OPINION OF ADVOCATE GENERAL ANTONIO TIZZANO delivered on 8 July 2004 [1]

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1 — Original language: Italian.

1. The present cases are appeals brought by Dansk Rørindustri A/S, Isoplus Fernwärmetechnick Vertriebsgesellschaft mbH and Others (hereinafter 'the Isoplus Group'), KE-KELIT Kunststoffwerk GmbH, LR AF 1998 A/S, Brugg Rohrsysteme GmbH, LR AF 1998 GmbH and ABB Asea Brown Boveri Ltd against the judgments of the Court of First Instance of 20 March 2002 in Cases T-9/99 *HFB and Others* v *Commission*, T-15/99 *Brugg Rohrsysteme* v *Commission*, T-16/99 *Lögstör Rör* v *Commission*, T-17/99 *KE-KELIT* v *Commission*, T-21/99 *Dansk Rørindustri* v *Commission*, T-23/99 *LR AF 1998* v *Commission* and T-31/99 *ABB* v *Commission* (hereinafter 'the contested judgments'), [2] which, in essence, confirmed Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty ('the contested decision'). [3]

2 — Respectively [2002] II-1487, II-1613, II-1633, II-1647, II-1681, II-1705 and II-1881.

3 — OJ 1999 L 24, p. 1.

I — Legislative background

1. Article 81 EC and Regulation No 17/62

2. Article 81 EC prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

3. The Commission may penalise such conduct by imposing fines on undertakings which have engaged in it.

4. Article 15(2) of Council Regulation No 17/62 ('Regulation No 17') [4] provides:

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

(a) they infringe Article 85(1) or Article 86 of the Treaty; or

(b) ....

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

2. The Guidelines on the method of setting fines

5. In order to ensure the transparency and objectivity of its decisions on such matters, in 1998 the Commission issued the Guide-

4 — OJ, English Special Edition 1959-1962, p. 87

lines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (hereinafter 'the Guidelines'). [5]

6. According to the procedures laid down in the Guidelines, the amount of the fine is in essence determined by a series of successive steps.

7. First, the Commission determines the basic amount of the fine 'according to the gravity and duration of the infringement' (Point 1 of the Guidelines). As regards the first aspect, infringements are classified as 'minor, serious and very serious' [6] having regard to their nature, their actual impact on the market and the size of the relevant geographic market. As regards duration, the infringements are classified as being of short duration (less than one year), of medium duration (from one to five years) and of long duration (more than five years).

8. Once the basic amount of the fine has been determined, the Commission then considers whether it should be increased because of aggravating circumstances [7] or reduced because of attenuating circumstances. [8]

9. Point 5(a) of the Guidelines provides:

'It goes without saying that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings,

5 — OJ 1998 C 9, p. 3.

6 — Depending on the gravity of the infringement, the Guidelines set lump sums which will, after evaluation of the duration of the infringement, go towards the basic amount of the fine. In the case of 'minor' infringements the applicable fine is from EUR 1 000 to EUR 1 000 000; for 'serious' infringements, from EUR 1 000 000 to EUR 20 000 000, and for 'very serious' infringements, above EUR 20 000 000 (Point 1A of the Guidelines).

7 — Point 2 of the Guidelines provides that the basic amount 'will be increased where there are aggravating circumstances such as: (a) repeated infringement of the same type by the same undertaking(s); (b) refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations; (c) role of leader in, or instigator of, the infringement; (d) retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement; (e) need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount; (f) other'.

8 — In that regard, Point 3 of the Guidelines states that 'the basic amount will be reduced where there are attenuating circumstances such as: (a) an exclusively passive or "follow-my-leader" role in the infringement; (b) non-implementation in practice of the offending agreements or practices; (c) termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks); (d) existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement; (e) infringements committed as a result of negligence or unintentionally; (f) effective cooperation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases; (g) other'.

as laid down by Article 15(2) of Regulation No 17'.

10. Subject to observance of the limit of 10%, the amount thus calculated may then be further adjusted, in accordance with Point 5 (b) of the Guidelines, on the basis of the Commission's evaluation of 'certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders ... , the specific characteristics of the undertakings in question and their real ability to pay in a specific social context'.

3. The Commission Leniency Notice by undertakings

11. In order to encourage undertakings to cooperate with it, the Commission then issued in 1996 the 'Notice on the non-imposition or reduction of fines in cartel cases (hereinafter 'the Leniency Notice' or 'the Notice').[9]

12. The purpose of the Notice is to set out 'the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from a fine, or may be granted reductions in the fine which would otherwise have been imposed upon them' (Point 3).

13. In the Notice, the Commission makes it clear that any undertaking wishing to receive the favourable treatment provided for must 'contact the Commission's Director-General for competition' through a person empowered to represent the enterprise for that purpose.

14. The undertaking's cooperation is then assessed by the Commission when it determines the fines to be imposed.

15. In practice, cooperation on the part of an undertaking may, depending on its timing and on its specific usefulness to Commission staff, give rise to (a) non-imposition or a very

9 — OJ 1996 C 207, p. 4

substantial reduction of the amount of the fine; [10] (b) a substantial reduction of that amount [11] or (c) a significant reduction of the amount of the fine. [12]

16. The Commission makes it clear, however, that 'cooperation by an enterprise is only one of several factors which the Commission takes into account when fixing the amount of a fine' and that the application of the provisions of the Leniency Notice 'does not prejudice the ... right to reduce a fine for other reasons'.

10 — Section B of the Notice on Cooperation states that: 'An enterprise which: (a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel; (b) is the first to adduce decisive evidence of the cartel's existence; (c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel; (d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation; (e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity, will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if they had not cooperated.'

11 — Section C of the Notice on Cooperation states that: 'Enterprises which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine.'

12 — Section D of the Notice on Cooperation states that: '1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated. 2. Such cases may include the following:
— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;
— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

II — Facts and procedure

1. The facts

17. In the contested judgments [13] the factual background to the dispute is described in the following terms:

'1. [The applicants are companies operating in the district heating sector].

2. In district heating systems, water heated in a central site is taken by underground pipes to the premises to be heated. Since the temperature of the water (or steam) carried in the pipes is very high, the pipes must be insulated in order to ensure an economic, risk-free distribution. The pipes used are pre-insulated and, for that purpose, generally consist of a steel tube surrounded by a plastic tube with a layer of insulating foam between them.

13 — For the description of the factual background and citations from the contested judgments, I shall, because of the substantially identical wording of the grounds of the contested judgments, refer only to one of them, namely the judgment in Case T-23/99 *LR AF 1998* v *Commission*.

3. There is a substantial trade in district heating pipes between Member States. The largest national markets in the European Union are Germany, with 40% of Community consumption, and Denmark, with 20%. Denmark has 50% of the manufacturing capacity in the European Union and is the main production centre in the Union supplying all Member States in which district heating is used.

4. By a complaint dated 18 January 1995, the Swedish undertaking Powerpipe AB informed the Commission that the other manufacturers and suppliers of district heating pipes had shared the European market in a cartel and that they had adopted concerted measures to harm its activities or to confine those activities to the Swedish market, or simply to force it out of the sector.'

2. The contested decision

18. Following Powerpipe AB's complaint, the Commission initiated an administrative investigation to determine whether there had been any infringement of Article 85(1) of the EC Treaty (now Article 81(1) EC). On completion of its investigation, the Commission adopted the contested decision, whereby:

— it found an infringement on the part of Dansk Rørindustri A/S, Henss/Isoplus Group, Pan-Isovit GmbH, KE-KELIT Kunststoffwerk GmbH, LR AF 1998 A/S, Brugg Rohrsysteme GmbH, LR AF 1998 GmbH, ABB Asea Brown Boveri Ltd, Sigma Tecnologie di Rivestimento Srl and Tarco Energi A/S of Article 85 (1) of the Treaty, consisting in their participation 'in a complex of agreements and concerted practices in the pre-insulated pipes sector which originated in about November/December 1990 among the four Danish producers [and were] subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market' (Article 1);

— required the abovementioned undertakings to bring the infringements to an end and refrain 'in relation to their activities in pre-insulated pipes from any agreement or concerted practice which may have the same or a similar object or effect as the infringement, including any exchange of commercial information by which they might be able to monitor adherence to or compliance with any tacit or express agree-

ment regarding market-sharing, price fixing or bid-rigging in the Community' (Article 2);

— and imposed:

(a) on ABB Asea Brown Boveri Ltd a fine of EUR 70 000 000;

(b) on Brugg Rohrsysteme GmbH a fine of EUR 925 000;

(c) on Dansk Rørindustri A/S a fine of EUR 1 475 000;

(d) on Henss/Isoplus Group a fine of EUR 4 950 000 for which the following companies are jointly and severally liable:

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft;

— Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH;

— Isoplus Fernwärmetechnik GmbH, Sondershausen;

— Isoplus Fernwärmetechnik Gesellschaft mbH — Stille Gesellschaft;

— Isoplus Fernwärmetechnik Ges mbH, Hohenberg;

(e) on KE-KELIT Kunststoffwerk Ges mbH, a fine of EUR 360 000;

(f) on Oy KWH Tech AB, a fine of EUR 700 000;

(g) on Løgstør Rør A/S, a fine of EUR 8 900 000;

(h) on Pan-Isovit GmbH, a fine of EUR 1 500 000;

(i) on Sigma Tecnologie Di Rivestimento S. r. l., a fine of EUR 400 000;

(j) on Tarco Energi A/S, a fine of EUR 3 000 000.

19. In the grounds of the decision, the Commission established the existence, as from the end of 1990, of a series of agreements and concerted practices contrary to Article 81 EC, engaged in by the appellants, and initially limited to the Danish market (hereinafter 'the Danish cartel'); they were then extended to the entire European market ('the European cartel') in district heating pipes and were intended, essentially, (a) to divide the European market among the various producers by means of a system of quotas, (b) to eliminate the only direct competitor (Powerpipe AB) not involved in the cartel, (c) to fix product prices, (d) to allocate projects to producers designated in advance, and (e) to manipulate bidding procedures (recitals 28 to 127 to the decision).

20. The Commission also emphasised that the Danish and European cartels constituted the manifestation of a single cartel which, although having originated in Denmark, had from the outset pursued the longer-term objective of extending the participants' control to the entire European market. Such anti-competitive conduct had considerably undermined trade between the Member States.

21. As regards the aspect which is of greatest importance in the present cases, namely the calculation of the fines imposed on the companies, the Commission took the view that the conduct of the abovementioned companies in the European district heating pipes market fulfilled the conditions for it to be classified as a very serious infringement of Article 81(1) EC and justified the imposition of a fine of a basic amount of EUR 20 million (recital 165 to the contested decision) for each undertaking.

22. Having determined the basic amount of the fine by reference only to the gravity of the infringement, the Commission then assessed the specific weight and therefore the real impact on competition of the offending conduct of each undertaking, so as to (a) adjust the amount of the fine to the actual capability of those participating in the infringement to undermine competition and (b) to ensure that the penalty had a sufficiently deterrent effect.

23. Thus, the Commission divided the undertakings into four categories by reference to their respective dimensions in the relevant Community market. To each category the Commission attributed different basic amounts as follows: to the first group, comprising ABB, was attributed a basic lump sum of EUR 20 000 000; for the second group, comprising Lögstör, the amount was EUR 10 000 000; for the third group, comprising Tarco, Starpipe, Henss/Isoplus and Pan-Isovit, the amount was EUR 5 000 000; and for the fourth group, comprising Brugg, KWH, KE-KELIT and Sigma, the amount was ECU 1 000 000.

24. Thereafter, for each of the undertakings concerned, the Commission fixed the amount of the fine, taking into account (a) the duration of their participation in the cartels, and (b) any attenuating or aggravating circumstances. Where the amount of the fine thus calculated was found to exceed 10% of the worldwide turnover of the undertaking in question, the Commission reduced the amount of the fine so as not to exceed that threshold (recital 167 to the contested decision).

25. Finally, where appropriate, the Commission applied reductions of the kind provided for in the Leniency Notice (recital 166 to the contested decision).

3. The procedure before the Court of First Instance and the contested judgments

26. By applications lodged at the Registry of the Court of First Instance between 18 and 25 January 1999, the companies Brugg Rohrsysteme, Lögstör Rör, KE-KELIT Kunstoffwerk, Dansk Rørindustri, LR AF 1998, Sigma Tecnologie di Rivestimento, ABB Asea Brown Boveri, HFB Holding KG, HFB Holding GmbH, Isoplus Rosenheim, Isoplus Hohenberg and Isoplus GmbH sought the annulment of the contested decision or, in the alternative, reduction of the amount of the fines imposed by the Commission.

27. Each of the applicants raised objections relating to its own specific situation. However, all of them, as preliminary points, criticised the procedure for determining the fines, on the following points: (a) illegality of the Guidelines; (b) breach of the principles of proportionality and equal treatment; (c) breach of the principles of non-retroactivity and the protection of legitimate expectations; (d) breach of the applicants' rights of defence, and (e) the statement of the reasons on which the contested decision was based.

28. Here, however, I shall summarise the Court of First Instance's response to those criticisms, but not without first stating that, according to the Court of First Instance, it is clear in this case that the Commission had set the fine imposed on the undertakings in conformity with the general method for calculating the amount of fines laid down in the Guidelines.

29. (a) The Court of First Instance first of all examined the objection that the Guidelines are illegal, submitted, under Article 241 EC, by a number of the applicants.

30. In their opinion, in those Guidelines the Commission set basic amounts for calculation of the fines which were so high as to deprive itself of the discretion conferred on it by Article 15 of Regulation No 17 whereby it may adjust the fines having regard to all the relevant factors, including, where appropriate, attenuating circumstances.

31. In that connection, although recognising that the Commission had adopted a method of calculating the fines which was not entirely based on the turnover of the undertakings concerned, the Court of First Instance nevertheless held that it had not departed from the proper interpretation of Article 15. That is because, in its opinion, 'the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market. ... In that regard, it is settled case-law that the gravity of the infringements must be established in accordance with numerous factors, such as, inter alia, the particular circumstances of the case, its context and the deterrent nature of the fines, although no binding or exhaustive list of criteria which must necessarily be taken into account has been drawn up ... It follows from the case-law that the Commission is entitled to calculate a fine according to the gravity of the infringement and without taking account of the various turnover figures of the undertakings concerned.' [14]

32. Second, the Court of First Instance stated that: 'contrary to what the applicant [s] claim ..., the Guidelines do not go beyond what is provided for in Regulation No 17 ... . In that regard, it should be observed that Article 15(2) of Regulation No 17, in providing that the Commission may impose fines of up to 10% of turnover during the preceding business year for each undertaking which participated in the infringement, requires that the fine eventually imposed on an undertaking be reduced if it should exceed 10% of its turnover, independently of the intermediate stages in the calculation intended to take the gravity and duration of the infringement into account. Consequently, Article 15(2) of Regulation No 17 does not prohibit the Commission from

14 — Paragraphs 278 to 281 of the contested judgment.

referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the amount of the fine eventually imposed on the undertaking does not exceed that maximum limit. The Guidelines make similar provision, moreover, where they state that "the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17". In a case where the Commission refers in the course of its calculation to an intermediate amount in excess of 10% of the turnover of the undertakings concerned, it cannot be criticised because certain factors taken into consideration in its calculation do not affect the final amount of the fine, since that is the consequence of the prohibition laid down in Article 15(2) of Regulation No 17 on exceeding 10% of the turnover of the undertaking concerned.' [15]

33. (b) The Court of First Instance also held that, in setting the fines, the Commission had not infringed the principles of proportionality and equal treatment.

34. In that connection, it observes that '[a]s regards the determination of the starting points for each category, the Commission stated, following a question put by the Court, that these amounts reflect the importance of each undertaking in the pre-insulated pipe sector, having regard to its size and weight compared with ABB and in the context of the cartel. For that purpose, the Commission took into account not only their turnover on the relevant market but also the relative importance which the members of the cartel ascribed to each of them ... In that context, it must be held, having regard to all the relevant factors taken into consideration in fixing the specific starting points, that the difference between the starting point chosen for the applicant[s] and that chosen for ABB is objectively justified. Since the Commission is not required to ensure that the final amounts of the fines for the undertakings concerned to which its calculations lead reflect every difference between them in terms of turnover, the applicant[s] cannot criticise the Commission because the starting point taken for [them] resulted in a fine higher, in percentage of total turnover, than the fine imposed on ABB.' [16]

35. (c) The Court of First Instance then also rejected the criticism concerning breach of the principle of non-retroactivity raised by the parties in relation to the fact that the Guidelines were applied to conduct engaged in by the undertakings before the entry into force of the Guidelines.

15 — Paragraphs 286 to 290 of the contested judgment.

16 — Paragraphs 296 to 298 of the contested judgment.

36. The Court recognised that that principle, first, forms an integral part of the general principles of which the Community Courts must guarantee observance and, second, requires that 'the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed'. [17]

37. The Court of First Instance took the view, however, that the application of the Guidelines did not involve any breach of the principle of non-retroactivity since they do not go beyond the legal context of penalties as defined by Article 15 of Regulation No 17.

38. According to that article, in fixing the amount of the fine for an infringement of the competition rules, the Commission must have regard to the gravity and to the duration of the infringement. The amount thus arrived at may not in any circumstances exceed 10% of the turnover achieved in the preceding business year of each of the undertakings participating in the infringement.

39. The Guidelines too require the Commission to fix the basic amount of the penalty according to the gravity and duration of the infringement. Furthermore, they prescribe that the amount thus calculated must not in any case exceed 10% of the worldwide turnover of the undertakings. It follows, in the opinion of the Court of First Instance, that 'under the method laid down in the Guidelines, the fines continue to be calculated according to the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, and the maximum percentage of turnover of each undertaking as laid down in that provision is observed.' [18]

40. As regards, next, the alleged breach of the principle of the protection of legitimate expectations, the Court of First Instance observed that '[a]s regards the setting of fines for infringements of the competition rules, the Commission exercises its powers within the limits of the discretion conferred on it by Regulation No 17. It is settled case-law that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained. ... On the contrary, the Commission is entitled to raise the general level of fines, within the limits laid down in Regulation No 17, if that is necessary to ensure the implementation of the Commu-

17 - Paragraph 221 of the contested judgment

18 Paragraph 231 of the contested judgment

nity competition policy. It follows that undertakings involved in an administrative procedure which may lead to a fine cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously applied.' [19]

41. (d) As regards the alleged breach of the applicants' rights of defence, the Court of First Instance observed that '[in] the statement of objections, the Commission set out its reasons for considering that the present infringement was a very serious infringement and also the factors constituting aggravating circumstances, namely the manipulation of the procedures for submitting tenders; the aggressive implementation of the cartel in order to ensure the compliance of all the participants in the agreements and to exclude the only competitor of any importance which did not participate in the agreements; and the fact that the infringement continued after the investigations had been carried out. At the same place, the Commission stated that, in assessing the fine to be imposed on each individual undertaking, it would take into account, inter alia, the role played by each of them in the anti-competitive practices, all the substantial differences as regards the duration of their participation, their importance in the district heating sector, their turnover in the district heating sector, their total turnover, if appropriate, in order to take account of the level and economic power of the undertaking in question and to ensure a sufficiently deterrent effect and, last, all the mitigating circumstances. ... In doing so, the Commission set out ... the elements of fact and of law on which it would base the calculation of the fine to be imposed on the applicant[s], so that, in that regard, the applicant[s'] right to be heard was duly observed. Since it had indicated the elements of fact and of law on which it was to base its calculation of the fines, the Commission was under no obligation to explain the way in which it would use each of those elements in determining the level of the fine. To give indications as regards the level of the fines envisaged, before the undertaking has been invited to submit its observations on the allegations against it, would be to anticipate the Commission's decision and would thus be inappropriate ... Nor, consequently, was the Commission bound to inform the undertakings concerned, during the administrative procedure, that it intended to use a new method to calculate the amount of the fines.' [20]

42. (e) Finally, the Court of First Instance rejected the criticism made by some of the applicants that the Commission did not include in the contested decision an adequate explanation of the methodology used in setting the amount of the fines.

43. According to many of the applicants, the Commission did not account for the fact that

19 — Paragraphs 241 to 243 of the contested judgment.

20 — Paragraphs 202 to 207 of the contested judgment.

the fines had been fixed on the basis of basic amounts, expressed in absolute amounts, regardless of the undertakings' turnover and in excess of the maximum level allowed by law.

44. Rejecting that objection, the Court of First Instance observed that the contested decision contained 'a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement committed by the applicant[s]' [21] and that therefore 'the Commission [could not] be criticised for not having given more precise reasons for the levels of the basic amount and the final amount of the fine imposed on the applicant [s]'. [22]

45. Concluding its analysis, and after examining the specific situation of the individual applicants, in the judgments now under appeal the Court of First Instance (a) substantially confirmed the evaluation of the infringement made in the contested decision by the Commission; (b) annulled the part of the decision relating to HFB Holding KG and HFB Holding GmbH; [23] (c) reduced the amount of the fine imposed on Sigma Tecnologie di rivestimento [24] and on ABB Asea Brown Boveri, [25] and (d) for the rest, confirmed the contested decision.

4. Proceedings before the Court of Justice

46. By applications lodged on 21 May and 7 June 2002, the companies Dansk Rørindustri A/S, Isoplus Fernwärmetechnick Vertriebsgesellschaft mbH, KE KELIT Kunstoffwerk GmbH, LR AF 1998 A/S, Brugg Rohrsysteme GmbH, LR AF 1998 GmbH and ABB Asea Brown Boveri Ltd (hereinafter jointly referred to as 'the appellants') claimed, in essence, that the Court of Justice should annul the judgments of the Court of First Instance and close the proceedings, or, in the alternative, annul the judgments and refer the cases back to the Court of First Instance or, in the further alternative, reduce the fines imposed on them; and that the Commission should be ordered to pay the costs incurred before the Court of First Instance and the Court of Justice.

47. The Commission contends that the Court should dismiss the appeals and order the appellants to pay the costs.

21 — Paragraph 383 of the contested judgment.

22 — Paragraph 384 of the contested judgment.

23 — The Court found that HFB Holding für Fernwärmtechnik Beteilingungsgesellschaft mbH & CO. KG and HFB Holding für Fernwärmtechnik Beteilingungsgesellschaft mbH Verwaltungsgesellschaft did not yet exist when the infringement was committted.

24 — The Court reduced the amount of the fine imposed on Sigma to EUR 300 000 in view of the fact that Sigma operated only in the Italian market and not the whole common market.

25 — The Court reduced the amount of the fine imposed on ABB Asea Brown Boveri to EUR 65 000 000 because ABB no longer denied its participation in the agreement and cooperated with the Commission, providing it with evidence of the cartel after receiving the statement of objections.

III — Legal analysis

48. I shall begin my analysis of the appeals by looking at the pleas in law of a general nature, put forward by all or some of the appellants, relating to the method of calculating the fines adopted by the Commission (A) and shall then look at the specific pleas concerning the specific situations of individual appellants (B).

A — The pleas concerning the method of calculation and the level of the fines

49. I shall examine these pleas in the order followed earlier.

1. The plea that the Guidelines are illegal

50. All the appellants have put forward, under various headings, pleas criticising the Court of First Instance's conclusions that the Commission's method of calculating the fines did not infringe the principles of proportionality and/or equal treatment or Article 15(2) of Regulation No 17.

51. In particular, according to some of them, the Court of First Instance erred in considering that the Commission, by adopting the Guidelines, did not overstep the legal framework defined by Article 15 of Regulation No 17, as interpreted by settled case-law of the Court of Justice, and that, accordingly, it did not exceed the limits of its discretion.

52. In their opinion, however, the Guidelines substantially amended the law in force without the Commission having been empowered by the Council to adopt new rules.

53. It follows that the Court of First Instance erred in law by rejecting the objection that the Guidelines — the measure on which the calculation of the fines in the present cases was based — were illegal.

(a) The admissibility of the objection

54. Before considering the merits of those criticisms, the question must be asked whether a measure formally devoid of binding force, as is the case of the Guidelines, may be the subject of an objection of illegality under Article 241 EC.

55. Under that provision, it is only possible to plead, indirectly, that a measure is inapplicable 'in proceedings in which a *regulation* adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue'.

56. However, since the time of the *Simmenthal* judgment, [26] the Court has extended the scope of objections of illegality to all 'acts of the institutions which, although they are not in the form of a regulation, nevertheless produce similar effects', that is to say measures of a general nature, which, precisely for that reason, cannot be directly challenged by individuals under Article 230 EC.

57. The Court made it clear, however, that there must be a close link between the contested measure and the one which, by way of preliminary, it is sought to have declared unlawful. The latter must 'be applicable, directly or indirectly, to the issue with which the application is concerned' [27] and there must be 'a direct legal connection' between the contested individual measure and the general measure. [28]

58. In my view, the Guidelines satisfy those requirements.

59. It is undeniable that the Guidelines are of general scope, since they apply to situations determined objectively and have legal effects with regard to categories of persons referred to in a general and abstract manner. [29] Also, although formally without binding force, they lay down principles and rules which the Commission has undertaken to apply in calculating fines for the purposes of Article 15(2) of Regulation No 17. The case-law of the Court of Justice has made it clear that in such cases the Commission cannot depart at will from the rules which it has imposed on itself. [30] Rules of that kind, which are intended to specify the criteria which an institution intends applying in the exercise of its discretionary powers, may therefore produce legal effects.

60. Nor could it be argued that the Guidelines are purely internal and are not therefore capable of having external legal effects.

26 — Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 40.

27 — Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, in particular at page 409.

28 — Case 21/64 *Macchiorlati Dalmas e Figli* v *High Authority* [1965] ECR 175, in particular at p. 187, and Joined Cases 81/85 and 119/85 *Usinor* v *Commission* [1986] ECR 1777, paragraph 13.

29 — Joined Cases 44/74, 46/74 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383, paragraph 7, and Case 206/87 *Lefebvre Frère et Soeur* v *Commission* [1989] ECR 275, paragraph 13.

30 — Case 148/73 *Louwage* v *Commission* [1974] ECR 81, paragraph 12.

61. It is in fact clear from the Guidelines themselves that the Commission is under an obligation to follow certain steps in the procedure for calculating fines and, in particular, to take into account certain attenuating and aggravating circumstances relating to undertakings; that obligation must necessarily be reflected by the right of the undertakings concerned to expect that the Commission will actually conduct itself specifically in conformity with the Guidelines.

62. That conclusion is fully in line with the Community case-law, which has recognised that only measures which merely rank as internal to an institution are incapable of producing external legal effects. That does not, however, apply to Commission measures, such as 'codes of conduct' [31] or 'internal instructions' [32] in which the obligations of Commission departments and employees are precisely mirrored by the rights of the Member States or of economic operators.

63. That said, it should also be noted that it is common ground, as correctly pointed out by the Court of First Instance, that the Commission fixed the amount of the fines by faithfully following the calculation method laid down in the Guidelines. It follows that, although they do not formally constitute the legal basis of the contested decisions (that basis being Articles 3 and 15 of Regulation No 17), there is a direct connection between the latter and the general measure which is challenged by way of preliminary objection.

64. I consider therefore that the objection of illegality is admissible.

(b) The merits of the objection

65. Turning to the merits of the objection, I should point out once more that, according to certain appellants, the new method of calculation established by the Guidelines, in so far as it is based on specified lump sums without taking account of the turnover of the undertakings concerned and also enables the Commission to exceed the limit of 10% during the process of calculating the fine, does not allow appropriate 'personalisation' of the penalty on the basis of all the relevant factors and circumstances. In particular, it is said, it no longer allows the Commission properly to take account of the size of the undertakings and of the role played by each in the cartel.

31 — Case C-303/90 *France* v *Commission* [1991] ECR I-5315.

32 — Case 366/88 *France* v *Commission* [1990] ECR I-3571.

66. I must first observe that neither Article 15 of Regulation No 17 nor the case-law of the Court requires the Commission to apply a specific calculation method for the purpose of fixing the amount of fines. As I made clear earlier, Article 15 of Regulation No 17 merely provides an upper limit for the amount of the fine, together with certain criteria for evaluating the infringement.

67. It is therefore necessary to establish whether the Guidelines, which purport to delimit the wide-ranging penalising power available to the Commission in this area, remain within those boundaries.

68. I agree with the Court of First Instance that, even after the adoption of the Guidelines, the calculation of fines continues to be carried out on the basis only of the two criteria laid down in Article 15 of Regulation No 17, namely the gravity and the duration of the infringement, and continues to be subject, as regards the final amount, to the maximum limit of 10% of the total turnover referred to by that provision (Point 5(a)).

69. As regards the first aspect, I agree again with the Court of First Instance that, according to settled case-law, the Commission enjoys a particularly broad discretion regarding the choice of the factors to be taken into consideration for the purpose of applying those criteria. As the Court itself has observed, '[t]he gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; *moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up*'.[33] Among those numerous factors for appraisal of the infringement may be included the volume and the value of the products involved in the infringement, the size and economic strength of the undertakings which committed the infringement and the influence they are able to exercise on the market, the conduct of each undertaking, the role played by each in committing the infringement, the benefit which they have obtained from such anti-competitive practices, and the economic context of the infringement, and so forth.[34]

70. In particular, as far as the taking into account of the undertaking's turnover is concerned, the Court of Justice, in its important judgment in *Musique Diffusion française*, which has been extensively cited both by the appellants and by the Commission, made it clear that '[i]t is permissible, for the purpose of fixing the fine, to have regard

33 — Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33. Emphasis added.

34 — See in particular the judgment in Joined Cases 100/80 to 103/80 *Musique Diffusion française* [1983] ECR 1825, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461

both to the total turnover of the undertaking ... and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed' without its being necessary 'to *confer on one or the other of those figures an importance disproportionate in relation to the other factors*'. [35]

71. The turnover, although representing a useful and important indication of the economic strength of an undertaking (total turnover) and of the impact on competition of its conduct (turnover in the relevant market), therefore represents only one of the many criteria of appraisal available to the Commission.

72. In any event, as correctly pointed out by the Court of First Instance and the Commission, the Guidelines did not prevent account being taken, at various points in the procedure for calculating the fine, also of the total turnover, or the turnover achieved in the relevant market, or both. In particular, the Guidelines provide that, in the case of infringements involving more than one undertaking, 'it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type' (sixth paragraph of Point 1A).

73. In other words, although the Guidelines do not provide for the turnover of the undertakings concerned to be systematically factored into the calculation of the basic amount or at a later stage in the process of quantifying the fine, [36] that element is not in fact excluded, a priori, from the calculation. That, moreover, is actually demonstrated by the Commission decision in the cases covered by the present appeal, which divided the applicants into four groups according to their size and, consequently, adopted basic amounts which differed considerably.

74. It cannot be said therefore, as contended by the appellants, that calculation of the fines according to the method laid down in the Guidelines is reduced to a mere pre-determined arithmetical operation. In addition to what I have just said regarding turnover and, in particular, the possibility of adjusting the fine according to the size of the undertakings concerned, it should be noted that the

35 — *Musique Diffusion française*, cited above, paragraph 121.

36 — For example, when account is taken of the fact that 'large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law' (fifth paragraph of Point 1(A), or possibly when account is taken of 'any economic or financial benefit derived by the offenders' and of 'the specific characteristics of the undertakings in question (paragraph 5(b))'.

Guidelines, in contemplating a number of aggravating and attenuating circumstances, and the possibility of taking account of 'certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders ... the specific characteristics of the undertakings in question ...' (Point 5B), expressly provide that the amount of the fine is to be determined, as required by settled case-law, having regard both to the specific circumstances of the case and to the context of the infringement. [37]

75. The Guidelines therefore display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15 of Regulation No 17, as interpreted by the case-law.

76. As regards, next, the exceeding of the 10% limit during the intermediate calculation operations and the allegedly illegal consequences thereof, it does not seem to me that any such possibility derives expressly or implicitly from the text of the Guidelines. They merely refer to the maximum limit set by Regulation No 17, making it clear, in Point 5(a), that '*it goes without saying* that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings'. [38] In other words, with regard to the question of exceeding that maximum amount, the Guidelines neither add to nor subtract from what was already provided for by Regulation No 17.

77. From that point of view, therefore, I see no reason to dissociate myself from the Court of First Instance's assessments regarding the legality of the Guidelines, even though the discussion cannot yet be regarded as closed, as we shall see shortly when examining the criticisms concerning breach of the principles of proportionality and equal treatment.

(c) Certain specific aspects of the objection

78. First, however, reference must be made to two further criticisms concerning specific provisions of the Guidelines, raised by the Isoplus Group.

37 — See, for example, *Musique Diffusion française*, cited above, paragraph 106.

38 — Emphasis added.

79. (i) First, the appellants claim that the Guidelines, which provide that it is possible 'to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement' (Point 2, fifth indent), introduce new aggravating circumstances in breach of Article 15 of Regulation No 17. At the same time, that provision is liable, in the appellants' view, to cause the same circumstance to be taken into account twice because, under the scheme provided for in the Guidelines, profits obtained from the infringement of competition law will already have been taken into consideration when the gravity of the infringement is determined.

80. It seems to me, however, that the analysis of that point made by the Court of First Instance is entirely acceptable. [39] As is apparent from the case-law cited by that Court, the advantages which the undertakings derive from infringements of competition law form part of the factors which the Commission may take into account not only in assessing the gravity of the infringement but also in making certain that the penalty represents a sufficient deterrent, particularly in relation, as in this case, to conduct which is particularly detrimental to the functioning of the single market. Preventing offenders from deriving an advantage from their infringement seems to me, moreover, to be one of the principal objectives of any system of penalties.

81. It seems to me, therefore, that neither the text of Regulation No 17 nor the Community case-law prevents the Commission, in the exercise of the wide discretion which the Court of Justice has recognised, from taking the view that it is appropriate to increase the basic amount in order better to take account of the benefit derived from anti-competitive practices (and therefore in cases where the basic amount of the calculation does not sufficiently reflect that profit) provided that, as correctly stated in the Guidelines, 'it is objectively possible to estimate that amount'. [40]

82. (ii) Second, the same appellants claim that the Guidelines are illegal because the second indent of Point 2 requires an undertaking, against its will, to collaborate with the Commission, even to the point of self-incrimination, on penalty of the fine being increased.

83. That, in their opinion, constitutes a breach of the rights of the defence and, in particular, the right not to testify against oneself, upheld in competition matters by the Court of Justice in the well-known *Orkem* judgment. [41]

39 — See paragraphs 454 to 458 of the contested judgment.

40 — Point 2, fifth indent, of the Guidelines.

41 — Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

84. In that connection, however, I must first of all observe that Point 2 of the Guidelines itself provides that the Commission can increase the basic amount of the fine in view of aggravating circumstances such as 'refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations'.

85. Furthermore, Regulation No 17 grants the Commission wide powers of investigation in proceedings intended to establish infringements of the competition provisions of the Treaty. Article 11 thereof authorises the Commission to require an undertaking to provide it with all the requisite information regarding the facts of which it is aware and, if appropriate, to disclose documents in its possession, where they are conducive to establishing that the undertaking itself or another undertaking has behaved in an anti-competitive manner.

86. It is true that in the *Orkem* judgment the Court of Justice held that those powers of enquiry and investigation cannot be interpreted so as to breach the rights of defence of the undertaking. In particular, 'the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove'. [42]

87. But that does not, in my opinion, apply to Point 2 of the Guidelines. On the contrary, it seems to me that its literal meaning is perfectly compatible both with the provisions of Regulation No 17 and with the meaning and scope of the *Orkem* judgment.

88. The Guidelines do not in fact impose any obligation on an undertaking to incriminate itself or to provide proof of its own guilt; they merely make it clear that the fine will be increased where the undertaking refuses to cooperate in any way with Commission staff or reacts obstructively.

89. Furthermore, that was also the situation dealt with by the Court of Justice in the *Metsä-Serla Sales Oy* case, [43] to which the Court of First Instance properly refers, in which it stated that '[a]n undertaking which, when challenging the Commission's stance, limits its cooperation to that which it is required to provide under Regulation No 17 will not, on that ground, have an increased fine imposed on it'. [44]

90. I therefore consider that those criticisms must also be rejected.

42 — *Orkem*, cited above, paragraph 35.

43 — Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157.

44 — *Metsa-Serla Sales Oy*, paragraph 58.

2. The pleas concerning breach of the principles of proportionality and equal treatment

91. Most of the appellants criticise the judgment of the Court of First Instance also for failing to hold that there had been a breach of the principles of proportionality and of equal treatment.

92. In that respect, they object to the automatism of the calculation method used in this case by the Commission, as a result of which it was not possible properly to take account of the facts and particular features of the situation of each of the undertakings in relation to the cartel.

93. In particular, by using lump sums, that method, it is alleged, made it impossible properly to take account of the undertakings' turnover, and in particular the turnover in the relevant market, even though the evaluation thereof has always been a matter of particular importance in the case-law of the Court of Justice, and in the Commission's decision-making practice, in order to ensure observance of the principle of proportionality.

94. It follows from that case-law, say the appellants, that the basic amount of the fine must be calculated by reference to the turnover of each individual undertaking in order to reflect its size and economic strength and, consequently, the influence which it may have been able to exercise on the market. It is therefore a calculation designed to 'personalise' the fine in relation to individual undertakings and to 'proportion it' in relation to the other undertakings involved.

95. In contrast, according to the appellants, the method followed by the Commission did not make it possible correctly to 'personalise' the penalty. In particular, whenever the Commission calculation procedure reached or exceeded the maximum limit of 10% of turnover, any adjustment of the calculation (by reference to the duration of the infringement, attenuating circumstances, and so on) carried out above that threshold was no more than an entirely theoretical operation: it had no impact on the amount of the fine, since ultimately that fine would have to be brought back below that threshold. And that is entirely contrary to the case-law of the Court of Justice (in particular, the judgment in *Musique Diffusion française*) [45] according to which the amount of the fine is to be determined having regard to all the relevant factors.

96. Finally, some of the appellants in question contend that, by taking as the basic amount a lump sum determined without

45 — Cited above.

reference to the turnover of the undertakings involved and in some cases determined from the outset of the calculation at a level exceeding 10% of turnover, the Commission was guilty of discrimination against the small and medium-sized undertakings, by imposing on them fines which were excessively high compared with their economic weight. And, they complain, their fines are, in relative terms, more severe than that imposed on ABB, the largest undertaking and also the leader of the cartel, and as a result there has been unjustified discriminatory treatment.

97. On this point, I must immediately make the preliminary point that appraisal of the adequacy of a fine in relation to the gravity and duration of the infringement falls within the scope of the unlimited jurisdiction entrusted to the Court of First Instance by Article 17 of Regulation No 17. Only the Court of First Instance, therefore, has jurisdiction to examine the manner in which the Commission evaluated in each case the gravity and duration of the illegal conduct. [46]

98. In an appeal, the review by the Court of Justice can only be directed towards verifying whether the Court of First Instance took account in a legally correct manner of all the factors essential for evaluation of the infringement and whether it erred in law in examining matters raised by the applicants. [47]

99. In particular, with regard to the allegedly disproportionate and discriminatory character of the fines, it must be observed that it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment for that which the Court of First Instance carried out, in the exercise of its unlimited jurisdiction, to rule on the amount of fines imposed on undertakings for infringements of Community law. [48]

100. In this case, therefore, the analysis by the Court of Justice must be limited to verifying whether, by confirming the criteria employed by the Commission to fix the fines and in checking or even correcting the way in which they were applied, the Court of First Instance committed a manifest error and whether it respected the principles of proportionality and equal treatment which govern the imposition of fines. [49]

46 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 128, and Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 47.

47 — *Ferriere Nord*, paragraph 31, and *Baustahlgewebe*, paragraph 128.

48 — *Baustahlgewebe*, and *British Sugar*, paragraph 48.

49 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 365.

101. Bearing in mind those limits on the judicial review which the Court of Justice can carry out, I shall now examine the criticisms in question.

102. First, it is undeniable that the Commission, in determining the amount of the fines it decides to impose for infringements of competition law, must observe the principle of proportionality.

103. In the area under review here, that principle operates first of all in an 'absolute' sense, so to speak, and is reflected by observance of the limit of 10% of the total turnover referred to in Article 15(2) of Regulation No 17. The purpose of that ceiling is specifically to ensure that the fines are not out of proportion to the size of the undertaking on which they are imposed. [50]

104. If that is borne in mind, there seems to me to be no basis for the objection raised by certain appellants concerning the Commission's failure to take account of their turnover in the relevant market when applying the 10% limit. I agree with the Court of First Instance's analysis that it is settled case-law that such a limit must be understood to apply to the *overall turnover* of the undertaking in question — the only figure which can give an approximate indication of the size and influence of the undertakings concerned — and that, therefore, in observing the abovementioned ceiling, the Commission enjoys a wide discretion in deciding to what extent it will take account of the overall turnover or of the turnover in the relevant market, or of both.

105. In other words, if the amount of the final fine does not exceed 10% of the appellants' total turnover during the last year of the infringement, the fine cannot be regarded as disproportionate merely because it exceeds the turnover achieved in the relevant market.

106. Nor can it be objected, as contended by a number of appellants, that the fines are discriminatory merely because, whilst for some of the undertakings involved it was necessary to reduce the fine to remain within the maximum limit of 10%, the same course was not followed for those undertakings in whose cases that ceiling was never exceeded when their fines were being calculated. As

50 — See, for example, *Musique Diffusion française*, paragraph 119.

has been observed by the Court of First Instance,[51] that reduction is a direct and inevitable consequence of the definitive limit laid down by Regulation No 17. In those circumstances, failure to reduce the fine, for that reason alone, does not seem to me to be capable of rendering discriminatory the amount of a fine that was determined lawfully.[52]

107. That does not mean, however, that such automatism cannot also have an effect on the principle of proportionality, where that principle is looked at not in absolute terms but rather in 'relative' terms, that is to say as being designed to ensure that the penalty is 'personalised' and therefore proportionate to the gravity of the infringement and to the other circumstances, both subjective and objective, of each case. From that standpoint, the proportional and non-discriminatory character of the fine does not derive from a simple correlation with the overall turnover for the previous business year but rather from the set of factors to which I referred earlier (see paragraph 69 above).

108. That 'relative' aspect of the test of proportionality is of particular importance in the case of collective infringements because, where an infringement has been committed by a number of undertakings, the requirement of proportionality means that, when the fine is fixed, it is necessary to examine 'the relative gravity of the participation of each undertaking'.[53]

109. That same requirement is imposed by the principle of equal treatment, which, according to settled case-law, is infringed when similar situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified.[54] It follows, for the present purposes, that the fine must be equal for all undertakings which are in the same situation and that different conduct cannot be punished by the same penalty.

110. That said, we shall look at the Court of First Instance's analysis of the present cases.

51 — *Brugg Rohrsysteme*, cited above, paragraph 155.

52 — Another issue, which I propose to consider below (see paragraph 113 et seq.), concerns the possible repercussions of exceeding the maximum limit of 10% on the legality of the fines in respect of which the Commission had to apply a reduction in order to remain within that limit.

53 — Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 110. See also 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 623, and *Aalborg Portland*, paragraph 92.

54 — Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25.

111. The contested judgments recognised that the criteria used by the Commission to determine the amount of the fine were the result of a careful and detailed analysis of the particular gravity of the infringement and of its duration, [55] and of the situation, role and conduct of the penalised undertakings; that, to determine the basic amount of the fines, the Commission correctly took into account the differing economic strengths of the participants in the cartel, dividing the undertakings into four categories 'according to their relative importance in the relevant market in the Community' (recital 166 to the decision) and imposing different basic amounts for each category; that, in determining those categories, 'the Commission took into account not only their turnover on the relevant market but also the relative importance which the members of the cartel ascribed to each of them, as evidenced by the quotas allocated within the cartel ... and by the results obtained and forecast in 1995 ...', [56] with the result that the division of the undertakings into four categories and the determination of the respective basic amounts were objectively justified and arrived at in a consistent manner. [57]

112. Thus, the Court observed, the Commission correctly applied those parts of the Guidelines which provide that, in cases of infringements involving several undertakings which differ considerably in size, the basic amounts may have weightings applied to them 'in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking' (see Point 1A, sixth and seventh paragraphs).

113. The fines imposed by the Commission, and confirmed by the Court of First Instance, resulted, in short, from a careful and detailed analysis of the particular gravity of the infringement, its duration and also the situation, role and conduct of each of the undertakings penalised.

114. That said, I must nevertheless observe that whilst the criteria governing the imposition of fines were observed, that does not mean that it can be said that all the issues linked with observance of the principles of proportionality and non-discrimination can be regarded as disposed of.

115. In the contested decision, as the Commission itself has recognised, many of the calculation operations were carried out above the maximum limit of 10% set by

55 — Except that, in the case of *Dansk Rørindustri*, the Court of First Instance decided that the Commission had made an error of assessment in attributing to the applicant participation in the cartel over the period from April to August 1994. Nevertheless, the Court confirmed the amount of the fine imposed by the Commission.

56 — *LR AF 1998* v Commission, paragraph 296.

57 — See, for example, *LR AF 1998* v *Commission*, paragraph 304, in which the Court of First Instance states that, as regards setting of the basic amount for the undertakings belonging to the 'second category', 'in the light of the criteria ... used in assessing the importance of each of the undertakings on the relevant market ... the Commission was justified in imposing ... at least a starting point twice as high as that imposed on undertakings in the third category'.

Article 15(2) of Regulation No 17. The Commission exceeded that limit in the procedure for calculating the fines imposed on each of the appellants, with the exception of KE KELIT Kunststoffwek, Brugg Rohrsysteme and ABB Asea Brown Boveri. In three cases (Isoplus Group, LR AF 1998 (Deutschland) and Dansk Rørindustri), the Commission even calculated the fines from the starting point of a basic amount which was already in excess of the maximum limit of 10% and it was only on completion of the calculation, before going on to apply the Leniency Notice, that it proceeded to reduce the intermediate amount thus arrived at in order to comply with the ceiling of 10% of total turnover.

116. In other words, the 10% ceiling laid down in Article 15 did not operate as a limit which cannot be exceeded once the calculation operations have commenced but only as a final limit for the purpose of 'abating' the fine as regards the amount by which it exceeded that threshold.

117. According to certain appellants, that calculation method is contrary to Article 15 (2) of Regulation No 17 and, in the present cases, gave rise to breaches of the principles of proportionality and of equal treatment, in that the amounts of the fines only partially and imperfectly observed the specific features of each case and the relative positions of the individual undertakings in the context of the cartel.

118. Whenever the Commission exceeded the 10% limit during the calculation procedure, it was not possible for any adjustment of the calculation (by reference to the duration of the infringement, mitigating circumstances, and so forth) made above that threshold to have any specific repercussions on the final amount of the fines, as is shown inter alia by the table summarising the figures used in arriving at that amount produced by the appellants.

119. Although not without foundation, those remarks do not however seem to me to be sufficient to justify upholding the application, for the reasons set out below.

120. Neither the letter nor the spirit of Article 15(2) of Regulation No 17 is inimical to the calculation method followed by the Commission. In particular, as the Court of First Instance pointed out, that provision does not prohibit the Commission from referring, during its calculation, to an amount exceeding 10% of the turnover of the undertaking concerned, provided that the amount of the fine eventually imposed does not exceed the maximum limit. [58]

58 — See *LR AF 1998*, paragraph 288

121. In that connection, I think it is important to point out that Article 15(2) defines the amount of the fines in two successive and distinct passages:

— first, it provides that the Commission may impose fines 'from 1 000 to 1 000 000 units of account', thus setting a minimum penalty and a maximum penalty;

— second, it allows the Commission to exceed that 'maximum penalty' provided that the final amount of the fine does not exceed '10% of the turnover of the preceding business year of each of the undertakings participating in the infringement'.

122. Two important inferences can, in my opinion, be drawn.

123. In the first place, as can be seen from the first indent of the provision, a system of adjusting fines by reference to a lump sum does not appear to be entirely alien to the logic of Regulation No 17.

124. Moreover, in those cases in which the Commission considers it appropriate to go outside the range of penalties provided for in the first indent, the second indent confines itself to fixing a 'ceiling', leaving the Commission free regarding all other aspects of the calculation.

125. Such a system inevitably involves adjustment or levelling operations of the kind complained of by the appellants because, by definition, a ceiling represents an absolute limit which applies automatically in the event of a specified threshold being reached, regardless of any other criterion. And as the Commission has observed, the appellants to which that limit was applied have had imposed on them a fine which is less than that which, in the absence of the ceiling, would have been imposed on them on the basis of all the circumstances of the infringement, in particular its gravity and duration.

126. But, I repeat, that approach falls entirely within the scheme established by Regulation No 17. What the appellants are describing as disproportionate or discriminatory results of the calculation procedure adopted by the Commission are in reality nothing more than an inevitable consequence of applying the limit of 10%.

127. From that standpoint, therefore, the Commission is not open to criticism once it

has been ascertained that, in situations like those under review, it (i) correctly appraised the gravity, duration and other circumstances of the infringement, and (ii) kept the final amount of the fines within the ceiling of 10% of the total turnover of the individual undertakings.

128. Accordingly, I must conclude that the present pleas in law are not supported by the legal framework as now in force.

129. Having said that, I must nevertheless point out that the examination so far carried out shows that the calculation method used by the Commission is not without risk as far as the fairness of the system is concerned.

130. It does not seem to me to be fully consistent with the requirements of individualisation and progressiveness of the 'penalty' — two principles of cardinal importance in any punitive system, both in the criminal and the administrative spheres — that, as in the present cases, some of the calculation operations are essentially formal and abstract in character and therefore do not have concrete repercussions on the final amount of the fine. Nor can the fact be ignored that, for the same reasons, the objective of greater transparency pursued by the Guidelines is liable to be less than fully attained.

131. I would add that those situations are not in fact exceptional and indeed run the risk of becoming ever more frequent. When the Guidelines were adopted in 1998, the Commission's policy on fines for infringements of competition law entered a new phase which, for reasons which it is not for me to judge, is certainly more rigorous and has led to an increase in the level of fines, particularly for more serious infringements. In addition, that intensification, deriving as it does from a calculation method based on flat-rate amounts, is liable for the most part to hit small and medium-sized undertakings. [59]

132. In short, a new situation is emerging, which is more problematical than was the

59 — It should be noted in this connection that, precisely for those reasons, the Guidelines for the determination of fines adopted by the Nederlandse Mededingingsautoriteit (the Netherlands competition authority) expressly departed from the line followed by the Commission:
'With regard to fines for infringements of the Competition Act, the Director-General of NMa is of the opinion that the Guidelines drawn up by the European Commission cannot be taken as the point of departure without adaptation. The European Commission uses categories of infringements, in accordance with the aforementioned Guidelines, to which fixed fines apply. A disadvantage of a system of fixed fines is that small undertakings are affected relatively more harshly than larger undertakings (which often operate internationally). The policy of the Director-General of NMa with regard to fines must be applicable both to (very) large undertakings and to small and medium-sized undertakings, without losing the intended preventive effect, on the one hand, and generating disproportionate results, on the other' (Richtsnoeren boetetoemeting — met betrekking tot het opleggen van boetes ingevolge artikel 57 van de Mededingingswet, 19 December 2001, point 5)

case when the method followed by the Commission did not, in principle, lead to the limit of 10% of total turnover being exceeded in the calculation process, so that the amount of the fine could be made to reflect all the circumstances of the case more easily and immediately.

133. The question must then be asked whether the abovementioned consequences of the new trend in the fines policy might not make it appropriate to steer a slightly different course so as to make certain that it is possible in every case to guarantee results that are in conformity with the general requirements of reasonableness and fairness.

3. The pleas concerning breach of the principles of the protection of legitimate expectations and non-retroactivity

(a) Breach of the principle of the protection of legitimate expectations

134. Most of the appellants complain that the contested decision applied the Guidelines to them even though the infringement commenced long before those Guidelines were drawn up. That, they claim, infringed the appellants' legitimate expectations regarding the earlier practice of calculating fines by reference to the undertaking's turnover in the relevant market.

135. According to the appellants, if it were conceded — which it is not — that the Commission was entitled to depart from that practice, it should nevertheless have informed the undertakings of its intentions and provided an adequate statement of its reasons for making such a change.

136. Furthermore, in the present case, the breach of the principle of protection of legitimate expectations is even more serious in that the appellants had decided to cooperate with the Commission and its decision to do so had been influenced precisely by the benefits which they expected to obtain from application of the Leniency Notice and the previous practice for the calculation of fines.

137. Let me say straight away that I have serious doubts concerning the link which the appellants purport to establish between the Leniency Notice and the level of the fines imposed by the Commission in this case.

138. It is true that, in point E(3) of the Notice, the Commission states that it is 'aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission'. However, it seems clear to me that any legitimate expectations which the appellants might have by virtue of the notice can relate only to the *modalities* for the reduction to be made in respect of their cooperation and not the *amount* of the fine 'which would otherwise have been imposed on them'[60] or the method of calculation adopted in setting it.

139. As correctly pointed out by the Commission, inter alia at the hearing, the Leniency Notice contains no reference to the level of fines which would be imposed in the absence of cooperation. Nor does the Notice contain any reference to the procedures which the Commission should follow in setting the fines imposed on undertakings which have infringed Article 81 EC.

140. More specifically, point A(5) of the Notice makes it clear that the cooperation afforded by an undertaking to Commission staff is only one of several factors which the Commission may take into account when fixing the amount of the fine.

141. Of decisive importance in support of my reasoning here is, in my view, the remainder of point A(3) of the Notice, which states that its purpose is to set out 'the conditions under which enterprises cooperating with the Commission during the investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed on them'.

142. That said, it is appropriate to consider here whether, in applying the new method of calculating the fines set out in the Guidelines, the Commission frustrated the legitimate expectations of the appellants.

143. The appellants correctly draw attention to the fact that, in principle, a Community institution's adherence over time to a given practice may give rise to well-founded and legitimate expectations which Community law must protect.

144. In that connection they refer to the *Ferriere San Carlo* case of 1987,[61] in which, giving judgment on the legitimacy of a decision by which the Commission criticised the Ferriere San Carlo company for exceeding its share of the quota of concrete-

60 — Leniency Notice, point A(1) to (3).

61 — Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435.

reinforcing bars which could be supplied to the Community market under an earlier Commission decision, the Court upheld the application, observing that the Commission's conduct was contrary to the practice followed by that institution in the previous two years which had led to toleration of supplies of reinforcing bars in quantities exceeding those laid down by the Community.

145. On the basis of that precedent, the appellants maintain therefore that in this case too their legitimate expectation that the Commission would maintain its practice regarding the calculation of fines should also be protected. In the present case, the Commission, they say, never informed the undertakings of its intention to apply the new method of calculating fines contained in the Guidelines and therefore not to follow the practice followed in the past.

146. I must, however, demur: the appellants are forgetting that the Court has also made it clear that the principle of the protection of legitimate expectations can be relied upon only where the change in the administration's practice cannot be foreseen by a 'prudent and discriminating trader'. [62]

62 — Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 25; see also Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44.

147. It is therefore necessary to establish whether a change in the method of calculating fines, as implemented by the Commission in the Guidelines, was foreseeable by 'prudent and discriminating' traders.

148. In my opinion, the answer to that question is linked with what I said earlier concerning the legality of the Guidelines.

149. It seems to me, in other words, that the Commission cannot be criticised for frustrating the legitimate expectations of the appellants merely because it chose a more severe approach to the setting of fines or for adopting a new method for calculating them, whilst at the same time remaining within the rules laid down in Regulation No 17.

150. I consider that a prudent and discriminating trader could have reasonably foreseen either that the general level of fines might be increased or, in the alternative, that the Commission might, within the scope of the discretion conferred on it by Article 15 of Regulation No 17, adopt a model for the calculation of fines conforming with the provisions of secondary Community law.

151. It is settled case-law of the Court of Justice that '... whilst the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained'. [63]

152. In the specific area of concern here, the Court has recognised that the Commission is entitled at its discretion to increase the general level of fines imposed for an infringement of Community competition law, stating that 'the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy'. [64]

153. In the same judgment, the Court also held that the Commission was not obliged to indicate, in the statement of objections, its intention to change its policy concerning the general amount of fines, since 'such a choice depends on general considerations of competition policy having no direct relationship with the particular circumstances of these cases'. [65]

154. Nevertheless, I must add, the Commission did not fail to draw the attention of economic operators to a possible increase in the level of fines and of the deterrent effect of penalties. [66] It follows that those economic operators had thus been made aware of the Commission's intentions in that regard.

155. I therefore conclude that there was no violation in this case of the appellants' legitimate expectations.

(b) Breach of the principle of non-retroactivity

156. As I mentioned, the appellants also allege breach of the principle of non-retroactivity of penalties.

63 — Case C-350/88 *Delacre* [1990] ECR I-395, paragraph 33

64 — *Musique Diffusion française*, paragraph 109.

65 — *Musique Diffusion française*, paragraph 22.

66 — See the XXIst Report on Competition Policy, p. 120.

157. In that connection, the appellants agree with what the Court of First Instance stated in the contested judgments, namely that the penalties imposed on an undertaking for infringement of the competition rules must correspond to those which were applicable when the infringement was committed.

158. In their opinion, however, the Commission infringed that principle by not observing the practice previously followed for calculation of fines, with the result that the final amount of the fines proved to be much higher.

159. For my part, I should point out that the system of penalties in force when the infringements at issue were committed did not, as the appellants contend, consist of the Commission's decision-making practice, but rather was laid down in Article 15(2) of Regulation No 17. It is solely that provision which indicates the criteria and parameters which the Commission must take into account for the purpose of calculating fines.

160. I therefore think it is clear that a breach of the principle of non-retroactivity could be alleged only to the extent to which the penalties imposed on the appellants go beyond the limits of, and are not in conformity with, the system defined by Article 15.

161. However, that is not the case here.

162. As I stated earlier, the Commission Guidelines observe the system crystallised in that provision and continue to be in conformity with it.

163. Even if the method indicated in the Guidelines is followed, the calculation of the fines continues to be based on the two criteria mentioned in Article 15(2), namely the gravity of the infringement and its duration, subject to observance of the maximum limit of 10% of the turnover of each undertaking involved.

164. Nor can any breach of the principle of non-retroactivity be inferred from a simple increase in the level of fines. In that regard,

the considerations expressed earlier apply, namely that the Commission enjoys a discretion in that regard so that, for reasons of competition policy, it may raise and increase the severity of fines provided that it remains within the general legal framework in force when the infringements penalised were committed.

165. In this case, therefore, the Commission cannot be accused of breaching the principle of non-retroactivity because, although applying the calculation method contained in the Guidelines, it nevertheless remained within the limits laid down by Article 15 of Regulation No 17.

4. The pleas concerning breach of the rights of the defence

166. All the appellants, except ABB, contend that the Court of First Instance erred in stating that their right to be heard did not require the Commission to disclose to them, in the administrative procedure, its intention to apply the new Guidelines for calculating fines. That omission is all the more serious, in their view, since the Guidelines substantially changed the law as previously in force and involved a significant increase in the amount of fines. However, the Commission did not, in the statement of objections, give any indication such as to make the introduction of a new policy for the calculation of fines foreseeable. During the administrative procedure, the appellants were not therefore able to submit any observations on the application of the new Guidelines.

167. In response to those objections, the Commission states in essence that it is under no obligation to give precise information to undertakings which are subject to investigations for infringement of competition rules concerning the method it intends applying to calculate the fines, or to give any indication as to the possible level of fines.

168. It seems to me also that the Commission did not breach the appellants' rights of defence, and in particular their right to be heard as regards the determination of the fines.

169. Reference need merely be made to the case-law of the Court of Justice, correctly cited by the Court of First Instance, to the effect that the obligation to hear undertakings is fulfilled where the Commission expressly declares in the statement of objections that it will consider whether it is

appropriate to impose fines on the undertakings and it indicates the main factual and legal considerations which may give rise to a fine, such as the gravity and duration of the alleged infringement, and whether or not the infringement was committed intentionally or negligently. [67]

170. As the Court of First Instance indicated in the contested judgments, [68] the Commission specified in the statement of objections the matters of fact and of law on which it relied in setting the amount of the fine: the fact that the infringement constituted a very serious infringement, the duration of the infringement that it intended to attribute to each undertaking, the circumstances considered to be aggravating circumstances, and the other factors it took into account in setting the fines, such as the role played by each undertaking in the cartel, its economic weight in the relevant market, and so on.

171. In that way, the Commission duly observed the undertakings' right to be heard concerning the imposition of fines and concerning each of the factors which it intended taking into account in setting their amount. According to the case-law, the observance of that right places no other obligation on the Commission and, in any event, certainly not the obligation to specify the way in which it envisages relying on each factor to calculate the level of the fines or any obligation to give indications as to the level of the fines. [69]

172. I should also point out that, according to the Court of Justice, the Commission is not bound to mention in the statement of objections its intention to change its policy regarding the general level of fines. [70]

173. In the light of the foregoing considerations, I therefore propose that the Court reject the present plea.

5. The pleas concerning breach of the obligation to state reasons concerning determination of the amount of the fine

174. Certain appellants (and in particular KE KELIT, LR AF 1998, and LR AF GmbH) claim that the Court of First Instance erred in law in concluding that the Commission decision contained an adequate statement of

67 — *Musique Diffusion française*, paragraph 21. See also *Michelin* v *Commission*, cited above, paragraphs 19 and 20.

68 — See for example *LR AF 1998*, paragraphs 201 to 203.

69 — *Musique Diffusion française*, paragraph 21, and *Michelin*, paragraph 19.

70 — *Musique Diffusion française*, paragraph 22.

reasons concerning calculation of the fines and that, therefore, the Commission had not infringed Article 253 EC. In their view, on the contrary, the Commission should have justified its decision for departing from its earlier practice — consisting in determining the fines according to turnover in the relevant market — and also the allegedly retroactive application of the Guidelines.

175. Let me say straight away that, even if we disregard the conclusions which I reached earlier concerning the criticisms regarding legitimate expectations and non-retroactivity, I consider this plea to be unfounded.

176. It need merely be pointed out that, according to established case-law, the obligation to give reasons for the method of calculating fines is satisfied where the Commission indicates the factors which enabled it to determine the gravity of the infringement and its duration, [71] thereby complying with the second subparagraph of Article 15(2) of Regulation No 17, according to which 'regard shall be had both to the gravity and to the duration of the infringement'. Thus, only if those elements are missing will the decision be vitiated by an inadequate statement of reasons.

177. As regards, next, the decisions imposing fines on various undertakings, in the contested judgments [72] the Court of First Instance properly pointed out that in such circumstances the scope of the obligation to state reasons must, in particular, be ascertained in the light of the fact that the gravity of infringements must be determined by reference to numerous factors, such as — but not solely — the particular circumstances of the case, its context and the dissuasive effect of fines. [73]

178. In my opinion, the Court of First Instance correctly held that the Commission had fulfilled those requirements. In particular, it found, as regards each of the appellants, that the Commission decision contained a relevant and sufficient statement of the criteria taken into account in order to determine the gravity and duration of the infringement. [74]

179. As the Court of First Instance correctly pointed out, '[e]ven supposing that, as

71 — Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 43, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV(LVM) and Others* v *Commission* [2002] ECR I-8375, paragraph 463.

72 — See, for example, *LR AF 1998*, paragraph 378.

73 — Order of the Court of Justice of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

74 — See *Løgstør Rør*, cited above, paragraph 372; *KE KELIT*, paragraph 203, and *LR AF 1998*, paragraph 383.

regards the level of the fine, the decision constitutes a significant increase compared with previous decisions, the Commission *quite explicitly* stated its reasons for fixing the amount of the appellant's fine at such a level', [75] referring to the particular gravity of the infringement, and its duration, the presence of aggravating and/or attenuating circumstances, the size of the undertakings, the role played by each undertaking in the cartel and the application of the Leniency Notice.

180. In other words, the Commission decision contains all the criteria which it used in setting the amount of the fines.

181. The plea alleging that the reasons on which the Commission decision was based were inadequately stated must therefore be rejected.

B — Pleas concerning the circumstances of the individual appellants

182. The appellants then make numerous criticisms concerning their own specific situations. In the pages which follow, I shall analyse those criticisms, but shall not dwell upon those which seem to me to be of only marginal interest and regarding which in any event the Court of First Instance's judgment seems to me to be absolutely incontrovertible.

1. Pleas concerning misapplication of Article 81(1) EC regarding the participation of an undertaking in a cartel

183. (i) The Isoplus Group contends that the Court of First Instance misapplied the case-law according to which, even if it did not give practical effect to the results of meetings having an anti-competitive object, an undertaking may still be held responsible for an infringement where it has not publicly distanced itself from what was discussed at those meetings.

184. In particular, the appellants take exception to the Court of First Instance's statement that, to establish an infringement of Article 81 EC, 'it is irrelevant ... whether the undertaking in question attends meetings with undertakings having a dominant position or, at least, an economically superior position on the market' (paragraph 224 of the relevant judgment). It is precisely in such circumstances, according to the appellants, that account should be taken of the lesser economic weight of certain participants, because it is difficult for them publicly to

75 — *LR AF 1998*, paragraph 385. Emphasis added.

distance themselves from the decisions of meetings also attended by undertakings with greater economic weight which are able to bring great pressure to bear on their competitors. In such situations, economically 'weaker' undertakings should not be held responsible for infringements of Article 81 EC where, although not publicly denouncing them, they have failed to act in conformity with decisions adopted at a meeting having an anti-competitive object.

185. Let me say straight away that I share the view put forward by the Court of First Instance and that, contrary to the appellants' contentions, its analysis fully meets the objections made by them in the proceedings at first instance.

186. I would add that, if the interpretation advocated by the appellants were to be upheld, the result would be that the application of Article 81 EC would differ according to the size and/or economic position of undertakings. However, such a 'variable geometry' approach would conflict with the principles of Community competition law, as interpreted by settled case-law of the Court of Justice, to the effect that, for the purposes of applying Article 81, it is irrelevant whether the parties to the agreement 'are or are not on a footing of equality as regards their position and function in the economy' [76] or whether an undertaking 'played only a minor role in the aspects [of the agreement] in which it did participate'. [77]

187. That obviously does not mean that the Commission is not required to take account of differences between participants in a cartel in terms of economic weight, or that no inferences should be drawn from such disparities. It means only that those factors are not of importance at the early stage of establishing the individual responsibility of the participants in the cartel but are relevant for the purposes of assessing the gravity of the infringement and, therefore, at the time when the fine is determined. [78]

188. Moreover, as correctly observed by the Commission, those factors may play a role regarding appraisal by the national court of the scope of the responsibility of individual undertakings regarding the consequences in civil law of the infringement. [79]

76 — Joined Cases 56-64 and 58-64 *Consten and Grundig* v *Commission* [1966] ECR 299, in particular at page 339.

77 — Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 90, and *Aalborg Portland and Others*, paragraph 86.

78 — See, for example, *Anic Partecipazioni*, paragraph 90.

79 — Case C-453/99 Courage [2001] ECR I-6297, paragraph 35.

189. (ii) Brugg Rohrsysteme GmbH (hereinafter 'Brugg'), for its part, contends that the Court of First Instance incorrectly took as proof of its active participation in the boycott of Powerpipe its presence at the meeting of 24 March 1995, at which that boycott was decided upon.

190. In support, it refers to the fact that its only activity is that of reselling pre-insulated pipes. For that reason, it could not in any way have implemented a boycott of Powerpipe; on the contrary, only the undertakings producing pre-insulated pipes who competed directly with Powerpipe could have given effect to the boycott.

191. Therefore, the appellant continues, the Commission was mistaken to conclude that the appellant's participation in that meeting could have constituted an aggravating circumstance, such as to give rise, in itself, to a 20% increase in the fine.

192. However, I think that that view goes too far.

193. If it were to be taken to the limit, it would have to be concluded that no responsibility for an infringement of Article 81 EC should attach to undertakings which, although having expressed their agreement with a measure involving anti-competitive conduct, did not then succeed in putting it into practice.

194. The responsibility of an undertaking, therefore, would be linked not with its manifest wish to infringe the competition rules but rather with its material ability to do so.

195. However, there is no support for such a view in the case-law.

196. I shall merely point out that, in *Anic Partecipazioni*, the Court stated that an undertaking infringes Article 81 EC not only when it 'intended to contribute by its own conduct to the common objectives' but also when 'it was aware of the actual conduct planned or put into effect by the other undertakings in pursuit of the same objectives or ... it could reasonably have foreseen it and ... it was prepared to take the risk'. [80]

80 — *Anic Partecipazioni*, paragraph 87.

197. That case-law was recently and more specifically confirmed by the judgment in *Aalborg Portland*, in which the Court made it clear inter alia that 'it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. ... [A] party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement'. [81]

198. As correctly pointed out by the Court of First Instance, Brugg should therefore have openly stated that it did not approve of the anti-competitive conduct decided on at the meeting of 24 March 1995 so as to apprise the other participants of the fact that it did not approve of their conduct, that it dissociated itself from it and that it was certainly not ready to accept the risks attaching to it.

199. As we have seen, that did not occur.

200. In conclusion, I consider that the pleas put forward by the Isoplus Group and Brugg concerning misapplication of Article 81(1) EC must be rejected.

2. The pleas concerning failure to take account of attenuating and aggravating circumstances

201. (i) The undertakings in the Isoplus Group then object that the Court of First Instance improperly denied them the right to a reduction of the fine on the basis of point D of the Leniency Notice.

202. They state that, by virtue of that provision, the Commission should always grant a reduction of the fine in the event of cooperation, even if it is partial and limited as in this case, where the cooperation contributed to confirming the existence of the infringement. Moreover, the appellants complain that the Commission, in making its calculation, took into account twice the attempts to obstruct the investigation: first, as an aggravating circumstance which led to an increase of the fine and, second, as a reason for not granting a reduction of the fine under the Leniency Notice. By taking

81 — *Aalborg Portland and Others*, paragraph 81 et seq.

that approach, the Commission in their view infringed in particular the appellants' rights of defence and their right to a 'fair trial'.

203. On this point too, however, I consider the Court of First Instance's analysis to be more convincing. I shall only add a few comments concerning the alleged 'double counting' regarding the obstructive conduct of the appellants.

204. First, in my opinion, the Commission would have infringed upon the appellants' fundamental rights only if it had imputed one and the same aggravating circumstance to the appellants twice.

205. However, the position is totally different where, as in this case, the existence of an aggravating circumstance is irreconcilable with the preconditions for an attenuating circumstance to be taken into account. In such a case, the cooperative or uncooperative conduct of an undertaking must be appraised as a whole.

206. The Commission decision shows that the appellants made a rather partial and limited, and indeed rather disputed, contribution. Whilst it is true that, to some extent, they cooperated with the Commission by providing some evidence additional to that already in its possession and admitting in part their participation in the cartel, it is also true that at the same time they deliberately obstructed inquiries by providing incomplete and partially inaccurate information, thus making the Commission's investigation more difficult. That fact, as can be seen not only from the spirit of the Leniency Notice but also from the settled case-law cited by the Court of First Instance, can hardly, in my view, be reconciled with the requirement of 'cooperative conduct' such as to justify a reduction of the fine.

207. (ii) For its part, LR AF 1998 complains that the Commission unjustly ruled out the existence of attenuating circumstances in its case and that the Court of First Instance was wrong to agree with that decision.

208. In particular, the appellant claims that it is entitled to a reduction of the fine imposed on it because of the following circumstances: (a) it was in a 'subordinate' relationship with ABB, the main operator and the only multi-national group in the district heating sector and the undertaking leading the cartel; (b) it was the victim of economic pressure brought to bear by ABB

in order to compel it to participate in the cartel and implement the measures decided upon jointly by the undertakings; (c) the infringements of competition law imputed to ABB were much more serious than those imputed to the appellant.

209. Secondly, LR AF 1998 criticises the Commission for ignoring the pressure brought to bear by ABB on other undertakings and criticises the Court of First Instance for supporting the Commission by saying that 'when it assessed the fine to be imposed on ABB, the pressure which ABB had brought to bear on the other undertakings in order to persuade them to enter the cartel was regarded as a factor leading to an increase in its fines'. [82]

210. According to the appellant, the obligation to determine the amount of a fine on the basis of the relevant factors could not be complied with by means of an operation whereby the fine imposed on another undertaking was adjusted.

211. The appellant objects, finally, that the Court of First Instance erred in holding that the fact that it introduced a policy of compliance with Community law did not constitute an attenuating circumstance such as to justify a reduction of the fine imposed on it.

212. For my part, I consider that the Court of First Instance was correct to hold that LR AF 1998 was not entitled to expect the Commission to decide that attenuating circumstances existed in its case.

213. No such attenuating circumstances can, in my opinion, be inferred from the economic pressure which, according to the appellant, ABB brought to bear upon it.

214. In the first place, the Guidelines do not expressly include such a case among the attenuating circumstances included in point 3 thereof. [83]

215. Moreover, the Commission, in my view correctly, has to date adopted a restrictive interpretation of the attenuating circumstance in question, to the effect that it is

82 — *LR AF 1998*, paragraph 339.

83 — Point 3 of the Guidelines states that the following are attenuating circumstances such as to justify a reduction of the fine: 'an exclusively passive or "follow my leader" role in the infringement; non-implementation in practice of the offending agreements or practices; termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks); existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement; infringements committed as a result of negligence or unintentionally; effective cooperation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases; other'

applicable only in cases where an undertaking's participation in a cartel is minimal: for example where the undertaking has never taken part in any cartel meeting. [84] Otherwise, such an attenuating circumstance would have to be recognised in the case of all undertakings which had not instigated and initiated the cartel, expanding its scope inordinately.

216. In the present case, the Court of First Instance was able to ascertain, beyond any shadow of doubt, not only the presence, but also the active participation, of the appellant in numerous meetings of the European cartel. The fact that it might have been constrained to do so by ABB is irrelevant, because there was nothing to prevent it from reporting such pressure to the national competition authorities or to the Commission itself, under Article 3 of Regulation No 17.

217. Less convincing, however, appears to be the reason followed by the Court of First Instance when it observed that, in any event, 'the Commission cannot be criticised for having disregarded such pressure, because, when it assessed the fine to be imposed on ABB, the pressure which ABB had brought to bear on the other undertakings in order to persuade them to enter the cartel was regarded as a factor leading to an increase in its fine'.

218. It seems to me that, in view of the purely individual nature of the fine, it is not possible to justify failure to reduce the amount thereof to the detriment of an economic operator by reference to a corresponding increase in the fine imposed on another operator.

219. That said, I consider however that the Court of First Instance's error of appraisal is not such as to undermine the conclusion reached in the contested decision to the effect that LR AF 1998 A/S was not entitled to any reduction of the fine. Indeed, I consider that the Commission correctly concluded that, in order to safeguard its position, the appellant had available to it legal means which were more effective than participation in the anti-competitive agreement.

220. Finally, no importance can be attached to the fact that the appellant introduced an internal Community law compliance programme. In that respect, I fully agree with what the Court of First Instance stated in paragraph 345 of the contested judgment

84 — See the Commission Decisions of 7 June 2000, Amino acid (OJ 2001 L 152, p. 24) and of 21 November 2001, Vitamins (OJ 2003 L 6, p. 1).

and, therefore, I consider it superfluous to dwell further on that point.

221. I therefore propose that the pleas just examined should also be rejected.

3.The pleas concerning the breach of procedural rules

222. By its first plea, ABB Asea Brown Boveri Ltd ('ABB') complains that the Court of First Instance was wrong to hold that the opinion of Professor J. Schwarze annexed to the appellant's reply could not be taken into consideration since, contrary to Article 48(2) of the Rules of Procedure of the Court of First Instance, it introduced new pleas which were not raised in the application.

223. In that connection, I would point out that according to that provision 'no new plea in law may be introduced *in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure*'.

224. According to settled case-law of the Court of Justice, [85] 'new pleas' are arguments introduced in the course of the proceedings which are found not to be in any way connected with the legal arguments already developed.

225. It follows that, in contrast, those arguments are admissible which, although raised in the course of the proceedings, can be linked with pleas already put forward, in so far as they develop them directly or by implication.

226. That being so, it is now necessary to establish whether the arguments put forward in Professor Schwarze's opinion are a natural development of the pleas put forward by

85 — Case 2-54 *Italy* v *High Authority* [1954] ECR 73, paragraph 6, Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25; Joined Cases C-71/95, C-155/95 and C-271/95 *Belgium* v *Commission* [1997] ECR I-687.

ABB in its application to the Court of First Instance.

227. In large measure, Professor Schwarze's opinion analyses whether the contested decision is in conformity with certain general principles of law, such as, in particular, the principles of the protection of legitimate expectations, the 'self-binding' of public administrations, estoppel, sound administration and rights of the defence.

228. In its application, ABB dealt with only some of those principles. In particular, in paragraph 44 et seq. of its application, ABB criticised the Commission on the ground that, by applying the Guidelines retroactively, it had frustrated its legitimate expectation that a particular practice regarding the calculation of fines would continue to be followed, and for failing to observe certain procedural safeguards to which the appellant was entitled.

229. In the first part of its application, however, it complained that, in the course of the procedure giving rise to the contested decision, the Commission had infringed its rights of defence and its right to be heard.

230. On the other hand, the appellant did not at any stage complain of breach of the other principles with which Professor Schwarze's opinion is concerned, in particular the principles of the self-binding of public administrations, estoppel and sound administration.

231. In those circumstances, many of the arguments developed in the opinion cannot be regarded as 'new'.

232. Also, Professor Schwarze's arguments cannot be considered inadmissible on the ground that they are set out in a legal opinion annexed to the reply. I consider that Article 48 does not prevent a party who intends making new legal submissions or developing the pleas already put forward (where that is allowed) from relying on an opinion drawn up by a lawyer not forming part of the defence team.

233. It seems to me therefore that, contrary to the Court of First Instance's conclusion, Professor Schwarze's opinion should be regarded as admissible to the extent to which it analyses the alleged breach of the principle of the protection of legitimate expectations and of the rights of defence of the appellant.

234. I would point out however that, even if those parts of the opinion had been admitted by the Court of First Instance, the arguments set out therein would not have undermined the conclusions reached by the Court of First Instance regarding those principles. The views put forward by Professor Schwarze do not in essence change the arguments on the basis of which both ABB and the other appellants alleged, in the proceedings at first instance as well, breach of those principles.

235. Since, as I endeavoured to show earlier, the Court of First Instance did not err in law in rejecting the pleas alleging breach of those principles, it follows that the criticism in question cannot be upheld.

236. In conclusion, I take the view that none of the criticisms made by the appellants has so far proved to be well founded, with the result that their applications cannot be upheld.

IV — Costs

237. Under Article 69(2) of the Rules of Procedure, and having regard to the conclusions I have reached regarding dismissal of the applications, I consider that the appellants should be ordered to pay the costs.

V — Conclusion

238. In the light of the foregoing considerations, I propose that the Court:

— dismiss the applications;

— order the appellants to pay the costs.