paragraph 83 above).

87 However, in so far as the sharing key document contains specific information corresponding to the information in other documents, in particular Mr Verluca's statements, those matters must be regarded as mutually supporting.

88 In that regard, it should be observed, in particular, that Mr Verluca's statement of 17 September 1996 mentions an 'initial' sharing key document applicable to 'international calls for tenders' and referring to the contracts concluded between the Japanese and European producers, so that the existence of such market sharing within the Europe-Japan Club is sufficiently made out. Furthermore, it follows from Vallourec's internal memorandum of 27 January 1994, reproduced at page 4822 of the Commission's file and entitled 'Record of the interview with JF in Brussels on 25/1', that 'in order to remain in the system [Vallourec was to] stay out of [the Far East], South America, limit its business in the Middle East to the point of sharing 20% of the market among 3'. When the Commission asked Mr Verluca to comment on those two documents, he stated that they related to an attempt in 1993 to amend the applicable sharing keys in order to take account of the Latin American producers' sales and also of the 'established positions' on the various markets.

89 Mannesmann states that the sharing key document contradicts Mr Verluca's assertion, set out in the document Investigation at Vallourec (at paragraph 1.3), concerning the question whether the Latin American producers responded favourably to the approaches of the European producers at the end of 1993, which calls in question the reliability of those two pieces of evidence. The Commission stated in recital 86 to the contested decision, on the basis of the sharing key

document, that 'the approaches made to the Latin Americans were partly successful' and recognises itself that that statement contradicts Mr Verluca's statement set out in the document Investigation at Vallourec, to the effect that 'the Europe-Japan Club did not include the South America producers ... exploratory contacts took place with the latter at the end of 1993 with the aim of arriving at a balance reflecting the positions acquired (approximately 20% of the Middle East for the Europeans). It quickly became clear that these attempts could not succeed'.

90 According to the sharing key document, however, the Latin American producers accepted the sharing key proposed 'except for the European market', on which matters should be examined 'case by case' in a spirit of cooperation. The Commission therefore concluded, at recital 94 to the contested decision, that the Latin American producers did not agree that the European market should be reserved for the European producers.

91 It follows from the various Vallourec memoranda referred to in the contested decision, and also from the document, reproduced at page 4902 of the Commission's file, entitled 'Paper for Presidents', and the document '(g) Japanese', reproduced at page 4909 of the Commission's file, that from the European producers' point of view, one of the essential objectives of their contacts with the Japanese producers was to protect their domestic markets, and in particular to maintain the domestic status of the United Kingdom market after Corus closed its Clydesdale factory. Although the contradiction noted at paragraph 89 above certainly weakens the probative value of the sharing key document and also, to a certain extent, that of Mr Verluca's statements, it becomes much less significant in the light of the circumstance stated at the beginning of this paragraph. Even on the assumption that the Latin American producers did agree to apply a sharing key on markets other than the European market, there can be no doubt that the negotiations with those producers were substantially unsuccessful from the Europeans' point of view, so that Mr Verluca's negative assessment of their outcome does in fact correspond with the description in the sharing key document on that crucial point.

92 It must be concluded that the contradiction between Mr Verluca's assertions in one of those statements and the sharing key document, which the Commission itself mentions in recital 86 to the contested decision, does not substantially reduce the credibility of those two pieces of evidence.

93 Last, it must be held, in the light of the reservation which, according to the sharing key document itself, the Latin American producers expressed about Europe (see paragraph 90 above), that the fact, alleged by Mannesmann, that those producers sold tubes in Europe does not affect the reliability of that document, even on the assumption that it were established.

94 It follows from all of the foregoing that the sharing key document retains a certain probative value as one of a number of coherent indicia identified by the Commission which corroborate certain of the essential assertions in Mr Verluca's statements concerning the existence of a market-sharing agreement affecting seamless OCTG tubes. It is clear from the sharing key document that the Japanese producers, on the one hand, and the European producers, on the other, accepted the principle that they were not to sell certain seamless steel tubes on the other producers' domestic markets in the context of 'open' invitations to tender. That document also confirms the existence of a market-sharing key in various regions of the world and therefore enhances the credibility of Mr Verluca's statements in so far as they also refer to that concept.

95 It follows that Mannesmann's objections to the use of the sharing key document must be rejected.

The alleged infringement of the rights of the defence owing to inconsistency between the statement of objections and the contested decision as regards the infringement referred to in Article 2 of the decision

— Arguments of the parties

96 Mannesmann claims that there is a discrepancy between the statement of objections and the contested decision. In the statement of objections, the Commission stated that the supply contracts concluded by Corus with Vallourec, Dalmine and Mannesmann formed part of an unlawful cartel set up in order to share the market in seamless steel tubes bought by Corus, the dominant undertaking on the United Kingdom OCTG market. The contracts were therefore connected with the infringement subsequently found in Article 2 of the contested decision (see points 147 to 151 of the statement of objections). In the contested decision, on the other hand, the Commission took the view that the contracts themselves constituted a measure to partition the United Kingdom market as against the Japanese undertakings and therefore a constituent element of the infringement referred to in Article 1 of the contested decision (recital 147). Mannesmann should have been given an opportunity to present submissions on such an important alteration to the Commission's objections (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 9, 14 and 16). In the absence of such an opportunity, its rights of defence have been irremediably prejudiced (*Solvay* v *Commission*, paragraph 42 above, paragraph 89 et seq.).

97 The Commission refutes those complaints on the ground that the statement of facts and the legal assessment contained in the contested decision are wholly consistent with those already set out in the statement of objections.

— Findings of the Court

98 The rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the

decision was not set out in the statement of objections in a manner sufficient to enable the addressees to defend their interests (see, to that effect, the *Cement* judgment, paragraph 42 above, paragraphs 852 to 860).

99 In that regard, the obligation placed on the Commission in connection with a statement of objections is limited to setting out the objections and to specifying clearly the facts upon which it relies and its classification of those facts, so that the addressees of the statement of objections are able to defend their interests effectively (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 29, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63).

100 In that regard, the legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence.

101 In the present case, the only material difference between the statement of objections and the contested decision is that in the decision the Commission stated at recital 164 that the contracts constituting the second infringement 'represented only a means of ensuring the application' of the first infringement, where in the statement of objections it merely stated, at point 144, that the 'purpose' of the supply contracts was to maintain the 'domestic' nature of the United Kingdom market in regard to the Fundamental Rules, i.e. vis-à-vis the Japanese producers, referring in regard to the latter to point 63 of the statement of objections. As regards recital 147 to the contested decision, to which Mannesmann refers in this context, it is sufficient to observe that its terms correspond with those of point 144 of the statement of

objections in so far as the Commission states there that, 'as is clear from recitals 78 to 81, there was an agreement between [Corus] and Vallourec ... that [Corus] should obtain its supplies of plain ends from [Mannesmann], Dalmine and Vallourec so as to preserve the "domestic" character of the [United Kingdom] market vis-à-vis the Japanese producers'.

102 It was held at paragraph 364 of the judgment delivered today by the Court of First Instance in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501 that the argument employed by the Commission in the contested decision is flawed in so far as the contracts going to make up the second infringement had more than just one objective. However, even on the assumption that it were possible to detect a difference in analysis between the statement of objections and the contested decision in that regard, it is plain that the addressees of the statement of objections had the opportunity to present their observations on the key concept underlying the Commission's approach, namely the idea that the European producers concluded the contracts constituting the second infringement for the particular purpose of reinforcing the application of the Fundamental Rules on the United Kingdom offshore market.

103 In those circumstances, there was no breach of the rights of the defence in that regard and the present plea must therefore be rejected.

The existence of the infringement of Article 81(1) EC referred to in Article 1 of the contested decision

The alleged contradiction between Article 1 and Article 2 of the contested decision

— Arguments of the parties

104 Mannesmann claims that the contested decision contains a contradiction. It submits that the Commission considered that the undertakings to which the contested

decision was addressed had agreed on rules designed to ensure respect for domestic markets within the Europe-Japan Club. The only piece of evidence relied on in that regard is the table at recital 68 to the contested decision. That table sets out the domestic producers' shares, expressed as a percentage, in deliveries of seamless OCTG to the countries affected by the Europe-Japan Club. Since 1991, Corus had obtained supplies in Germany, France and Italy, however, so that it is incorrect to take the view that access to the United Kingdom market was reserved for the domestic producer.

105 Mannesmann complains that the Commission concluded that there had been an infringement consisting in an agreement on observance of the domestic markets (Article 1 of the contested decision) on the basis of the findings made in respect of Corus's supply contracts, which were themselves the object of the infringement referred to in Article 2 of the contested decision. It contends that the second infringement is not made out. The supply contracts concluded by Corus with Dalmine, Vallourec and Mannesmann can reveal a tendency to respect domestic markets only if they are examined together. Deliveries of the relevant products from non-member countries, including Japan, still represent 20% of the United Kingdom market, so that there can be no question of effective protection of that market. Thus, the defects affecting the legality of Article 2 of the contested decision also affect the legality of Article 1.

106 The Commission refutes those complaints, which in its contention are based on a misreading of the contested decision. Article 1 of the contested decision finds that certain undertakings infringed Article 81(1) EC by participating in an agreement providing, inter alia, for the observance of their respective markets. Article 2 finds Mannesmann responsible for having, contrary to Article 81 EC, concluded, 'in the context of the infringement mentioned in Article 1', contracts which led to a sharing of the supplies of plain end OCTG pipes and tubes to Corus. Article 2 thus refers to the protection of the United Kingdom market following Corus's withdrawal.

— Findings of the Court

107 The argument put forward by Mannesmann in the context of the present plea is incorrect and must therefore be rejected in so far as it ignores the basic fact that the infringement found in Article 1 of the contested decision concerns the market in threaded OCTG pipes and tubes (and the market in project line pipe) and the infringement found in Article 2 concerns the upstream market in plain end OCTG pipes and tubes.

108 Although Article 1 of the contested decision, in the German version, states that the infringement found in that article concerns 'seamless standard threaded OCTG pipes and tubes and project line pipe', it follows from the general scheme of the contested decision that the OCTG pipes referred to are only standard thread OCTG tubes. In particular, Mr Verluca's statement of 17 September 1996, referred to in recital 56 to the contested decision as the source of the definition of the relevant product market, limits the scope of the infringement to 'standard thread tubes and ("project" line pipe)'. It follows that the reference in that recital is to API thread OCTG tubes, i.e. to 'standard' threaded OCTG, and not to plain end OCTG. That interpretation of the scope of Article 1 of the contested decision is confirmed by the other three authentic language versions of the authentic text of the contested decision, since each of those versions expressly states in Article 1 that the products concerned are standard threaded OCTG pipes and tubes. Where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, for example, Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 42) and in any event one language version cannot take priority over the other language versions when they are all consistent with one interpretation (Case T-68/97 *Neumann and Neumann-Schölles* v *Commission* [1999] ECR-SC I-A-193 and II-1005, paragraph 80; see also, to that effect, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 15, and the case-law cited there). On the other hand, Article 2 of the contested decision, according to its wording, concerns only 'supplies of plain end OCTG pipes and tubes to [Corus] (Vallourec from 1994)'.

109 It follows that the apparent contradiction alleged by Mannesmann does not exist.

110 In reality, it follows from the contested decision, read as a whole, that the United Kingdom market for threaded pipes and tubes, to which the infringement found in Article 1 of the contested decision relates, remained a 'domestic' market, within the meaning of the Fundamental Rules, essentially because Corus continued to sell there the OCTG pipes and tubes which it threaded using the plain end pipes and tubes supplied by the other three European producers for that purpose. Thus, a significant part of the upstream United Kingdom market for plain end tubes, consisting of Corus's needs was shared, at least from 1993, between Vallourec, Dalmine and Mannesmann. It follows from that connection between the two infringements that they were not just mutually compatible but also complementary.

111 As regards the arguments which Mannesmann specifically devotes to the United Kingdom market, in particular its analysis of the table at recital 68 to the contested decision, it follows from the actual wording of Article 81(1) EC, as consistently interpreted in the case-law, that agreements between undertakings are prohibited, regardless of their effect, when they have an anti-competitive object (see, in particular, Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 123). In this case, the Commission relied primarily on the restrictive object of the agreement sanctioned in Article 1 of the contested decision and mentioned, in particular in recitals 62 to 67, numerous items of documentary evidence which in its view attested to both the existence of the agreement and its restrictive object.

112 Thus, even on the assumption that Mannesmann were able to demonstrate that the figures in the table do not provide sufficient support for the Commission's assertions concerning the effective protection of the United Kingdom market, that circumstance would have no bearing on the existence of the infringement found in Article 1 of the contested decision.

113 Furthermore, it follows from recital 62 to the contested decision, which is based in that regard on Mr Verluca's statement of 17 September 1996, that the United Kingdom offshore market was only 'semi-protected'. Thus, the circumstance, relied on by Mannesmann, that the level of protection of the United Kingdom market was lower, according to the table in recital 68 to the contested decision, than on the other domestic markets concerned by the market-sharing agreement, does not undermine the Commission's analysis.

114 In the light of the foregoing, the present plea must be rejected.

The alleged defects in the Commission's reasoning concerning the infringement found in Article 1 of the contested decision.

— Arguments of the parties

115 In its reply, Mannesmann claims that the findings of fact and of law relating to the infringement found in Article 1 of the contested decision are not supported by sufficient reasons. First, it submits that the Commission treated the extra-Community and the intra-Community aspects of the Fundamental Rules in the same way. It did not distinguish the provisions relating to access by the Japanese producers to the Community market from those relating to access by the Community producers to their respective domestic markets. The Commission relied on the same factors (recitals 54, 63, 64, 66, 67 and 129 et seq. to the contested decision) in order to establish the existence of both of those aspects. However, those factors concern only the external part of the Fundamental Rules, namely access by the Japanese producers to the Community market. They do not permit the inference that agreements relating to respect for the domestic markets within the Community existed.

116 Second, Mannesmann criticises the Commission, also in its reply, for not having shown that the agreement on access to the Community markets satisfies the conditions set forth in Article 81(1) EC that an agreement must affect trade between Member States and that it must significantly restrict competition within the common market.

117 First of all, since it did not precisely define the relevant market, the Commission was not in a position to determine whether those conditions were satisfied.

118 Next, Mannesmann maintains that the agreements concluded with the Japanese undertakings, as described by the Commission, cannot have an appreciable effect on competition within the common market or on trade between Member States. Mannesmann disputes the information used by the Commission, in particular in annexes 1 to 4 of the contested decision. It states that on the worldwide market, Community producers of seamless steel tubes are subject to effective competition on the part of producers in non-member countries, which, moreover, the Commission accepted in its decision of 3 June 1997 declaring a concentration compatible with the common market (Case N IV/M.906 — Mannesmann/Vallourec) on the basis of Council Regulation (EEC) No 4064/89 (OJ 1997 C 238, p. 15). At recital 103 to the contested decision, moreover, the Commission acknowledged that it was not able to provide evidence of such a restrictive effect on prices and supply within the common market.

119 Last, owing to the characteristics of the relevant market, the undertakings concerned by the contested decision could not in Mannesmann's submission contemplate restricting competition within the meaning of Article 81(1) EC.

120 In the Commission's contention, Mannesmann's arguments concerning the definition of the relevant market and the conditions for the application of Article 81(1) EC relating to the existence of appreciable restrictions on competition and also

to the existence of an effect on trade between Member States are new pleas. Under Article 48(2) of the Rules of Procedure, those pleas are all inadmissible.

121 In the alternative, the Commission contends that these pleas are unfounded. The definition of the relevant market is consistent with that used in the Mannesmann/Vallourec decision referred to above, as may be seen from recital 29 et seq. to the contested decision.

122 The Commission further states that it is clear from the contested decision that the cartel also extended to the protection of the domestic market of each of the four Community producers concerned (recitals 62, 54, 66, 64 and 69 to the contested decision). The agreement in question was therefore capable, by its object, of affecting trade between Member States. The conditions for the application of Article 81(1) EC are therefore satisfied, as affirmed at recital 102 to the contested decision.

123 Next, concerning the effects of the abovementioned agreement on intra-Community trade, the Commission maintains that such effects are evident, since each of the European producers had a dominant position on its domestic market (see table in recital 68 to the contested decision). In any event, in the light of the object of the agreement as established in the preceding paragraph, there is no need to analyse its effects (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 128, and Case 123/83 *BNIC* [1985] ECR 391, paragraph 22).

124 As regards the appreciable nature in the present case of the impact of the agreement on intra-Community trade, the Commission states that sales by the Community producers in question on the German, United Kingdom, French and Italian markets accounted for approximately 15% of total consumption of seamless OCTG and line

pipe in the Community (recital 106 to the contested decision). Because of the market shares held by the Community producers, it is plain that an agreement to respect the German, United Kingdom, French and Italian markets must have an appreciable effect on trade between Member States. The fact that, by comparison with the world market, the agreement in issue affects only a small percentage of the products concerned is irrelevant.

— Findings of the Court

125 First, the applicant's complaints set out above are inadmissible under Article 48(2) of the Rules of Procedure in so far as they relate to the question whether the infringement found in Article 1 of the contested decision had an appreciable impact on trade between Member States.

126 By those arguments, which were first raised in the reply, Mannesmann criticises the Commission for having made an error of law or of assessment in respect of one of the conditions for the application of Article 81(1) EC and not for having failed to provide proper reasons, in spite of its assertions in that regard at paragraph 26 of its reply. As substantive pleas are not a matter of public policy, unlike those alleging inadequacy of reasons, the Community judicature is not required to raise them of its own motion (see, by analogy, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67).

127 It should be noted, for the record, that the Court has rejected as unfounded certain arguments comparable with those put forward by Mannesmann in cases which were joined with the present case for the purposes of the hearing (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, in particular paragraphs 156 and 157, and *JFE Engineering and Others* v *Commission*, paragraph 102 above, in particular paragraphs 337 and 367 to 395).

128 As regards the argument that there were no appreciable restrictions of competition, which goes to the substance and not to the reasoning, it must be declared admissible in so far as it amplifies the arguments already put forward in the application to the effect that the Commission did not demonstrate to the requisite legal standard that the agreement found in Article 1 of the contested decision had an object on effects restrictive of competition for the purposes of Article 81(1) EC.

129 As regards the substance, it should be recalled, first of all, that in the present case the Commission relied primarily on the restrictive object of the agreement sanctioned in Article 1 of the contested decision (see paragraph 111 above).

130 In that regard, undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement should not have an appreciable effect on competition.

131 As the purpose of agreement sanctioned in Article 1 of the contested decision was to share the markets between the members of the Europe-Japan Club, its existence made sense only if its object were to restrict competition appreciably, i.e. in a manner commercially useful to them; and the Commission has established to the requisite legal standard that the agreement did in fact exist.

132 It follows that Mannesmann's argument that the Commission did not precisely define the relevant market is irrelevant. The obligation to define the market in a decision adopted pursuant to Article 81 EC is binding on the Commission only where, without such a definition, it is impossible to determine whether the agreement in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the common market (see, to that effect, Joined Cases T-374/94, T-375/94, T-384/94 and

T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105). In principle, if the actual object of an agreement is to restrict competition by 'market sharing', it is not necessary to define the geographic markets in question precisely, provided that actual or potential competition on the territories concerned was necessarily restricted, whether or not those territories constitute 'markets' in the strict sense.

133 Thus, even on the assumption that Mannesmann were able to establish that the Commission defined the market affected by the infringement found in Article 1 of the contested decision insufficiently or incorrectly in the present case, that circumstance could not have an impact on the existence of that infringement.

134 It follows from the foregoing that the complaints summarised above must be rejected on the substance in so far as they relate to whether the infringement found in Article 1 of the contested decision had as its object or its effect to restrict competition in an appreciable manner.

The existence of the infringement of Article 81(1) EC referred to in Article 2 of the contested decision

Arguments of the parties

135 Mannesmann maintains that the Commission's conclusion that the contracts concerning supplies to Corus concluded between Corus, Vallourec, Dalmine and Mannesmann were conceived in order to implement a common business strategy and constitute an infringement of Article 81(1) EC is vitiated by a manifest error of assessment.

136 First, Mannesmann maintains that the evidence put forward in support of the finding of the existence of the infringement referred to in Article 2 of the contested decision relates solely to Vallourec and Corus (recitals 78, 91, 110, 146 and 152 to the contested decision). The Commission has wholly failed to establish that Mannesmann participated in the implementation of the Fundamental Rules concluded within the Europe-Japan Club. In so far as the Commission's complaints in respect of Mannesmann relate exclusively to the contracts which Corus concluded with third parties, Mannesmann submits that it is unable to defend itself effectively. It therefore requests the Court to order the following measures of organisation of procedure:

— order the Commission to communicate to the Court the documents relied on by Corus in Case T-48/00 concerning the facts constituting the infringement referred to in Article 2 of the contested decision;

— grant the applicant the right to peruse those documents, in so far as they are not confidential, and to express its position in regard to them in further submissions.

137 The Commission rejects Mannesmann's allegations and contends that its participation in the infringement referred to in Article 2 was sufficiently demonstrated in recitals 146 to 155 to the contested decision.

138 Second, Mannesmann disputes the Commission's assertion that the contracts for the supply of seamless tubes concluded by Corus come within the framework of a cartel. First of all, had that been the case, Corus would not have waited another two years before concluding a contract with Mannesmann. In reality, each of the supply contracts was concluded individually. The similarities between the contracts may be explained by the fact that Corus, which was a party to each of them, wished to standardise them.

139 Next, there were objective and legitimate reasons for concluding the contracts. Corus's decision to stop producing certain types of steel tubes, while retaining its capacity to thread seamless tubes, was perfectly valid. Corus concluded a supply contract with Vallourec because Vallourec controlled the 'VAM' threading technique, which was indispensable in order to be able to access the United Kingdom market for premium OCTG tubes. The litigation between Mannesmann and Vallourec concerning the intellectual property rights in 'premium' VAM connections culminated in decisions which benefited Vallourec, thus allowing it to gain market share to the detriment of Mannesmann. Rather than withdraw from the United Kingdom offshore market, Mannesmann then chose to concentrate on selling seamless plain end pipes and tubes, which can be threaded by its customers. Furthermore, Vallourec was not capable of meeting Corus's entire demand. It was in that context that Mannesmann delivered seamless tubes and pipes to Corus.

140 Last, Mannesmann states that the supply contracts in question relate only to tubes of more than 5½ inches in diameter. The only Community undertakings capable of producing tubes of that size are Vallourec, Dalmine and Mannesmann. By dealing with those three undertakings and thus diversifying its sources of supply, Corus was protecting itself against the risks of price increases. The Commission cannot criticise Corus for having thus sought to maximise its profits from sales of its end products.

141 The Commission rejects that interpretation. It claims that the true object of the supply contracts in question was to implement the Fundamental Rules designed to ensure respect for domestic markets drawn up within the Europe-Japan Club (recital 146 to the contested decision).

142 Those contracts, which were renewed in 1993, thus come within the framework of a cartel contrary to Article 81(1) EC. They provide for the sharing of Corus's supplies between Vallourec, Dalmine and Mannesmann at the rate of 40%, 30% and 30% respectively. Although Corus concluded the contracts on different dates, they

constitute a single infringement of Article 81 EC. However important control of the VAM technique may be, the Commission maintains that Mannesmann's participation in a cartel relating to seamless steel tubes is established to the requisite legal standard.

143 What is more, there was no legitimate interest requiring Corus to conclude the contracts in question. As the supply of seamless steel tubes exceeded demand, Corus had no reason to fear problems in obtaining supplies or high prices. As regards the argument that Corus cannot be criticised for wishing to maximise profits from sales of the end products, the Commission reiterates that Corus's strategy comes within the framework of an unlawful cartel.

144 Third, Mannesmann maintains that Corus's supply contracts do not infringe Article 81(1) EC. Corus's deliveries were considerably below the thresholds above which the Commission generally intervenes in respect of vertical agreements. It states, by way of example, that Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 1) provides that 'non-compete obligation' means only an obligation causing the buyer to acquire more than 80% of its annual purchases from the same supplier. Below that threshold, the agreements are lawful.

145 In Mannesmann's submission, the supply method used by Corus does not restrict competition. In the absence of any exclusivity, Corus's decision to allocate each of its three suppliers a quota defined by reference to its annual volume of purchases does not distort competition. Supply of seamless steel tubes exceeds demand and Corus's needs are foreseeable. In those circumstances, it was reasonable for Corus to allocate its suppliers a purchase quota rather than stipulate in its supply contracts the quantities of goods needed.

146 Mannesmann further submits that the prices of the relevant products were negotiated individually and then reviewed according to a formula based on developments in the market. Such indexation clauses are commonly found in long-term contracts and are justified by the price fluctuations typical of the steel tubes sector. The contracts do not establish any exchange of confidential information. Corus merely sent Mannesmann the adjustments resulting from the review formula. It also follows from the Commission's practice in taking decisions that it has never declared such clauses contrary to Article 81(1) EC.

147 As regards the other stipulations in the contracts, Mannesmann contends that the Commission attached particular significance to the penalty clauses, whereas they have no relevance from the aspect of Community competition law. The light contractual penalty for failure to deliver the goods may be explained by the supply surplus situation, which allowed Corus to obtain supplies easily.

148 Last, Mannesmann maintains in its reply that the two conditions set out in Article 81(1) EC relating to the appreciable nature of the effect on intra-Community trade and the restriction of competition are not satisfied in the present case. It follows from the grounds of the contested decision (recital 147) that the agreements referred to in Article 2 were designed to restrict access by Japanese producers to the United Kingdom market. An agreement of that kind affects trade between the Community and Japan, but has no effect on trade between Member States or on competition within the common market.

149 In any event, the effects of the agreements referred to in Article 2 of the contested decision are negligible by comparison with the volume of trade between Japan and the Community. Mannesmann criticises the Commission's inadequate analysis of the relevant market. The United Kingdom market represents approximately 2.5% of world consumption of OCTG tubes, including seamless tubes. Seamless tubes

represent only 16% of the market for all OCTG tubes (annex 2 to the contested decision). The alleged cartel is well below the thresholds set out in paragraph 9 of Commission Notice 97/C 372/04 on agreements of minor importance which do not fall within the meaning of Article [81](1) of the [EC] Treaty (OJ 1997 C 372, p. 13, 'the 1997 Notice').

150 The Commission refutes those arguments, which it finds unconvincing. The supply contracts reserved for Vallourec, Dalmine and Mannesmann a fixed share of deliveries of seamless steel tubes to Corus, whatever the quantities actually consumed by Corus. Those undertakings had no interest in competing on the price of seamless steel tubes which are threaded in the United Kingdom.

151 After observing that Regulation No 2790/1999 is not applicable in the present case, the Commission states that it assessed the contractual penalty provided for in the supply contracts solely in order to ascertain whether the length of the delivery periods could objectively justify Corus's decision to obtain supplies exclusively from Community undertakings. It concluded that the clause on delivery times had been inserted solely in order to exclude the Japanese producers.

152 Last, the Commission claims that Mannesmann's pleas alleging that the restrictions on competition and the effect on trade between Member States were not appreciable are inadmissible on the ground that they were raised out of time. Likewise, it was only at the stage of the reply that Mannesmann submitted that Article 2 of the contested decision was unlawful from the aspect of the 1997 Notice. Both of these submissions are new pleas in law and are therefore inadmissible under Article 48(2) of the Rules of Procedure.

153 In the alternative, the Commission maintains that the pleas are unfounded.

154 As regards the argument that the 1997 Notice should be applied, the Commission observes that, in so far as the reference period taken into account for the purposes of the fines was from 1990 to 1995, it would have been appropriate to request rather the application of the Commission Notice of 3 September 1986 on agreements of minor importance which do not fall under Article [81](1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2). The de minimis threshold of 5% in that notice refers not to the world market but to the relevant geographic market within the Community. In this case, the supply contracts represent 78 to 84% of consumption on the United Kingdom market and 13 to 24% of consumption on the Community market. Furthermore, the turnover of each of the undertakings concerned is considerably higher than the threshold of EUR 200 million in that notice. Furthermore, the thresholds in the 1997 Notice which Mannesmann claims should be applied were clearly not observed in this case.

155 Last, the Commission contends that even if Article 2 of the contested decision were to be annulled that would have no effect on the amount of Mannesmann's fine, since the infringement referred to in that provision did not give rise to any independent sanction.

Findings of the Court

156 First of all, Mannesmann's request that the Commission produce in the present case certain documents lodged by Corus in Case T-48/00 has become devoid of purpose in so far as the seven cases concerning the lawfulness of the contested decision, including the present case and Case T-48/00, were joined for the purposes of the

hearing, so that all the applicants had the opportunity to consult at the Court Registry the pleadings and annexes lodged in the other cases, with the exception of the documents treated as confidential. Thus, Mannesmann had access to all the documents in question and was able to comment as it saw fit on the content of those documents at the hearing. In those circumstances, there is no need to grant its further request for leave to submit further submissions to that effect.

157 The object and the effect of the three supply contracts are described by the Commission at recital 111 to the contested decision as follows:

'The object of these contracts was the supply of plain ends to the leader of the North Sea OCTG market, and their purpose was to maintain a domestic producer in the United Kingdom with a view to securing respect for the fundamentals in the Europe-Japan Club. The main object and effect of the contracts was to share between [Mannesmann], Vallourec and Dalmine (Vallourec from 1994) all the requirements of their competitor, [Corus]. The contracts made the purchase prices of the plain ends dependent on the prices of the pipes and tubes threaded by [Corus]. They also contained a restriction on [Corus's] freedom of supply (on Vallourec's from 1994) and forced it to communicate to its competitors the selling prices applied and quantities sold. In addition, [Mannesmann], Vallourec (until February 1994) and Dalmine undertook to supply a competitor ([Corus], then Vallourec from March 1994) with quantities not known in advance.'

158 The terms of the supply contracts produced before the Court, in particular the contract concluded by Mannesmann with Corus on 9 August 1993, confirm, in substance, the facts stated in recital 111 to the contested decision and also in recitals 78 to 82 and 153. Taken together, those contracts divide up, at least from 9 August 1993, Corus's plain-end tube requirements between the three other European producers (40% for Vallourec, 30% for Dalmine and 30% for Mannesmann). Furthermore, each of the contracts stipulates that the price paid by Corus for plain end tubes is to be set according to a mathematical formula which takes into account the price obtained by Corus for its threaded tubes.

159 It follows from those findings that the object and/or, at the very least, the effect of the supply contracts was to substitute a negotiated allocation of the profits to be obtained from sales of threaded tubes which could be made on the United Kingdom market for the risks of competition in the case of the four European producers (see, by analogy, as regards concerted practices, the *Cement* judgment, paragraph 42 above, paragraph 3150).

160 By each of the supply contracts, Corus bound its three Community competitors in such a way that any effective competition on their part on its domestic market, and also any prospect of such competition, disappeared, in return for which it sacrificed its freedom to obtain supplies. Those three competitors' sales of plain end tubes would fall should Corus's sales of threaded tubes fall. Furthermore, the profit margin on the sales of plain end tubes which the three supplies undertook to make would also be reduced should the price obtained by Corus for its threaded tubes fall and could even become a loss. In those circumstances, it was practically inconceivable that the three producers should seek to provide effective competition for Corus on the United Kingdom market for threaded tubes, in particular on price (see recital 153 to the contested decision).

161 On the other hand, by agreeing to conclude such contracts, each of Corus's three Community competitors secured an indirect participation on Corus's domestic market and a share in the related profits. In order to obtain those advantages, they in effect waived the possibility of selling threaded tubes on the United Kingdom market and also, at least from the time when the third contract was signed, on 9 August 1993, allocating the remaining 30% to Mannesmann, the possibility of supplying a larger proportion of the plain end tubes bought by Corus than that allocated to each of them in advance.

162 Furthermore, Corus's competitors accepted the onerous, and therefore commercially unusual, obligation to supply Corus with quantities of tubes defined in advance

solely by reference to Corus's sales of threaded tubes. That obligation reinforced the unlawful interdependence between those producers and Corus, in so far as the producers, as contractually-bound suppliers, were dependent on Corus's commercial policy.

163 It is quite evident that if the supply contracts had not existed, the three European producers other than Corus would normally, in the absence of the Fundamental Rules, have had an actual or at least a potential commercial interest in competing efficiently with Corus on the United Kingdom market for threaded tubes and also in competing among themselves to supply Corus with plain end tubes.

164 In that regard, it should further be observed that each of the supply contracts was concluded for an initial period of five years. That relatively long period confirms and reinforces the anti-competitive nature of the contracts, particularly since Mannesmann and Corus's two other suppliers in effect waived the possibility of directly exploiting any growth in the United Kingdom market for threaded tubes during that period.

165 As regards Mannesmann's specific argument that the price formula in the contracts is merely an indexation clause, the Commission characterised that clause as anti-competitive because it fixes the price paid by Corus for its plain end tubes to each of its suppliers by reference to the price obtained by Corus for its threaded tubes, and does so in the same way for each of the three suppliers. Even on the assumption that the initial prices for the supply of plain end tubes were really negotiated independently between Corus and each of its suppliers, the commercial power relationship existing between Corus and each of those undertakings and reflected in those prices was established, and any possibility of competition on prices of plain end tubes purchased by Corus was eliminated. The choice of the price of threaded

tubes sold by Corus as an index is not neutral and makes the formula in question very different from an ordinary indexation clause. As stated at paragraph 160 above, that choice had the consequence that the three suppliers, which also produced threaded tubes themselves, lost their commercial interest in competing with Corus on prices on the United Kingdom market.

166 Furthermore, as the Commission observes, the formula for fixing the price of plain end tubes in each of the supply contracts entailed an unlawful exchange of business information (see recital 153 to the contested decision; see also recital 111) which must remain confidential under pain of compromising the autonomy of the business policy of the competing undertakings (see, to that effect, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 403, and Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 383 et seq.).

167 Mannesmann's argument that confidential information relating to the quantities of tubes sold by Corus and to the prices paid by the latter's customers was not disclosed to it cannot exonerate it in the circumstances of the present case.

168 As regards the quantities of threaded tubes sold by Corus, Corus's suppliers, including Mannesmann, could easily calculate them, since each of them supplied, in principle, a fixed percentage of Corus's requirements.

169 On the other hand, it is true, as Mannesmann states, that Corus did not communicate the prices which it obtained for its threaded pipes to its contracting partners as such. Consequently, the assertion at recital 111 to the contested decision that the supply contracts 'forced [Corus] to communicate to its competitors the selling prices applied' overstates the scope of the relevant contractual obligations. However, the Commission was correct to state at recital 153 to the contested

decision and before the Court that those prices were related mathematically to the prices paid for the plain end tubes, so that the three suppliers concerned received precise information about the direction, the timing and the extent of any fluctuation in the prices of the threaded tubes sold by Corus.

170 Not only does the communication of that information to competitors infringe Article 81(1) EC, but, in addition, the nature of that infringement is in substance the same, whether it was the price of the threaded tubes themselves or only information concerning price fluctuations that was communicated. In those circumstances, it must be held that the inaccuracy described in the preceding paragraph is insignificant in the wider context of the infringement found in Article 2 of the contested decision and that, consequently, it has no impact on the finding of the existence of that infringement.

171 As to the argument which Mannesmann bases on Regulation No 2790/1999, it must be stated at the outset that that regulation cannot apply directly in the present case, since the contested decision was adopted on 8 December 1999 and Article 2 thereof relates, so far as Mannesmann is concerned, to a period beginning in 1993 and ending in 1997, i.e. to a period preceding the entry into force of the relevant provisions of Regulation No 2970/1999 on 1 June 2000.

172 Furthermore, in so far as that regulation may none the less be of some assistance in the present case, in that it represents a position adopted by the Commission in December 1999 to the effect that little damage is caused to competition by vertical agreements, it must be pointed out that that regulation applies Article 81(3) EC. However, Article 4 of Regulation No 17 provides that agreements between undertakings can benefit from an individual exemption under Article 81(3) EC only if they have been notified the Commission for that purpose, which was not done in the present case.

173 It follows that the lawfulness of the contracts in question can be assessed only under Article 81(1) EC. Thus, even on the assumption that it were established, the circumstance that the contracts satisfied the substantive conditions of Article 81 (3) EC, governing the grant of exemptions, in the light of the Commission's policy as reflected in Regulation No 2790/1999, is of no relevance in the present case. On the contrary, the adoption of that regulation in December 1999 confirms that, in the Commission's view, such agreements in principle infringe Article 81(1) EC, since they require the application of Article 81(3) EC. Consequently, Mannesmann's argument based on Regulation No 2790/1999 must be rejected.

174 It must be held, moreover, that as the infringement found in Article 2 of the contested decision was constituted by the restrictions of competition in the supply contracts themselves, the considerations set out above suffice to establish its existence.

175 No matter what the actual degree of collusion between the four European producers, each of them concluded one of the supply contracts, which restricted competition and came within the infringement of Article 81(1) EC found in Article 2 of the contested decision. Although Article 2(1) of the contested decision states that the supply contracts were concluded 'in the context of the infringement mentioned in Article 1', it is clear from the wording of recital 111 to the contested decision that it is the fact of having concluded those contracts that constitutes in itself the infringement found in Article 2.

176 Thus, even on the assumption that Mannesmann did succeed in demonstrating that the conclusion of its supply contract with Corus was objectively compatible with its business interest, that circumstance would not in any way undermine the Commission's argument that the agreement was unlawful. Anti-competitive practices are very often in the undertakings' commercial interest, at least in the short term.

177 In the light of those findings, there is no need to settle the dispute between the parties over the meaning of the contractual penalty for non-delivery, which was merely a corresponding reduction in the share of the supplier in question, since the argument put forward in that regard by Mannesmann seeks to show that it was commercially logical from Corus's point of view to conclude the three supply contracts thus drafted. The argument that the only undertakings established in the Community capable of producing tubes of that dimension were Vallourec, Dalmine and Mannesmann is also irrelevant, for the same reason.

178 Likewise, Mannesmann's arguments relating to Vallourec's commercial power on the threaded tubes market owing to its patent for the 'VAM' premium joint relate essentially to the commercial interests which led Mannesmann to conclude a supply contract for plain end tubes with Corus and are therefore irrelevant. At best, those arguments might to a certain extent reduce the force of the Commission's assertions concerning the elimination of effective competition by Mannesmann on the United Kingdom threaded tubes market, but they cannot invalidate the essential finding that the parties to the supply contracts substituted cooperation, i.e. commercial certainty, for the risks of competition as regards the United Kingdom markets for plain end and threaded tubes.

179 As the existence of the infringement found in Article 2 of the contested decision is established to the sufficient legal standard, there is, strictly speaking, no need to examine further the Commission's reasoning as regards the collusion between the four European producers (see paragraph 171 above). In particular, there is no need to analyse for that purpose Mannesmann's arguments concerning the body of evidence external to the supply contracts on which the Commission relied to demonstrate that the collusion did take place.

180 However, in so far as the extent of the collusion between the four Community producers in respect of the infringement found in Article 2 of the contested decision is relevant to the examination of certain of the other pleas raised in the present case, the Court must examine it.

181 In that context, conduct which forms part of a global plan and pursues a common objective may be regarded as coming within a single agreement (see, to that effect, the *Cement* judgment, paragraph 42 above, paragraph 4027). If the Commission shows that an undertaking, when it participated in cartels, knew or must necessarily have known that in doing so it was joining in a single agreement, its participation in the cartels concerned may constitute the expression of its accession to that agreement (see, to that effect, the *Cement* judgment, paragraph 42 above, paragraphs 4068 and 4019).

182 In that regard, the document entitled Reflections on the VAM contract, dated 23 March 1990, is particularly relevant. Under the heading 'Scenario II', Mr Verluca mentions the possibility of 'getting the Japanese to agree not to intervene on [the United Kingdom] market and that the problem should be settled between Europeans'. He goes on: '[i]n that case, plain end tubes would effectively be shared between [Mannesmann], [Vallourec] and Dalmine'. In the following paragraph, he states that 'it would probably be beneficial to tie [Vallourec's] sales to both the price and the volume of VAM sold by [Corus]'.

183 Since that proposal accurately reflects the essential terms of the contract concluded between Vallourec and Corus 16 months later, it is clear that that strategy was effectively adopted by Vallourec and that the contract was signed in order to implement it.

184 Furthermore, the fact that virtually identical contracts were then signed between Corus and each of the other European members of the Europe-Japan Club, i.e. Dalmine and then Mannesmann, so that Corus's requirements for plain end tubes were effectively shared between the other three members of the Europe-Japan Club from August 1993, precisely as Mr Verluca had foreseen, confirms that those three contracts must have been concluded with the aim of pursuing the common strategy proposed in the context of their collusion within that club.

185 That conclusion is supported by the evidence on which the Commission relies in the contested decision, particularly in recital 91, which reads as follows:

'On 21 January 1993 [Corus] sent Vallourec (and probably [Mannesmann] and Dalmine as well) outline proposals for a seamless pipe and tube restructuring agreement for discussion at a meeting at Heathrow on 29 January 1993 between Mannesmann, Vallourec, Dalmine and [Corus] (page 4628 [of the Commission's file, i.e. the first page of the document entitled "Outline proposals for a seamless pipe and tube restructuring agreement"]). The document states: "[Corus] has indicated its intention to withdraw eventually from seamless tube manufacture. It seeks to do this in an orderly and controlled manner in order to avoid disruption in the supply of tubes to its customers and to assist these producers who acquire the business to retain the order load ... Discussions have been held over the last six months between [Corus] and other producers interested in acquiring assets from [Corus] and [Corus] believes that there is a consensus to proceed along the lines described in this paper". One of the proposals consisted in transferring the OCTG activities to Vallourec while maintaining in force the contracts for the supply of plain ends between [Corus] and Vallourec, [Mannesmann] and Dalmine, without changing the proportions. The same day, a meeting took place between [Mannesmann] and [Corus], in the course of which [Mannesmann] "agreed that Vallourec should take the lead in the future ownership of the OCTG Business" (page 4626 [of the Commission's file, i.e. the single page of a fax sent by Mr Davis of Corus to Mr Patrier of Vallourec on 22 January 1993]). The Dalmine document entitled "Seamless steel tube system in Europe and market evolution" (p. 2053 [of the Commission's file], dated May/August 1993, stated that a solution to the [Corus] problem which was appropriate to everybody could only be found in a European context; the fact that Vallourec was acquiring the [Corus] plant was also accepted by Dalmine.'

186 It should further be noted that in its memorandum 'Strategic reflections', cited at recital 80 to the contested decision, Vallourec expressly foresaw the possibility that Dalmine and Mannesmann would collude with it in order to supply plain end tubes

to Corus. At recital 59 to the contested decision, moreover, the Commission relies on the document '(g) Japanese', and in particular on the calendar on the fourth page of that document (page 4912 of the Commission's file), to support its assertion that the European producers held preparatory meetings before meeting the Japanese producers, in order to coordinate their positions and make joint proposals in the context of the Europe-Japan Club.

187 It follows from the documentary evidence relied on by the Commission in the contested decision and set out above that the four Community producers actually met in order to coordinate their position within the framework of the Europe-Japan Club before the intercontinental meetings of that club, at least in 1993. It is also established that the closure of Corus's threading facility in Clydesdale and its purchase by Vallourec, and also the supply of plain end tubes to Corus by Dalmine and Mannesmann, were discussed at those meetings. It is inconceivable, therefore, that Mannesmann could have been unaware of the terms of the strategy drawn up by Vallourec and of the fact that its supply contract with Corus formed part of a wider anti-competitive agreement affecting the market for standard threaded tubes as well as the market for plain end tubes.

188 As regards Mannesmann's argument that the third supply contract, between it and Corus, was concluded long after the other two, so that the Commission was not entitled to infer that there was a single agreement involving the four European producers, it must be held that the fact that there was no supply contract between Mannesmann and Corus before 1993 cannot undermine the Commission's argument. Although the strategy of sharing supplies of plain end tubes was fully implemented only from the time when Corus had three suppliers, the signature of the other two contracts constituted a partial implementation of that plan, pending its completion.

189 Furthermore, as the Commission stated before the Court, the reference in the document entitled 'Outline seamless tubes restructuring proposals', dated 21 January 1993, to the fact that Mannesmann was already supplying plain end tubes to

Corus, far from being irreconcilable with the signature of a supply contract by Corus and Mannesmann in August 1993, as Mannesmann claims, gives further force to the Commission's analysis. Although the Commission took the precaution of finding that the infringement referred to in Article 2 of the contested decision had in Mannesmann's case existed only from 9 August 1993, because its signature of a supply contract with Corus on that date constituted definite proof of its participation in the infringement, it is clear from the reference in the above-mentioned document that in reality Mannesmann supplied Corus with plain end tubes from January 1993.

190 Thus, it follows from the evidence relied on by the Commission in the contested decision that Vallourec conceived the strategy of protecting the United Kingdom market and concluded a supply contract with Corus which, in particular, allowed the first step to be taken in implementing it. Then, Dalmine and Mannesmann joined the first two, as may be seen from the fact that each of those undertakings concluded a supply contract with Corus.

191 Last, as regards the allegations relating to the absence of any appreciable effect on trade between Member States, they must be held inadmissible pursuant to Article 48 (2) of the Rules of Procedure, as the Commission submits.

192 By those arguments, which were first raised in the reply, Mannesmann claims that the Commission made errors of law or of assessment in respect of one of the conditions for the application of Article 81(1) EC. As substantive pleas are not a matter of public policy, it is not for the Community judicature to raise them of its own motion.

193 It should be noted, for the record, that the Court has rejected as unfounded arguments similar to those put forward by Mannesmann in cases which were joined

with the present case for the purpose of the hearing (*Dalmine* v *Commission*, paragraph 127 above, in particular paragraphs 156 and 157, and *JFE Engineering and Others* v *Commission*, paragraph 102 above, in particular paragraphs 367 to 374 and 386 to 395).

194 As regards the argument that the anti-competitive effects of the contract concluded between Mannesmann and Corus were not significant, that argument must be declared admissible in so far as it expands on the arguments already put forward in the application to the effect that the Commission did not demonstrate to the requisite legal standard that the supply contracts sanctioned by Article 2 of the contested decision had an object or effects which restricted competition within the meaning of Article 81 EC.

195 As regards the substance, it should be noted, first of all, that in this case the Commission relied not only on the restrictive effects but also on the restrictive object of the agreement sanctioned in Article 2 of the contested decision (see recital 111 to the contested decision and also paragraph 157 et seq. above).

196 In that regard, undertakings which conclude an agreement with the purpose, in particular, of restricting competition cannot in principle avoid the application of Article 81(1) EC by claiming that their agreement should not have an appreciable impact on competition (see also paragraph 130 above).

197 The contracts sanctioned in Article 2 of the contested decision were conceived, as held at paragraph 179 et seq. above, in particular to share the supply of plain end tubes to Corus, the leader (see recital 111 to the contested decision) on the United Kingdom market, between its European competitors which were also members of the Europe-Japan Club. Those contracts also envisaged the unlawful communication

of commercial information by Corus. Thus, their very object entailed significant restrictions on competition on the United Kingdom market, which was a separate market on account of the existence of the infringement found in Article 1 of the contested decision (*Dalmine* v *Commission*, paragraph 127 above, paragraphs 267 and 268), irrespective of their effects.

198 Consequently, the complaints summarised above must be rejected in so far as they relate to the question whether the infringement referred to in Article 2 of the contested decision satisfied the criterion relating to the existence of an object or effects which appreciably restricted competition.

199 Mannesmann's argument based on the 1997 Notice must also be held admissible notwithstanding that it was first raised in the reply. Mannesmann relies on that notice in order to reinforce the argument, already put forward in its application, that the supply contracts were not anti-competitive agreements which infringed Article 81(1) EC.

200 As regards the substance, it must be held, first of all, that the 1997 Notice is applicable *ratione temporis* in the present case since the contested decision was adopted in 1999. The 1997 Notice reflects a position adopted by the Commission on that date on the agreements which must be regarded as infringing Article 81(1) EC. In particular, the 1997 Notice fixes thresholds in terms of percentages, so that, unlike the previous notices, which fix thresholds in absolute value, it reflects a development in the Commission's policy and/or assessment and not a simple adjustment to take account of inflation. In those circumstances, it is the 1997 Notice and not the 1986 Notice that is relevant to the assessment of the contested decision, notwithstanding that the contracts in question were signed in 1991 and 1993.

201 However, it must be held that the 1997 Notice cannot be relied upon to validate the supply contracts in the present case, since those contracts contributed to the implementation of a wider anti-competitive agreement relating to threaded tubes, which is not covered by the terms of that notice (see paragraph 179 et seq. above). The anti-competitive object and effects of those contracts go, in part, further than those which result directly from their provisions, so that a mechanical application of the 1997 Notice to the contracts alone would fail to take proper account of their impact on the concerned markets.

202 In any event, the figures submitted by Mannesmann to demonstrate that the market share of the undertakings concerned is below the thresholds laid down in the 1997 Notice refer to the worldwide market in OCTG tubes. The 1997 Notice states that it is 'the aggregate market shares held by all of the participating undertakings' that must not exceed the relevant thresholds 'on any of the relevant markets'.

203 In that regard, although the definition set out in recital 35 to the contested decision refers to a 'worldwide' market for seamless OCTG tubes, that definition must be read in the light of the detailed description of the various parts of the agreements concluded within the framework of the Europe-Japan Club, in particular the Fundamental Rules. It follows from the contested decision, taken in its entirety, and in particular from recitals 53 to 77, that the conduct of the Japanese and European producers on each domestic market or, in certain cases, on the market of a certain region of the world was determined by specific rules which varied from one market to the other and which were the consequence of commercial negotiations within the Europe-Japan Club.

204 In those circumstances, it is the detailed description of the situation existing on each market that represents the real analysis of the geographic markets at issue in the contested decision. Recital 35 to the contested decision must therefore be interpreted as containing a definition of the geographic market for seamless OCTG tubes as it should normally exist in the light of purely objective commercial and economic considerations, in the absence of unlawful agreements having the object or effect of dividing it up artificially.

205 Thus, Mannesmann's arguments relating to the lower percentage of sales made by Corus and itself on the worldwide OCTG market must be rejected as irrelevant. Even on the assumption that it were appropriate to apply the 1997 Notice, it would therefore be the shares of the United Kingdom market, or at the very least the Community market, that would have to be taken into account. It follows from the contested decision, and in particular from the figures in recitals 68 and 113, that the market shares of Corus alone, which was a party to each of the supply contracts, on both the United Kingdom market and the Community market were much higher than the thresholds fixed by the 1997 Notice, whether 10% of the market applicable to vertical agreements or 5% applicable to horizontal agreements. It is plain, therefore, that the contracts in question are not agreements of minor importance within the meaning of the 1997 Notice.

206 In the light of the foregoing, it must be concluded that the Commission was correct to conclude in the contested decision that the supply contracts constituted the infringement found in Article 2 of the contested decision and therefore established its existence to the requisite legal standard. It should also be noted, for the record, that the additional evidence taken into account by the Commission confirms the correctness of its argument that those contracts form part of a wider common policy affecting the market in standard OCTG tube.

The claim for a reduction in the amount of the fine

The rules governing the calculation of the fine

Arguments of the parties

207 First of all, Mannesmann criticises the Commission for not having properly applied the rules on the determination of the amount of fines, in particular the Guidelines

on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and the Leniency Notice. It also relies, in that regard, on the Commission's previous practice in taking decisions, which, in the applicant's submission, gave rise to a legitimate expectation on its part as regards the method which would be used in calculating the fines and the level at which they would be set.

208 In its reply, the applicant further submits that the contested decision does not refer expressly to the Guidelines and therefore fails to satisfy the requirements of Article 253 EC as regards the statement of reasons. If the Guidelines were not applicable in the present case, the Commission should have followed its previous practice in taking decisions and set the fine by reference to Mannesmann's turnover on the relevant market. The Commission was not entitled to depart from its previous practice without expressly stating its reasons for doing so. Moreover, should it be the case that the Commission applied the Guidelines by implication in calculating the fines, then in Mannesmann's submission it has still not complied with Article 253 EC. In such a case, the Commission was required to make plain in the decision the factors which it took into account in setting the fine (the *Cement* judgment, paragraph 4725 et seq., and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 283).

209 The Commission states that the applicant's argument, which was developed for the first time in its reply, concerns an alleged departure from its pre-Guidelines decision-taking practice. It constitutes a new plea, since Mannesmann had initially confined its argument to breach of the Guidelines. The plea is therefore inadmissible under Article 48(2) of the Rules of Procedure. As regards the reasons on which the contested decision is based, in the Commission's submission they satisfy the requirements laid down by the Court of Justice in Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 44 et seq. The Commission stated its position on the gravity of the infringement (recitals 159 to 165 to the contested

decision), its duration (recital 166), the existence of attenuating circumstances (recital 169) and the application of the Leniency Notice (recital 174). Last, the Commission submits that the contested decision is consistent with the Guidelines.

Findings of the Court

210 It should be noted first of all that in an action for annulment a plea alleging failure to state or failure sufficiently to state the reasons on which a Community act is based is a matter of public policy which must be raised by the Community judicature of its own motion and which, in consequence, may be invoked by the parties at any stage of the proceedings (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 125). Accordingly, the fact that the plea alleging failure sufficiently to state reasons for the method of setting the fines was first raised only in the reply does not have the consequence that the Court is unable to examine it in this case.

211 In that regard, it is settled case-law that the requirement to be satisfied by the statement of reasons depends on the circumstances of each particular 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 (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and *Commission* v *Sytraval and Brink's France*, paragraph 126 above, paragraph 63). 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 253 EC 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 (*Petrotub and Republica* v *Council*, paragraph 72 above, paragraph 81).

212 Furthermore, although the Commission has a margin of discretion in setting the amount of fines (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, and, by analogy, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127), it cannot depart from the rules which it has imposed on itself (*Hercules Chemicals* v *Commission*, paragraph 44 above, paragraph 53, upheld on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, and the case-law cited there). Thus, the Commission was required to take account of the terms of the Guidelines in calculating the fines, in particular of the mandatory provisions thereof.

213 In the present case, it is clear upon reading recitals 156 to 175 to the contested decision that the Commission applied the method of calculation laid down in the Guidelines, as it was in any event required to do, in accordance with the case-law cited in the preceding paragraph. In those circumstances, it must be held that the absence of any express reference to the Guidelines in the contested decision cannot render it unlawful on the ground of failure to state reasons. Such a reference would have served only to confirm a fact which must have been clear to Mannesmann in any event, regard being had to the legal context described above.

214 Consequently, the plea alleging failure to state reasons in that regard is rejected.

215 As regards the plea which Mannesmann bases on the Commission's previous practice in taking decisions and the consequent legitimate expectation, it must be held, first of all, that it is admissible, since it was put forward, albeit succinctly, in the application, namely at paragraph 74 in the context of Mannesmann's argument relating to the gravity of the infringement. Accordingly, the argument on that point in the reply must be regarded as expanding on that plea.

216 Next, it must be observed, as regards the substance of that argument, that, having regard to the discretion which Regulation No 17 confers on the Commission (see, in that regard, paragraph 212 above), the fact that the Commission introduces a new method of calculating fines, which may in certain cases lead to an increase in the level of fines, without exceeding the maximum level fixed by Regulation No 17, cannot be regarded as an increase, with retroactive effect, of the fines as legally envisaged by Article 15(2) of Regulation No 17 (see, although it is under appeal, judgment in Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 235).

217 It is irrelevant, therefore, to claim that the calculation of the amount of the fines following the method set out in the Guidelines may lead the Commission to impose higher fines than in its previous practice, particularly since no systematic account is taken of the differences in size between the undertakings. The Commission has a discretion in setting the amount of fines in order to steer undertakings towards respect for the competition rules (see paragraph 212 above and Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53). Furthermore, the fact that the Commission may in the past have applied fines of a certain level to certain types of infringements cannot preclude it from raising that level within the limits indicated by Regulation No 17, if that is necessary to ensure the implementation of the common competition policy (*Musique diffusion française and Others* v *Commission*, paragraph 96 above, paragraph 109; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309, and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). The proper application of the Community competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique diffusion française and Others* v *Commission*, paragraph 109, and *LR AF 1998* v *Commission*, paragraph 216 above, paragraphs 236 and 237).

218 It follows from the foregoing that Mannesmann cannot rely on the Commission's previous decision-taking practice and the present plea must therefore be rejected.

The determination of the amount of the fine imposed on the applicant

219 Mannesmann then submits four main complaints relating to the determination of the amount of the fine imposed on it.

The gravity of the infringement found in Article 1 of the contested decision

— Arguments of the parties

220 First of all, the applicant disputes the Commission's assessment of the gravity of the infringement referred to in Article 1 of the contested decision. It states that the gravity of an infringement must be assessed in the light of its effects on the market (Point 1 A of the Guidelines). Even on the assumption that the infringements in question might be regarded as 'very serious' for the purposes of the Guidelines, Mannesmann criticises the Commission for having taken their effects on the market into account as aggravating circumstances.

221 The applicant maintains that it has already demonstrated to the requisite legal standard that the infringements referred to in Articles 1 and 2 of the contested decision were not made out. It seeks a reduction in its fine which would reflect at least the extent to which the Commission considered that the infringement referred to in Article 2 of the contested decision had the effect of altering competition.

222 In setting the basic amount of the fine without taking account of the size or turnover on the relevant market of each of the undertakings concerned, the Commission exceeded the limits of its discretion. Equity and the principle of proportionality

require that undertakings are not placed on the same footing but that their conduct attracts sanctions that reflect their individual role or the impact of the infringement. A certain 'distributive' justice should also be ensured for large undertakings, as indicated by the fact that under Article 15(2) of Regulation No 17 the maximum fine is fixed at 10% of turnover.

223 The applicant maintains that the Commission also went beyond the bounds of its discretion by imposing a separate fine in respect of the infringement imputed to Vallourec, when Mannesmann took over control of that undertaking. The Commission should have imposed a single fine on Mannesmann that took into account the activities of its subsidiary Vallourec. By not doing so the Commission infringed the principle of equal treatment and misused its power.

224 The Commission contends that the agreement, whose purpose is to ensure respect for domestic markets in the context of the Europe-Japan Club, constitutes, by principle, a very serious infringement (recital 161 to the contested decision).

225 In so far as the infringement referred to in Article 2 did not lead to the imposition of a separate fine, the complaints relating to the assertion that that infringement had no anti-competitive effects are irrelevant.

226 The Commission further contends that Mannesmann, Vallourec and Dalmine must all be regarded as large undertakings (see Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996 L 107, p. 4)). The absolute cap on fines laid down in Regulation No 17 does not require that the Commission differentiate between large undertakings when calculating the basic amount of a fine.

227 The Commission recalls that Vallourec was taken over by Mannesmann in 1997. The two undertakings were independent of each other throughout the entire infringement period and the Commission therefore imposed separate fines on them. If the Commission were required to reduce fines because undertakings which were parties to a cartel merged after the cartel had been discovered, the deterrent effect of the fines would be substantially reduced.

— Findings of the Court

228 Under Article 15(2) of Regulation No 17, the Commission may impose fines of from EUR 1 000 to EUR 1 000 000, which may be increased to 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. Article 15(2) also provides that in fixing the amount of the fine, regard is to be had to the gravity and to the duration of the infringement.

229 Contrary to Mannesmann's contention, neither Regulation No 17, nor the case-law nor the Guidelines provide that fines are to be set in direct proportion to the size of the market affected, size being only one among a number of factors. In accordance with Regulation No 17, as interpreted in the case-law, the fine imposed on an undertaking for infringement in a competition-related matter must be proportionate to the infringement, assessed in its entirety, account being taken, in particular, of its gravity (see, to that effect, Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 240, and, by analogy, *Deutsche Bahn* v *Commission*, paragraph 212 above, paragraph 127). As the Court of Justice held at paragraph 120 of its judgment in *Musique diffusion française and Others* v *Commission*, paragraph 96 above, in assessing the gravity of an infringement, regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (see also, by analogy, *Deutsche Bahn* v *Commission*, paragraph 127).

230 Furthermore, although the Commission did not expressly refer to the Guidelines when calculating the fines in the contested decision, it none the less determined the amount of the fines imposed on the addressees of the contested decision in accordance with the calculation method which it thereby imposed on itself (see paragraph 212 above).

231 As stated above, while the Commission has a margin of discretion in setting the amount of fines, it may not depart from the rules which it has imposed on itself (see paragraph 212 above and the case-law cited there). Thus, the Commission must give effect to the terms of the Guidelines when setting fines, in particular the mandatory provisions thereof. However, the Commission's discretion and the limits which it has placed thereon do not in any event prejudice the exercise by the Community judicature of its unlimited jurisdiction.

232 According to Point 1.A of the Guidelines, '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'. At recital 159 to the contested decision, the Commission states that it is taking those very three criteria into account in assessing the gravity of the infringement.

233 However, at recital 161 to the contested decision the Commission relied essentially on the nature of the unlawful conduct of all the undertakings as a basis for its finding that the infringement found in Article 1 of the contested decision was 'very serious'. In that regard, it referred to the seriously anti-competitive nature of the market-sharing agreement and its harmful effect on the proper functioning of the internal market, to the deliberate nature of the offending act and also to the secret

and institutional nature of the system put in place to restrict competition. At recital 161 the Commission also took into account the fact that 'the four Member States in question account[ed] for most of the consumption of seamless OCTG and line pipe in the Community and therefore constitute[d] an extended geographic market'.

234 On the other hand, the Commission stated at recital 160 to the contested decision that 'the specific impact of the infringement on the market [had] been limited', since both the products affected, namely standard OCTG tubes and pipeline, accounted for only 19% of Community consumption of seamless OCTG and line pipe and since welded tubes and pipes could in future cover part of the demand for seamless pipes and tubes as a result of technological progress.

235 Thus, at recital 162 to the contested decision, the Commission, after placing the infringement in the category of 'very serious' infringements on the basis of the factors set out at recital 161, took into account the relatively small quantity of sales of the products concerned by the addressees of the contested decision in the four Member States in question (EUR 73 million a year). That reference to the size of the affected market corresponds to the assessment of the limited impact of the infringement on the market at recital 160 to the contested decision. The Commission therefore decided to set an amount to reflect gravity of only EUR 10 million. The Guidelines provide, in principle, for an amount 'above [EUR] 20 million' for an infringement in that category.

236 The Court must consider whether the Commission's approach as described above is unlawful in the light of the arguments against it put forward by Mannesmann.

237 It is necessary to examine, first, the argument whereby Mannesmann seeks to demonstrate that the infringement found in Article 2 of the contested decision had no effects.

238 In that regard, the Commission clearly stated, both at recital 164 to the contested decision and before the Court, that it did not impose an additional fine in respect of that infringement.

239 The Court considered in *JFE Engineering and Others* v *Commission*, paragraph 102 above, that by failing to take into consideration the infringement found in Article 2 of the contested decision in setting the amount of the fine imposed on the European producers, the Commission failed to have regard to the general Community-law principle of equal treatment. However, as the Commission had not requested that the Court revise upwards the fines imposed on the European producers in Cases T-44/00, T-48/00 and T-50/00, the most appropriate way of making good the unequal treatment was to reduce the amount of the fine imposed on each of the Japanese applicants rather than increase the amount of the fines imposed on the European applicants (*JFE Engineering and Others* v *Commission*, paragraph 102 above, paragraphs 574 to 579).

240 As the infringement found in Article 2 of the contested decision was not taken into account for the purpose of the calculation of the fine imposed on Mannesmann either by the Commission or by the Court, its argument is based on a false premiss and must therefore be rejected.

241 As regards, next, Mannesmann's arguments relating to the fact that, according to the Guidelines, the Commission is required to consider the actual effects of an infringement for the purpose of calculating the fine, that element was in fact taken into account in the contested decision as regards the infringement found in Article 1 of the contested decision. The fact, referred to at paragraph 235 above, that the amount set according to gravity was reduced to 50% of the minimum sum normally applied in the event of a 'very serious' infringement adequately reflects that limited impact.

242 In that regard, it should also be borne in mind that fines are intended to have a deterrent effect in competition cases (see, in that regard, the fourth paragraph of Point 1.A of the Guidelines). Thus, taking into account the large size of the undertakings to which the contested decision was addressed, which is mentioned at recital 165 to the contested decision (see also paragraph 243 et seq. above), a substantially larger reduction in the amount set for gravity could have deprived the fines of their deterrent effect.

243 As regards Mannesmann's argument that the Commission was not entitled to take the view that the effects of the infringement found in Article 1 of the contested decision on the relevant market constituted an aggravating circumstance in the present case, it is sufficient to state that the Commission did not make a finding in respect of aggravating circumstances in the contested decision. That argument must therefore be rejected.

244 As concerns Mannesmann's argument that the Commission must take account of the size of each individual undertaking and also of the extent of its participation in the infringement when it sets the amount of the fine, it must be stated first of all that the reference in Article 15(2) of Regulation No 17 to 10% of worldwide turnover, referred to at paragraph 228 above, is relevant solely for the purpose of calculating the upper limit of the fine which the Commission is able to impose (see first paragraph of the Guidelines and also *Musique diffusion française and Others* v *Commission*, paragraph 96 above, paragraph 119) and does not mean that there must be a proportionate relationship between the size of each undertaking and the amount of the fine imposed on it (see also paragraph 227 above).

245 It should further be pointed out that under the sixth paragraph of Point 1.A of the Guidelines, which are applicable in this case (see paragraph 230 above), it is necessary 'in some cases to apply weightings to the amounts determined within each

of the three categories [of gravity] in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition'. According to that paragraph, that approach is appropriate 'particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'.

246 However, it follows from the use of the expression 'in some cases' in the Guidelines that weighting according to the individual size of the individual undertakings is not a systematic step in the calculation which the Commission has imposed on itself but an opportunity for flexibility which it has conferred on itself in cases where that is required. In that context, it is settled case-law that the Commission has a discretion which allows it to take or not to take certain factors into consideration when it sets the amount of the fines which it proposes to impose, by reference in particular to the circumstances of the case (see, to that effect, order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and judgments in *Ferriere Nord* v *Commission*, paragraph 108 above, paragraphs 32 to 33, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 465; see also, to that effect, judgment in Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraph 68).

247 Having regard to the wording of the sixth paragraph of Point 1.A of the Guidelines, it must be considered that the Commission retained a discretion as to whether it is appropriate to weight the fines by reference to the size of each undertaking. Thus, the Commission is not required, when determining the amount of fines, to satisfy itself, where fines are imposed in a number of undertakings involved in the same infringement, that the final amounts of the fines reflect a differentiation between the undertakings concerned as regards their overall turnover (see, to that effect, although it is under appeal, *LR AF 1998* v *Commission*, paragraph 216 above, paragraph 278, and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385).

248 In the present case, the Commission stated at recital 165 to the contested decision that all the undertakings to which the contested decision was addressed were large undertakings and that, accordingly, there was no need to differentiate between the amounts adopted for the fines.

249 The Commission stated in its defence, without being contradicted by Mannesmann, that Mannesmann is not a small or medium-sized undertaking. Recommendation 96/280, which was applicable when the contested decision was adopted, states, in particular, that undertakings must employ fewer than 250 individuals and have an annual turnover not exceeding EUR 40 million or a balance sheet of less than EUR 27 million. In Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36), those two thresholds were revised upwards and fixed at EUR 50 million and EUR 43 million respectively.

250 Although the Court has no figures relating to the number of Mannesmann's employees or its balance sheet, its turnover in 1998, at EUR 2 321 million (see recital 13 to the contested decision) was more than four times the limit laid down in the successive Commission recommendations on that criterion. It must therefore be held, on the basis of the information submitted to the Court, that the Commission did not err in stating, at recital 165 to the contested decision, that Mannesmann was a large undertaking.

251 As regards Mannesmann's role in the infringement, its participation in the market-sharing agreement is the consequence of the commitment it gave not to sell the relevant products on other markets. Each producer gave the same commitment, namely not to sell standard OCTG tubes and line pipe on the domestic market of each of the other members of the Europe-Japan Club. As stated at paragraph 233 above, the Commission relied principally on the highly anti-competitive nature of that commitment when it determined that the infringement found in Article 1 of the contested decision was a 'very serious' infringement.

252 Since Mannesmann is the only German member of the Europe-Japan Club, it must be held that its presence was sufficient to extend the geographic scope of the anti-competitive agreement to the territory of a Member State of the Communities. By giving a commitment not to sell its pipes and tubes on the markets of the other three Member States of the Community concerned by the agreement, Mannesmann also helped to reduce actual or potential competition on those other markets. By its presence at the meetings of the club, it adhered, or at least gave the other participants to believe that it was adhering, in principle to the terms of the anti-competitive agreement concluded at those meetings. It is apparent from the file, and in particular from the figures reproduced in the table in recital 68 to the contested decision, that the market-sharing envisaged by the cartel was applied in practice, at least to a certain extent, and that the cartel necessarily had a real impact on the conditions of competition on those Community markets. It must therefore be held that Mannesmann's participation had an appreciable impact on the Community market.

253 Thus, since the Commission found in the contested decision that the four Japanese undertakings concerned were large undertakings (see paragraph 248 above) and took account generally of the relatively small impact of the infringement on the markets concerned (see paragraphs 235 and 241 above), Mannesmann's argument does not suffice to demonstrate that the Commission exceeded the bounds of its discretion in the present case by not applying the sixth paragraph of Point 1.A of the Guidelines.

254 Last, as regards Mannesmann's argument relating to the fact that two separate fines were imposed on it and Vallourec notwithstanding that they had amalgamated their tube production facilities in 1997 (see recitals 12 and 15 to the contested decision), it must be held that it falls, in principle, to the natural or legal person managing the undertaking in question when the infringement of the Community competition rules was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility

for running the undertaking (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 210 above, paragraph 57). That is not the case, however, where the person now responsible for running the undertaking has stated that he is prepared to answer for the conduct imputed to his predecessor (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 62).

255 In the present case, Mannesmann is the legal person which managed an undertaking which participated in the infringement found in Article 1 of the contested decision during the period of that infringement and Vallourec is the legal person which at that time managed a different undertaking, independent of the former, which participated in the same infringement. There is no indication in the file that Mannesmann, Vallourec or one of their subsidiaries formally accepted responsibility in the present case. In any event, the rule described in the preceding paragraph does not allow the inference that, in circumstances where the person accepting responsibility also participated in the infringement independently, a single fine, in a sum lower than the sum of the two fines which would have been imposed on autonomous undertakings, should be imposed on the person accepting responsibility.

256 It follows from all of the foregoing that Mannesmann's arguments as summarised above cannot provide grounds for reducing the amount of its fine in the present proceedings.

Duration

— Arguments of the parties

257 Mannesmann disputes the Commission's assessment of the duration of the infringement. Although the meetings of the Europe-Japan Club began in 1977 and ceased in 1995, the infringement period is limited to five years (1990 to 1995) owing to the agreement on the voluntary restraint of exports concluded between the

Commission and the Japanese authorities (recital 108 to the contested decision). Mannesmann criticises the Commission's failure to take into consideration the fact that the voluntary restraint agreements were extended to 31 December 1990 under the agreement of 28 December 1989 concluded between the Commission and the Japanese Ministry of International Trade and Industry. It follows, in Mannesmann's submission, that the basic amount of the fine imposed on it, which is fixed at EUR 10 million, could only be increased by 40% (10% per annum) for duration. Thus, the duration of the infringement justified an increase in the basic amount of only EUR 4 million. Mannesmann therefore requests the Court to reduce its fine by EUR 1 million.

258 The Commission rejects those complaints, which in its contention are unfounded, and states that the applicant has adduced no evidence that the voluntary restraint agreements concluded with the Japanese Government lasted until December 1990.

— Findings of the Court

259 At recital 108 to the contested decision, the Commission stated that it could have taken into account the existence of the infringement from 1977 but that it chose not to do so because of the voluntary restraint agreements. Thus, in Article 1 of the contested decision it took into account the existence of the infringement only from 1990. That approach plainly constitutes a concession on the Commission's part towards the addressees of the contested decision.

260 Neither of the parties maintained before the Court that that concession should be called in question in the present case. Consequently, in the present proceedings the Court will not examine the lawfulness of that concession or whether it was appropriate to make it, but only whether, after expressly making that concession in

the grounds of the contested decision, the Commission correctly applied it in the present case. In that regard, it must be borne in mind that the Commission must adduce precise and consistent evidence to found the firm conviction that the infringement has been committed, since it bears the burden of proof as regards the existence of the infringement and, accordingly, its duration (Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20; Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeytiö and Others* v *Commission* (*'Wood Pulp II'*) [1993] ECR I-1307, paragraph 127; Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraphs 193 to 195, 198 to 202, 205 to 210, 220 to 232, 249, 250 and 322 to 328; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraphs 43 and 72).

261 Thus, the concession described above makes the alleged cessation of the voluntary restraint agreements the determining criterion for the purpose of assessing whether the infringement should be considered to have existed in 1990. Since the agreements in question were concluded at international level between the Japanese Government, represented by the Japanese Ministry of International Trade and Industry, and the Community, represented by the Commission, it must be held that the Commission should have kept the documentation confirming the date on which the agreements ended, in accordance with the principle of sound administration. It should therefore have been in a position to produce that documentation before the Court. However, the Commission stated before the Court that it had searched its archives but had been unable to produce any documents showing the date on which the agreements ended.

262 Although an applicant cannot generally transfer the burden of proof to the defendant by relying on circumstances which it is not in a position to establish, the concept of burden of proof cannot be applied to the Commission's advantage in the present case as regards the date on which the international agreements which it concluded came to an end. Its inexplicable inability to adduce evidence relating to a circumstance which is of direct concern to it deprives the Court of the possibility of adjudicating with all the facts before it as regards the date on which the agreements

ended. It would be contrary to the principle of the proper administration of justice to require that the consequences of that inability on the Commission's part be borne by the undertakings to which the contested decision was addressed, which, unlike the Commission, were not in a position to provide the missing evidence.

263 In those circumstances, it must be held, exceptionally, that it was for the Commission to adduce the evidence of the date on which the agreements came to an end. However, the Commission has not adduced evidence of the date on which the voluntary restraint agreements came to an end, either in the contested decision or before the Court.

264 In any event, the Japanese applicants adduced evidence that the voluntary restraint agreements were extended until 31 December 1990, at least at Japanese level, which supports the applicant's argument in these proceedings (*JFE Engineering and Others* v *Commission*, paragraph 102 above, paragraph 345). In joined cases where all the parties have had the opportunity to consult all the files, the Court may of its own motion take account of the evidence in the files in the parallel cases (see, to that effect, Case T-113/89 *Nefarma and Bond van Groothandelaren in het Farmaceutische Bedrijf* v *Commission* [1990] ECR II-797, paragraph 1, and Case T-116/89 *Prodifarma* v *Commission* [1990] ECR II-843, paragraph 1). In this instance, the Court is required to adjudicate in cases which were joined for the purpose of the oral procedure, which have as their subject-matter the same decision making a finding of infringement and in which all the parties have requested the Court to review the amount of the fines which they were ordered to pay. Thus, the Court formally takes notice, in the present case, of the evidence adduced by the four Japanese applicants.

265 Furthermore, Mannesmann is requesting the Court not only to annul the contested decision so far as concerns the starting date of the infringement found in Article 1 thereof and, to that extent, the duration of the infringement but also, in the exercise of the unlimited jurisdiction conferred on the Court, in accordance with Article 229 EC, by Article 17 of Regulation No 17, to reduce the amount of its fine in order

to take account of that reduction in duration. That unlimited jurisdiction has the consequence that when the Court reforms the contested measure by amending the amount of the fines imposed by the Commission, it must take account of all the relevant circumstances of fact (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 246 above, paragraph 692). In those circumstances, and since all the applicants have contested the fact that the Commission took account of the infringement as from 1 January 1990, it would not be appropriate for the Court to make a separate assessment of the situation of each of the applicants in the circumstances of the present case by reference solely to the elements of fact on which they have chosen to base their case and without regard to those which other applicants or the Commission may have invoked.

266 Furthermore, neither Mannesmann nor, *a fortiori*, the Commission has claimed that the voluntary restraint agreements were still in force in 1991.

267 In those circumstances, the Court finds that, for the purposes of these proceedings, the voluntary restraint agreements concluded between the Commission and the Japanese authorities remained in force until the end of 1990.

268 It follows from the foregoing that, in the light of the concession made by the Commission in the contested decision, the duration of the infringement found in Article 1 of the contested decision must be reduced by one year. Thus Article 1 of the contested decision must be annulled in so far as it establishes the existence of the infringement imputed to Mannesmann before 1 January 1991.

269 As regards the date on which the infringement ended, the Commission stated at the hearing, in answer to a question put by the Court, that in the contested decision 1995 was not taken into account for the purpose of calculating the fines. Mannesmann has not challenged before the Court that assessment as regards the end of the infringement.

270 It follows from the foregoing that the correct duration of the infringement found in Article 1 of the contested decision is four years, namely from 1 January 1991 until 1 January 1995. The fine imposed on Mannesmann must therefore be reduced accordingly.

The alleged attenuating circumstances

— Arguments of the parties

271 Mannesmann criticises the Commission for having failed to take into consideration certain attenuating circumstances which justified a reduction in the amount of the fine. It concedes that the Commission took the crisis in the steel industry into account as an attenuating circumstance and reduced its fine by 10% on that ground. However, Mannesmann submits that other circumstances justified a greater reduction in the fine. It relies in particular on the fact that the agreement referred to in Article 1 of the contested decision had no effects. It also observes that it put an end to the impugned conduct immediately the Commission became involved. Last, it states that it cooperated in the investigation carried out by the Commission.

272 The Commission rejects those claims. It contends that the complaint alleging that the agreement had no effects can at best relate only to the contract of supply which the applicant concluded with Corus, which is dealt with in Article 2 of the contested decision. Since no fine was imposed in respect of that article, the question of attenuating circumstances is of no relevance. For the remainder, Mannesmann's claims relating to its cooperation are not sufficiently made out.

— Findings of the Court

273 It must be borne in mind, first of all, that in the present case the Commission granted a reduction of 10% of the fine on the ground of an attenuating circumstance, namely the crisis affecting the steel industry at the material time.

274 It must also be borne in mind that the Commission must comply with its own Guidelines when setting fines. However, the Guidelines do not state that the Commission must always take separate account of each of the attenuating circumstances set out at point 3 of the Guidelines. Point 3, entitled '[a]ttenuating circumstances', provides that 'the basic amount will be reduced where there are attenuating circumstances such as: ...'. Although the circumstances listed at point 3 of the Guidelines are undoubtedly among those which may be taken into account by the Commission in a specific case, there is no automatic requirement for it to grant a further reduction under that head when an undertaking provides some indication that one of those circumstances may apply. Whether it is appropriate to grant a reduction of the fine on grounds of attenuating circumstances must be determined on the basis of an overall assessment which takes account of all the relevant circumstances.

275 According to a line of decisions which predate the adoption of the Guidelines, the Commission has a discretion allowing it to take or not to take certain factors into consideration when fixing the amount of the fines which it proposes to impose, by reference in particular to the circumstances of the case (see, to that effect, order in *SPO and Others* v *Commission*, paragraph 246 above, paragraph 54, and judgments in *Ferriere Nord* v *Commission*, paragraph 246 above, paragraphs 32 and 33, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 246 above, paragraph 465; see also, to that effect, judgment in *KNP BT* v *Commission*, paragraph 246 above, paragraph 68). Thus, in the absence of a mandatory indication in the Guidelines as regards the attenuating circumstances which may be taken into account, it must be held that the Commission has retained a certain discretion when making an overall assessment of the size of any reduction in the fines on the ground of attenuating circumstances.

276 In any event, as regards Mannesmann's argument that the market-sharing agreement referred to in Article 1 of the contested decision had no effects, it has already been held above that that is not the position in the present case. On the contrary, the market-sharing envisaged by the cartel in question was applied in practice, at least to a certain extent, and it necessarily had a real impact on the conditions of competition existing on the Community markets (see paragraph 251 et seq. above). It should further be borne in mind in that regard that the fact that the amount set for gravity was 50% of the minimum sum normally set in the event of a 'very serious' infringement, indicated at paragraph 235 above, adequately reflects the fact, acknowledged by the Commission itself, that the impact was limited (see also paragraph 241 above).

277 The second indent of point 3 of the Guidelines must therefore be interpreted as meaning that the Commission is not required to recognise the existence of an attenuating circumstance consisting of non-implementation of a cartel unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question. The fact that an undertaking which has been proved to have participated in collusion on market-sharing with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as an attenuating circumstance when determining the amount of the fine to be imposed (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 142).

278 As the Court of First Instance held in the *Cement* judgment, paragraph 42 above (paragraph 1389), an undertaking which does not distance itself from what was agreed at a meeting which it has attended retains, in principle, 'full responsibility for the fact that it participated in the agreement or concerted practice'. It would be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful cartel and then benefit from a reduction

in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition.

279 It follows from the foregoing that, even on the assumption that Mannesmann and certain other members of the Europe-Japan Club did not fully respect the market-sharing agreement, that circumstance would not justify the application of the second indent of point 3 of the Guidelines in order to reduce the fine on the ground of an attenuating circumstance in this case.

280 As regards the argument that the applicant ceased the infringement immediately, 'termination of the infringement as soon as the Commission intervenes', as stated in point 3 of the Guidelines, can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive conduct by the interventions in question. It appears that the purpose of that provision is to encourage undertakings to terminate their anti-competitive conduct immediately when the Commission launches an investigation.

281 It follows from the foregoing, in particular, that a fine cannot be reduced under the third indent of point 3 of the Guidelines, which concerns the termination of the infringement as soon as the Commission intervenes, where the infringement has already come to an end before the date on which the Commission first intervenes or where the undertakings concerned have already taken a firm decision to put an end to it before that date. While it is of course desirable that the undertakings should terminate an infringement before the Commission has intervened, it follows from its wording that point 3 of the Guidelines envisages the situation where the undertakings react positively to such intervention by ceasing any anti-competitive conduct, the objective being to provide an incentive for undertakings to react in that way. The application of that provision in favour of an undertaking, by the Commission in the exercise of its discretion or by the Court in the exercise of its

unlimited jurisdiction, will be particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive, on the assumption that it is proven. In the present case there can be no doubt that the market-sharing agreement sanctioned in Article 1 of the contested decision was anti-competitive.

282 Furthermore, a reduction applied in the circumstances described in the first sentence of the preceding paragraph would duplicate the reduction for duration which, in accordance with the Guidelines, is applied in calculating the fine. Duration is taken into account for the specific purpose of imposing a heavier penalty on undertakings which infringe the competition rules over a prolonged period than on those whose infringements are of short duration. Thus, a reduction in the amount of a fine on the ground that an undertaking terminated its unlawful conduct before the Commission first intervened would have the effect of benefiting for a second time those responsible for infringements of that duration.

283 In *JFE Engineering and Others* v *Commission*, paragraph 102 above, the Court of First Instance held, in the light of the pleas in law and arguments put forward by the applicants in those cases, that the infringement should not be imputed to them after 1 July 1994, since there was no evidence that any meeting of the Europe-Japan Club took place in Japan in the autumn of 1994, in accordance with previous practice. It follows from that circumstance that the infringement had probably come to an end or that it was at least in the process of doing so when the Commission carried out its investigations on 1 and 2 December 1994.

284 It follows that the fact that the unlawful conduct constituting the infringement found in Article 1 of the contested decision did not continue after the date of the first inspections carried out by the Commission does not justify a reduction in the fine imposed in Mannesmann in the circumstances of the present case.

285 Last, as regards Mannesmann's argument that its cooperation should have been taken into account as an attenuating circumstance, the Court will consider that argument at paragraph 307 et seq. below when it examines the plea based on the Leniency Notice.

286 In the light of all of the foregoing, and of the fact that the Commission has already reduced the fines in the present case to take account of the attenuating circumstance represented by the economic crisis in the steel tubes sector (see recitals 168 and 169 to the contested decision), all of Mannesmann's complaints relating to the failure to grant an additional reduction on the ground of other allegedly attenuating circumstances must be rejected.

Mannesmann's alleged cooperation

— Arguments of the parties

287 Mannesmann claims that the Commission failed to have regard to the Leniency Notice. It maintains that the Commission has infringed the principle of equal treatment in its case.

288 First, it claims that it suffered discriminatory treatment by comparison with Vallourec. Like that undertaking, it replied to the Commission's requests for information. It gave valuable assistance to the Commission during the investigation (recitals 62, 67, 72 and 170 to the contested decision), owing in particular to Mr Becher's declarations. Likewise, Mannesmann, like Vallourec, did not substantially contest the facts imputed to it (recital 174 to the contested decision).

289 Vallourec did not provide information to the Commission on its own initiative, but was the first undertaking to be investigated, in September 1996. The Commission carried out investigations at Mannesmann's premises in April 1997. While it is true that, chronologically, the first information to become available to the Commission came from Vallourec, the fact remains that that circumstance is purely the consequence of the Commission's choice of the order in which it carried out its investigations at the premises of the undertakings concerned. The Commission cannot derive from such a discretionary choice consequences which are prejudicial to the undertakings on which it imposes that choice, in this instance Mannesmann.

290 Mannesmann levels similar criticisms in respect of the treatment given to Dalmine (recital 172 to the contested decision). Although Mannesmann cooperated in the investigation to a degree comparable with Dalmine, the Commission reduced Dalmine's fine by 20%. The Commission cannot justify such a difference in treatment on the ground that Mannesmann appealed against a Commission decision adopted pursuant to Article 11(5) of Regulation No 17; in fact Dalmine brought a similar action, which was dismissed as manifestly unfounded by the Court of First Instance. In any event, the Commission cannot draw any consequence from Mannesmann's legitimate exercise of its fundamental right to seek a remedy.

291 The Commission states that it carried out an investigation at Mannesmann's premises on 1 and 2 December 1994. The complaints alleging discriminatory treatment by comparison with Vallourec are therefore devoid of purpose.

292 Vallourec's attitude cannot be compared with Mannesmann's. Vallourec was the only undertaking to communicate substantial information about the existence and the terms of the cartel. That information made the Commission's task of establishing the infringements easier. Vallourec did not substantially contest the facts. It thus received a reduction of 40% in its fine.

293 On the other hand, Mannesmann did not cooperate in the investigation. Mr Becher's declarations were made on the occasion of an investigation carried out by the Commission at Mannesmann's premises, in answer to the questions put to him, and merely confirmed certain matters which were already established. Mannesmann adopted an ambiguous attitude throughout the investigation. Although it did not contest the facts, it did not clearly express its position (recital 174 to the contested decision). It also refused to provide certain information requested under Article 11 (5) of Regulation No 17. For those reasons, it was not given a reduction of 20% in its fine on the same basis as Dalmine.

294 In that regard, the fact that an undertaking plays a passive role does not justify a reduction in the amount of the fine under the Leniency Notice. In order to receive a reduction in the amount of the fine, that notice requires that an undertaking inform the Commission that it does not intend substantially to contest the facts after becoming aware of the objections (see point D.2 of the Leniency Notice and the judgment in *Mayr Melnhof* v *Commission*, paragraph 208 above, paragraph 309).

— Findings of the Court

295 According to a well-established line of decisions, when appraising the cooperation shown by undertakings, the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 210 above, paragraph 237, and the case-law cited there).

296 It should also be borne in mind that, in order to justify a reduction in a fine on grounds of cooperation, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of the Community competition rules (*Mayr Melnhof* v *Commission*, paragraph 208 above, paragraph 309, and the case-law cited there).

297 In this instance, Mr Verluca's statements, made in his capacity as a representative of Vallourec in answer to the questions put to that company by the Commission, constitute key evidence in the file relating to the present case.

298 Admittedly, on condition that undertakings provide the Commission, at the actual stage of the administrative procedure and in comparable circumstances, with similar information concerning the facts imputed to them, the extent of the cooperation provided by them must be regarded as comparable (see, by analogy, *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 210 above, paragraphs 243 and 245).

299 However, although Mannesmann's replies to the questions, in particular the declaration by Mr Becher referred to in recital 63 to the contested decision, were of some use to the Commission, they merely confirm, albeit less precisely and less explicitly, some of the information already provided by Vallourec in the form of Mr Verluca's declarations. In particular, Mr Verluca stated that each member of the Europe-Japan Club was required to respect the domestic markets of each of the other members of that club, while the United Kingdom offshore market had special status, as it was 'semi protected'. He also informed the Commission about the duration of the market-sharing agreement and the way in which it operated.

300 Mr Verluca did not merely answer the questions about the operation of the Europe-Japan Club and the Fundamental Rules put to him by the Commission during the first investigation carried out at Vallourec's premises in September 1996. Taken as a whole, his statements reveal a genuine willingness to cooperate in the Commission's investigation. All that Mr Becher revealed about the Fundamental Rules, on the other hand, was that the Japanese producers were excluded from the European markets and the European producers from the Japanese markets, no further details being provided.

301 It must be held that the usefulness of Mr Becher's declaration lies exclusively in the fact that he corroborates to a certain extent Mr Verluca's declarations which the Commission already had at its disposal and that, consequently, his declaration did not facilitate the Commission's task significantly and therefore sufficiently to justify a reduction in the fine on grounds of cooperation.

302 It must therefore be held that the information provided to the Commission by Mannesmann before the Statement of Objections was sent is not comparable to that provided by Vallourec. In any event, that information is not sufficient to justify a reduction in the amount imposed under the Leniency Notice.

303 As regards the comparison with the cooperation provided by Dalmine, to which Mannesmann refers, it should be recalled that in order to receive a reduction in the fine on the ground of not contesting the facts, in accordance with point D.2 of the Leniency Notice, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the Statement of Objections (*Mayr Melnhof* v *Commission*, paragraph 208 above, paragraph 309). In the absence of such an express declaration, mere passivity on the part of an undertaking cannot be considered to facilitate the Commission's task, since the Commission is required to establish the existence of all the facts in the final decision without being able to rely on a declaration by the undertaking in doing so.

304 In that regard, Dalmine received a reduction of 20% precisely because it informed the Commission that it was not substantially contesting the facts on which the Commission had based its accusations (recitals 172 and 173 to the contested decision). The circumstance, referred to in recital 5 to the contested decision, that Dalmine refused to answer some of the questions put by the Commission before the Statement of Objections was sent has no relevance in the present context, since it follows from point D of the Leniency Notice that a statement to the effect that the undertaking concerned does not intend substantially to contest the facts after the Statement of Objections has been sent justifies in itself a reduction in the fine, irrespective of the undertaking's conduct before the Statement of Objections was sent.

305 On the other hand, the Commission stated at recital 174 to the contested decision that Mannesmann never clearly expressed its position in that regard. Although Mannesmann maintains that it did not contest the facts set out in the Statement of Objections, it does not claim that it expressly informed the Commission that it was not substantially contesting them.

306 In those circumstances, it must be held that Mannesmann's line of argument does not justify the application of the second indent of point D.2 of the Leniency Notice with a view to reducing the fine imposed on it.

307 As for Mannesmann's argument that its cooperation none the less justifies a reduction in the amount of the fine on the ground of attenuating circumstances, under point 3 of the Guidelines, it must be borne in mind, as held above, that the Commission has a discretion as regards the application of attenuating circumstances. The sixth indent of point 3 of the Guidelines provides, for example, as an attenuating circumstance 'effective cooperation by the undertaking in the proceedings, outside the scope of the [Leniency Notice]'. The sixth indent therefore necessarily relates, at least as regards the horizontal agreements referred to in that notice, to cooperation which is insufficient to justify a reduction under the Leniency Notice.

308 However, it must also be borne in mind that, in order to justify a reduction in the amount of a fine on grounds of cooperation, an undertaking's conduct must facilitate the Commission's task of finding and bringing to an end infringements of the Community competition rules (see paragraph 296 above and the case-law cited there). In those circumstances, it must be held that the hypothesis envisaged by the sixth indent of point 3 of the Guidelines is an exceptional situation as regards the horizontal agreements referred to by the Guidelines, since there must have been 'effective' cooperation which facilitated the Commission's task but which was not covered by the Leniency Notice.

309 In the present case, Mannesmann has not shown that its cooperation genuinely facilitated the Commission's task of finding and putting an end to infringements (see paragraphs 297 to 306 above). Thus there is no reason to consider that the Commission exceeded the limits of its discretion by not granting a reduction in Mannesmann's fine on the ground that Mannesmann effectively cooperated in the investigation, within the meaning of the sixth indent of point 3 of the Guidelines.

310 In any event, the Commission states that, far from having cooperated in its investigation, Mannesmann even refused to provide certain information, in spite of the fact that the Commission on 15 May 1998 adopted a decision under Article 11 (5) of Regulation No 17 requiring it to produce that information. Although Mannesmann brought an action before the Court of First Instance for annulment of that decision, which was registered as Case T-112/98, it did not submit an application for interim relief in that procedure, as it would have been entitled to do under Articles 242 EC and 243 EC. Mannesmann's approach, consisting in contesting the legality of the decision of 15 May 1998, was of course perfectly lawful and cannot be regarded as indicative of an absence of cooperation. However, it must be held that Mannesmann was not entitled to continue to refuse to provide the

information concerned in the absence of interim measures suspending the application of the decision of 15 May 1998 and that by acting as though interim measures had been ordered in its favour, when it had not even applied for them, it did not comply with its obligations under Community law.

311 Furthermore, although Mannesmann obtained partial annulment of that decision in so far as by its judgment in *Mannesmannröhren-Werke* v *Commission*, paragraph 8 above, the Court of First Instance annulled certain of the questions forming the subject-matter of the decision of 15 May 1998, it follows from that judgment that the majority of the information which Mannesmann refused to produce had been properly requested by the Commission. Mannesmann lodged an appeal before the Court of Justice against the judgment of the Court of First Instance, registered as Case C-190/01 P. However, that case was removed from the register of the Court of Justice by order of 4 October 2001 in *Mannesmannröhren-Werke* v *Commission*, not published in the ECR. In that regard, it follows from the reference in that order to Article 69(5) of the Rules of Procedure of the Court of Justice, in conjunction with the third paragraph of Article 122 of those rules, that the Court considered, in spite of the reference to an agreement between the parties in the applicant's initial request to have the case removed from the register, that the applicant simply withdrew its appeal and for that reason was required to pay the costs of the appeal.

312 Consequently, it follows from that order that the judgment in *Mannesmannröhren-Werke* v *Commission*, paragraph 8 above, became final. It must therefore be concluded that, owing to Mannesmann's unlawful conduct, the Commission never received a significant amount of information which it had lawfully requested Mannesmann to produce at the stage of the administrative procedure. In those circumstances, Mannesmann's attitude during the administrative procedure, taken as a whole, cannot be considered to constitute effective cooperation in this instance.

313 In the light of the foregoing, Mannesmann's complaints based on its alleged cooperation at the administrative procedure stage must be rejected.

The calculation of the fine

314 It follows from the foregoing that the fine imposed on Mannesmann must be reduced in order to take account of the fact that the duration is fixed at four years rather than five years.

315 As the method of calculating the amount of fines set out in the Guidelines was correctly applied by the Commission in the present case, the Court considers, in the exercise of its unlimited jurisdiction, that that method must also be applied in the light of the conclusion reached in the preceding paragraph.

316 Thus, the basic amount of the fine is set at EUR 10 million, increased by 10% for each year of the infringement, that is to say, by 40% in all, which gives a figure of EUR 14 million. That amount must then be reduced by 10% on the grounds of attenuating circumstances, in accordance with recitals 168 and 169 to the contested decision, giving a final amount for Mannesmann of EUR 12 600 000 instead of EUR 13 500 000.

Costs

317 Under Article 87(3) of the Rules of Procedure, the Court may rule that costs are to be shared or that each party is to bear its own costs where each party succeeds on some and fails on other heads. Since each party has failed on one or more heads in the present case, it is appropriate to order the applicant and the Commission to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Article 1(2) of Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) in so far as it finds that the infringement imputed to the applicant by that provision existed before 1 January 1991;**

2. **Sets the amount of the fine imposed on the applicant in Article 4 of Decision 2003/382 at EUR 12 600 000;**

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

4. **Orders the applicant and the Commission to bear their own costs.**

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 8 July 2004.

H. Jung J. Pirrung

Registrar President

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