# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

29 November 2005 *

In Case T-64/02,

**Dr Hans Heubach GmbH & Co. KG,** established in Langelsheim (Germany), represented by F. Montag and G. Bauer, lawyers,

applicant,

v

**Commission of the European Communities,** represented by F. Castillo de la Torre, acting as Agent, assisted by H.-J. Freund, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1) and, in the alternative, for reduction of the amount of the fine imposed on the applicant,

* Language of the case: German.

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

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2004,

gives the following

## Judgment

### Facts

1 Dr Hans Heubach GmbH & Co. KG ('the applicant' or 'Heubach') is a German company engaged in the manufacture and distribution of specialised organic and mineral pigments, mainly used as ingredients in the manufacture of inks, plastics and paints. Heubach produces and sells zinc phosphate, including modified types. Its worldwide turnover in 2000 was EUR 71.02 million.

2 Although they may have slightly differing chemical formulae, zinc orthophosphates form a homogeneous chemical product, generically referred to as 'zinc phosphate'. Zinc phosphate, which is derived from zinc oxide and phosphoric acid, is widely used as an anti-corrosion mineral pigment in the paint industry. It is marketed either as standard zinc phosphate or as modified (or activated) zinc phosphate.

3 In 2001, virtually all of the world zinc production was controlled by the following five European producers: the applicant, James M. Brown Limited ('James Brown'), Société nouvelle des couleurs zinciques S.A. ('SNCZ'), Trident Alloys Ltd (formerly Britannia Alloys and Chemicals Ltd) ('Britannia') and Union Pigments AS (formerly Waardals AS) ('Union Pigments'). Between 1994 and 1998, the annual value of standard zinc phosphate on the world market was approximately EUR 22 million and in the European Economic Area (EEA) market approximately EUR 15 to 16 million. In the EEA, the applicant, SNCZ, Trident (formerly Britannia) and Union Pigments had rather similar shares in the standard zinc phosphate market, of approximately 20%. James Brown had a significantly lower market share. Customers for zinc phosphate are the main paint manufacturers. The paint market is dominated by a few multinational chemical groups.

4 On 13 and 14 May 1998, the Commission carried out simultaneous and unannounced investigations under Article 14(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Article 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), at the premises of the applicant, SNCZ and Trident. From 13 to 15 May 1998, acting at the request of the Commission under Article 8(3) of Protocol 23 to the Agreement on the European Economic Area (EEA), the Surveillance Authority of the European Free Trade Association (EFTA) carried out simultaneous and unannounced investigations at the premises of Union Pigments under Article 14(2) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

5 In the administrative procedure, Union Pigments and Trident informed the Commission of their intention to cooperate fully with it in accordance with the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice') and each made a statement concerning the cartel ('the Union Pigments statement' and 'the Trident statement').

6 On 2 August 2000, the Commission adopted a statement of objections addressed to the addressees of the decision being challenged in these proceedings (see paragraph 7 below), including the applicant.

7 On 11 December 2001, the Commission adopted Decision 2003/437/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1). The decision which is the subject of the present judgment is the one that was notified to the undertakings concerned and is annexed to the application (hereinafter 'the contested decision'). That decision differs in certain respects from the one published in the *Official Journal of the European Union*.

8 In the contested decision, the Commission states that a cartel, consisting of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Union Pigments, existed between 24 March 1994 and 13 May 1998. The cartel was limited to standard zinc phosphate. The members of the cartel first adopted a market sharing agreement with sales quotas for the producers. Then they agreed on 'bottom' or 'recommended' prices at each meeting, which they generally followed. There was also a certain amount of customer allocation.

9 The operative part of the contested decision reads as follows:

*'Article 1*

Britannia ... , Heubach ... , James ... Brown ... , [SNCZ], Trident ... and [Union Pigments] have infringed the provisions of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement by participating in continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

(a) in the case of ... Heubach ... , James ... Brown ... , [SNCZ], ... and [Union Pigments]: from 24 March 1994 until 13 May 1998;

...

*Article 3*

For the infringement referred to in Article 1, the following fines are imposed:

(a) Britannia ...: EUR 3.37 million,

(b) ... Heubach ....: EUR: 3.78 million,

(c) ... James ... Brown ...: EUR 940 000,

(d) ... [SNCZ]: EUR 1.53 million,

(e) ... Trident ...: EUR 1.98 million,

(f) [Union Pigments] ...: EUR 350 000.

...'

10 In calculating the fines, the Commission applied the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines') and the Leniency Notice.

11 Thus, the Commission first set a 'basic amount' by reference to the gravity and duration of the infringement (see recitals 261 to 313 to the contested decision).

12 As regards gravity, it considered that the infringement should be classified as 'very serious', having regard to the nature of the behaviour at issue, its actual impact on the zinc phosphate market and the fact that it had covered the whole of the common market and, following its creation, the whole EEA (recital 300 to the contest decision). Regardless of the very serious nature of the infringement, the Commission explained that it would take into consideration the limited size of the product market (recital 303 to the contested decision).

13 The Commission applied 'differential treatment' to the undertakings concerned in order to take account of their effective economic capacity to cause significant damage to competition, and set the fine at a level ensuring that it had sufficient deterrent effect (recital 304 to the contested decision). For that purpose, it divided the undertakings concerned into two categories, according to their 'relative importance in the market concerned'. It thus relied on each of those undertakings' EEA-wide product turnover in the last year of the infringement and took account of the fact that the applicant, Britannia (Trident as from 15 March 1997), SNCZ and Union Pigments were 'the major producers of zinc phosphate in the EEA, with rather similar market shares above or around 20%' (recitals 307 and 308 to the contested decision). The applicant, together with Britannia, SNCZ, Trident and Union Pigments were placed in the first category ('starting point' of EUR 3 million). James Brown, whose market share was 'significantly lower', was placed in the second category ('starting point' of EUR 750 000) (recitals 308 and 309 to the contested decision).

14 As regards duration, the Commission considered that the infringement attributable to the applicant was of 'medium' duration, having lasted from 24 March 1994 to 13 May 1998 (recital 310 to the contested decision). It therefore increased the applicant's starting point by 40% and arrived at a 'basic amount' of EUR 4.2 million (recitals 310 and 313 to the contested decision).

15 The Commission then considered that it was inappropriate to find that there were any aggravating or attenuating circumstances (recitals 314 to 336 to the contested decision). It also rejected arguments concerning the 'poor economic context' in which the infringement took place and the specific characteristics of the undertakings concerned (recitals 337 to 343 to the contested decision). The Commission therefore set the amount of the fine at EUR 4.2 million 'prior to any application of the ... Leniency Notice' as regards the applicant (recital 344 to the contested decision).

16 The Commission also referred to the limit which, under Article 15(2) of Regulation No 17, the fine to be imposed on each of the undertakings concerned may not exceed. The amount of the applicant's fine prior to application of the Leniency Notice was not affected by that limit (recital 345 to the contested decision).

17 Finally, the Commission granted the applicant a reduction of 10% under the Leniency Notice in view of the fact that it had stated, in its response to the statement of objections, that it did not substantially contest the facts as set out in the latter (recitals 360, 363 and 366 to the contested decision). The final amount of the fine imposed on the applicant was thus EUR 3.78 million (recital 370 to the contested decision).

**Procedure and forms of order sought by the parties**

18 By application lodged at the Registry of the Court of First Instance on 28 February 2002, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to produce certain documents and to answer a number of written questions. They complied.

20 The parties presented oral argument and answered questions put to them by the Court at the hearing on 1 July 2004.

21 The applicant claims that the Court of First Instance should:

— annul Article 3(b) of the contested decision;

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

— order the Commission to pay the costs.

22 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

## Law

### A — *The objection of illegality*

#### 1. *Arguments of the parties*

23 The applicant claims that Article 3(b) of the contested decision is void because the fine that it lays down was calculated on the basis of the Guidelines, which infringe Article 15(2) of Regulation No 17.

24 It submits that its objection of illegality is admissible and that the Commission's argument that the illegality of the Guidelines would not render the contested decision void because Article 15(2) of Regulation No 17 alone constitutes the legal basis thereof must be rejected.

25 As regards the substance, the applicant submits, first, that Article 15(2) of Regulation No 17 must be regarded as laying down a general obligation to calculate fines in proportion to the turnovers of the undertakings concerned. That is the only way in which account can be taken of the economic capacity of the undertaking concerned. However, the Guidelines are based on overall categories of fines determined irrespective of turnover and, consequently, irrespective of the economic strength of the undertaking concerned. In particular, they provide for a lump sum of at least EUR 20 million for infringements classified as 'very serious', whatever the size of the offending undertaking.

26 That breach is not in its view affected by the fact that the Guidelines allow differentiation according to certain factors, including the nature of the infringement, the effective economic capacity of offenders to cause significant damage to other operators, or the limited importance of the relevant market. Such differentiation is, in fact, only possible within the categories laid down by the Guidelines.

27 As regards the Commission's argument that the economic capacity of an undertaking, evidenced in particular by its total turnover, is only one of the criteria it must take into account, the applicant replies that it does not deny that several criteria must be taken into consideration, but objects that the Commission did not do so in its favour. According to the case-law, the Guidelines do not preclude either total turnover or turnover on the relevant product market of the undertakings concerned 'from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it' (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 283).

28 Second, the applicant considers that, by calculating the amount of the fines on the basis of amounts determined in absolute terms, the Guidelines impose a calculation method which disregards the size of small and medium-sized enterprises (SMEs) such as the applicant. It observes that its turnover was EUR 71 million in 2000 and that, on a Europe-wide basis in the standard zinc phosphate market, its turnover in 2000 was only EUR 3.48 million, which is about 4.9% of its total turnover. It adds that a small group comprising no more than six people working together, assisted by a few employees, was responsible for the turnover recorded in that market. It achieved practically no profit from the product at issue and in fact often suffered losses.

29 The basic amounts, including the amount of at least EUR 20 million for infringements classified as 'very serious', are applied even if the undertakings

concerned are SMEs. The consequence of that 'flat-rate' approach in this case is that the fine imposed on the applicant is significantly higher, in relation to total turnover, than those imposed in other comparable cases with regard to the gravity of the infringement. In support of that argument, the applicant refers to a number of decisions, in which the Commission imposed relatively lower fines (Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60, hereinafter 'the Volkswagen decision'); Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1, hereinafter 'the British Sugar decision')); Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (IV/35.691/E-4 — Pre-insulated Pipe Cartel) (OJ 1999 L 24, p. 1, hereinafter 'the Pre-insulated pipe decision')). Thus, the fine imposed on the applicant is up to 280 times higher, in relation to its turnover, than that imposed in the British Sugar decision. In other words, the Guidelines are illegal in that they lead, in comparable cases in terms of gravity, to disproportionate fines in relation to turnovers.

30 In response to the Commission's argument that it took account of the applicant's size by setting the starting point at EUR 3 million (see paragraph 13 above) and not EUR 20 million, the applicant claims that the 'flat-rate' approach nevertheless has an impact on the fines imposed and leads to disproportionate fines.

31 Third, the applicant asserts that the increase of the basic amount by reference to the duration of the infringement, provided for in the Guidelines, is also illegal. Certain infringements, in particular agreements on quotas, extend by their nature over several years. That long duration is penalised when the infringement is classified as very serious. By providing for increases for infringements by reference to their duration, the Guidelines thus have the effect of imposing a double penalty on the undertaking concerned.

32 First, the Commission expresses doubts as to the admissibility of the objection of illegality on the ground that the Guidelines do not constitute the legal basis of the contested decision. Although it used the method set out in the Guidelines to calculate the fines in this case, the fact remains that Article 15(2) of Regulation No 17 is the sole legal basis of the decision. Thus, even if the Guidelines were to be declared illegal, that would not render the contested decision illegal.

33 Regarding the substance, the Commission states that it is clear from the judgments of the Court of First Instance of 20 March 2002 concerning the pre-insulated pipe cartel that the Guidelines do not infringe Article 15(2) of Regulation No 17 (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487; Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613; Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633; Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647; Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681; Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845; Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, and, in particular, *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraphs 223 to 232 and 278 to 291). Consequently, that objection of illegality should be rejected as unfounded.

34 In particular, the Commission rejects the applicant's argument that it should have taken account the smallness of its turnover and that it did not apply the ratio between total turnover and the fine imposed in other decisions. As regards the comparison with the British Sugar decision, it observes that the applicant seems to consider that either the Commission should have fixed the starting point according to the gravity of the infringement at EUR 18 million (the starting point in British Sugar), multiplied by 280, giving EUR 5.04 billion, or that it should have divided by 280 the starting point of EUR 3 million adopted in the applicant's case and arrive at starting points of EUR 10 000. The applicant is forgetting that, according to the case-law, the Commission must in all cases set an amount which has a sufficient deterrent effect.

2. *Findings of the Court*

35 As a preliminary point, the Court would point out that although the Guidelines are not the legal basis of the contested decision, that being Regulation No 17, they determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 274). In view of the legal effects which may derive from rules of conduct such as the Guidelines and the fact that they include provisions of general application which, it is agreed, were applied by the Commission in the contested decision, it is clear that a direct link exists between that decision and the Guidelines. It follows that the objection of illegality is admissible.

36 The applicant pleads that the Guidelines are illegal in that, contrary to the wording of Article 15(2) of Regulation No 17, which, according to the applicant, provides that fines must be calculated in proportion to the turnovers of the undertakings concerned, they take as a starting point overall categories of fines determined irrespective of turnover. Thus, the fact that the applicant is an SME is disregarded. Moreover, the duration of the infringement is taken into account twice by the Guidelines.

37 Contrary to the applicant's assertion, the Guidelines do not go beyond the legal framework for fines set out in Article 15(2) of Regulation No 17. The general method for calculating fines set out in the Guidelines is based on the two criteria referred to in Article 15(2) of Regulation No 17 namely, the gravity of the infringement and its duration, and that the maximum percentage of turnover of each undertaking as laid down in that provision is observed (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraphs 231 and 232, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraphs 189 and 190).

38 The Guidelines constitute a description by the Commission of the way in which it assesses the factors of gravity and duration and its method of appraising infringements by reference to their nature and the surrounding circumstances. Article 15(2) of Regulation No 17 does not require that the amount of the fine be proportionate to the turnover of the undertaking concerned. It simply indicates that, if the fine exceeds EUR 1 million, it may not exceed the upper limit of 10% of the turnover of the undertaking in question (see *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 278).

39 Moreover, the Guidelines enable the Commission to take into consideration, where the circumstances so require, the particular circumstances of SMEs in comparison with undertakings which have a higher turnover in the relevant market or overall. The Court has already held in that connection that, when the Guidelines are applied, the turnover of the undertakings concerned may be relevant when the actual economic capacity of the offenders to cause significant harm to other traders and the need to ensure that the fine has sufficient deterrent effect are taken into consideration, or 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. The turnover of the undertakings concerned may also be relevant when the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition is determined, particularly where there is a considerable disparity between the sizes of the undertakings committing infringements of the same type. Likewise, the turnover of the undertakings may give an indication of any economic or financial benefit acquired by the offenders or of other specific characteristics which, depending on the circumstances, may need to be taken into consideration (*Lögstör Rör* v *Commission*, cited in paragraph 33 above, paragraphs 295 and 296, and *Dansk Rørindustri* v *Commission*, cited in paragraph 33 above, paragraph 203).

40 As regards the applicant's assertion that the Guidelines infringe Article 15(2) of Regulation No 17 because they provide for a flat-rate amount of at least EUR 20 million for very serious infringements even if the undertaking concerned

is an SME, it must be pointed out that the basic amounts provided for in the Guidelines are merely 'likely' (Section 1 A). The Commission is therefore entirely free to set a basic amount below EUR 20 million. Thus, although the applicant committed a serious infringement in this case, the Commission set the starting point for its fine at EUR 3 million, an amount falling far short of the EUR 20 million which is stated to be likely by the Guidelines for very serious infringements (recital 309 to the contested decision).

41 As regards the applicant's argument that the Guidelines lead to the imposition of higher fines, as a proportion of turnover, than those imposed on other undertakings in comparable earlier cases, it must be emphasised that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 234). The fact that the Commission in the past imposed fines of a certain level for particular 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 (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109, and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89).

42 Provided that the Commission imposes on undertakings involved in the same infringement fines which are justified, for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of those undertakings, the amount of the fine, as a proportion of turnover, is higher than that of other undertakings in earlier cases (see, by analogy, *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 278).

43 Furthermore, the gravity of infringements must 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 (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33, and *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 236). However, the relevant information such as the markets, the products, the countries, the undertakings and the periods concerned differ case by case. It follows that the Commission cannot be obliged to impose fines representing the same proportion of turnover in all comparable cases in relation to gravity (see, to that effect, Case T-67/01 *JCB Service* v *Commission* [2004] ECR I-49, paragraphs 187 to 189).

44 It must be borne in mind, in any event, that the 'flat-rate' amounts provided for by the Guidelines are merely indicative and therefore cannot in themselves give rise to a breach of the principle of proportionality.

45 As regards the applicant's argument that the Guidelines have the effect of causing the duration of infringements to be taken into account twice, it will be noted that Article 15(2) of Regulation No 17 expressly provides that, for the purposes of determining the amount of the fine, regard is to be had 'both to the gravity and to the duration of the infringement'. In the light of that provision, even on the assumption that certain infringements are conceived as long-term arrangements, the Commission cannot be prohibited from taking their actual duration in each particular case into account. Thus, the harmful effect of cartels which, in spite of their planned longevity, are detected by the Commission or reported by a participant after having actually been in operation for a short time, is necessarily less than in a situation where they have been in operation for a long period. Consequently, a distinction must always be drawn between the duration of an infringement and its gravity as resulting from its particular nature (see, to that effect, *Tokai Carbon and Others* v *Commission*, cited in paragraph 37 above, paragraph 259).

46 It follows that the objection of illegality must be rejected.

B — *The pleas seeking annulment*

47 The applicant puts forward five pleas in law. The first alleges infringement of Article 15(2) of Regulation No 17 and of the Guidelines. The second alleges breach of the principle of proportionality. The third alleges breach of the principle of equal treatment. The fourth alleges infringement of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). The fifth plea alleges infringement of Article 253 EC.

1. *The first plea: infringement of Article 15(2) of Regulation No 17 and of the Guidelines*

48 The applicant claims that, if the Guidelines are considered to be legal, it follows that the Commission has misapplied them. In its view, Article 3(b) of the contested decision infringes both Article 15(2) of Regulation No 17 and the Guidelines. This plea comprises three parts, in which the applicant claims that:

— the Commission did not correctly assess the gravity of the infringement;

— the Commission's failure to take account of the fact that only a small part of its turnover was involved constitutes an infringement of Article 15(2) of Regulation No 17 and of the Guidelines;

— the Commission did not take account of the applicant's economic capacity.

(a) The first part: incorrect assessment of the gravity of the infringement

49 According to the applicant, it is the gravity of the infringement which is decisive in calculating the fine under Article 15(2) of Regulation No 17. In this case, the Commission's classification of the infringement as 'very serious' by reason of its nature and its repercussions on the market (recital 300 to the contested decision) is incorrect. The applicant submits that the Commission, first, failed to take account of all the relevant facts, in particular the moderate nature of the infringement, and, second, did not correctly analyse the information relied on by it. If it had correctly appraised the infringement, it would necessarily have imposed a lower fine.

50 This first part of the first plea comprises four complaints, namely that the Commission assessed wrongly:

— the nature of the infringement;

— the effects of the infringement on the market;

— the crisis in the zinc phosphate sector as an attenuating circumstance;

— the fact that the infringement differs from other cartel arrangements classified as very serious.

The nature of the infringement

— Arguments of the parties

51 The applicant claims that the infringement should have been classified as moderate by the Commission and that a smaller fine should therefore have been imposed on it. Whilst conceding that the cartel was a serious infringement of competition law, it maintains that the risk for competition was relatively limited in view of the moderate aspects of the cartel. It states that, according to settled case-law, 'in assessing the gravity of an infringement regard must be had to ... all the factors capable of affecting the assessment of the gravity of the infringement' (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 4949, and *Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraphs 120 and 129). In the past, the Commission followed that case-law. In contrast, in this case, although recognising in the statement of objections the existence of factors proving the moderate nature of the infringement, following a manifest turnaround in its policy regarding fines, it subsequently concealed those same factors in the contested decision. Moreover, in its defence, the Commission changed its views regarding the importance of the moderate aspects. It accepted that those aspects were relevant to its analysis of the gravity of the infringement but stated that they in no way altered the fact that the infringement should be classified as 'very serious'.

52 Next, the applicant sets out the reasons for which, in its view, the infringement should not have been classified as 'very serious'.

53 First, it claims that the infringement consisted of an informal agreement which was not accompanied by any special mechanism for implementation by the undertakings concerned. Although it recognised that fact in the statement of objections, the

Commission nevertheless did not reduce the fine in the contested decision. In contrast, in its Polypropylene decision, the Commission imposed a low fine in view of the fact that the undertakings concerned had not provided for an implementing mechanism (Commission Decision 86/398/EEC of 23 April 1986, relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene decision'), paragraph 108). By its nature, an infringement has a less harmful effect on the market when there is no implementing mechanism. The applicant rejects the Commission's argument that the present case must be distinguished from the Polypropylene case in that the parties to the present agreements were subject to pressure having the same function and effects as a formal implementing mechanism. It considers that the fact that there was no compulsion to ensure compliance with quotas, either in the Polypropylene case or in this case, is decisive.

54 In response to the argument that the Commission is not obliged to take account of its prior practice, the applicant submits that the case-law requires the Commission to consider all the factors capable of affecting the assessment of the gravity of the infringement (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraph 4949). Accordingly, the Commission was not entitled, 'arbitrarily and without compelling reason', to fail to take account of the criteria which it considered relevant in previous decisions in assessing the gravity of the infringement. Moreover, the Commission distorted the judgment of the Court of First Instance in Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751. The applicant recognises that, in that judgment, the Court held that 'the mere fact that the Commission has found in its previous decisions that certain factors constitute mitigating circumstances for the purpose of determining the amount of the fine does not mean that it is obliged to do so also in a subsequent decision' (paragraph 368). It considers, however, that that statement does not affect the Commission's obligation to take account of all the relevant factors. The applicant submits that the lack of an implementing mechanism, the lack of obstacles to competition between States (see paragraph 56 below) and the secondary role of prices (see paragraph 57 below) are essential elements for the purpose of correctly assessing the gravity of the infringement. It adds that the Commission disregarded all the facts favourable to the undertakings concerned even though they were essential to appraisal of the gravity of the infringement. It states that in *Mayr-Melnhof* v *Commission* there was a crisis in the sector of which particular account had to be taken as an attenuating circumstance or objective factor within the meaning of Section 5 of the Guidelines, and that it is less important for assessing the gravity of the infringement than the matters raised by the applicant in this case.

Moreover, the applicant disputes the view that the judgment in *LR AF 1998* v *Commission*, cited in paragraph 27 above, allows the Commission to depart from its practice in earlier decisions. The findings made by the Court in that judgment are a response to LR AF's assertion that a departure from the previous level of fines deriving from the Guidelines amounted to a change to the legal framework which determines the fines that may be imposed. That judgment does not allow the Commission to disregard relevant factors in assessing the gravity of the infringement.

55 As regards the Commission's argument that the Court found, in Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, that the lack of measures for monitoring implementation does not in itself constitute an attenuating circumstance, the applicant argues that that case-law is not relevant to appraisal of the gravity of the infringement. It adds that, in its judgment in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 269 to 271, the Court held that the absence of an implementing mechanism is an attenuating circumstance.

56 Second, the applicant submits that the quotas fixed by the cartel were set only at European level. The undertakings concerned did not attempt to set quotas for each country and there was therefore no partitioning of the national markets. Consequently, the risk to competition was limited from the outset. The applicant claims that the Commission, in contrast to its Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1; 'the Cement Decision'), in which it attached particular importance to the fact that the undertakings concerned had set quotas for each country and had thus partitioned the national markets, did not, however, take account of that circumstance in this case when determining the amount of the fine.

57 Third, in contrast to the other infringements classified as 'very serious', the agreement on prices played a secondary role. The applicant admits that prices were referred to in many meetings but states that the discussion on that subject was limited, above all at the start of the infringement, to complaints concerning the low price levels and price differences between the Member States. The handwritten notes taken during the 1994 and 1995 meetings contain no information concerning prices because prices were not fixed at the start of the cartel. It observes that, as the Commission mentions in paragraph 99 of the statement of objections, the cartel was based on the principle 'only quantities, no prices'. Minimum prices were, however, fixed. The applicant adds that the undertakings concerned fixed only reference prices and that, by their very nature, those prices have, as the Commission recognises, more limited repercussions than fixed prices. The applicant states that it does not contest the facts found but only the appraisal thereof.

58 The applicant criticises the Commission's finding that there is no real difference of degree between the cartel in this case and other cartels, in which there were specific agreements setting prices and quotas, implemented effectively. It insists that the risks of restriction of competition and obstacles to integration are considerably lower in this case.

59 Fourth, the applicant claims that, with the exception of one customer only, Tekno Winter, and a single occasion when James Brown had a few small United Kingdom undertakings allocated to it, there was no customer allocation.

60 For its part, the Commission observes that the applicant does not claim that it exceeded the bounds of its discretion or committed other errors of assessment. It merely asserts in general terms that the Commission 'arbitrarily and without compelling reason' departed from its practice in earlier decisions.

61 The Commission states that, in accordance with the principles laid down in the case-law, it considered all the relevant factors in assessing the nature of the infringement and concluded that, by its very nature, it should be classified as 'very serious'.

62 The Commission considers that the applicant has misunderstood the applicable case-law. It concedes that it is obliged to consider all the relevant factors but states that the case-law does not, however, require that certain matters of fact, in particular those raised by the applicant in this case, must systematically lead to a reduction of the starting point of the fine. It is clear from the case-law that there is no binding or exhaustive list of criteria which must be taken into account. Moreover, the importance of each of those criteria in the analysis of the gravity of the infringement depends on the circumstances of each case.

63 Next, the Commission examines the question of the allegedly moderate aspects referred to by the applicant and considers that they do not diminish the gravity of the infringement. It states, in that connection, that it is under no obligation to follow its practice in earlier decisions.

— Findings of the Court

64 As a preliminary point the Court notes, that the applicant seeks only to have the fine cancelled or reduced. It does not dispute Article 1 of the contested decision and thus recognises that the Commission's conclusions regarding its participation in the cartel and its infringement of Article 81 EC are well founded. In its response to the statement of objections, it states that it did not substantially contest the facts set out and thus benefited from a reduction of 10% of the amount of its fine under the Leniency Notice (recitals 360 and 363 to the contested decision).

65 Next, the applicant's argument that the Commission concealed, in the contested decision, all the circumstances establishing the moderate nature of the infringement, which were mentioned in the statement of objections, must be rejected. The Commission did take all the relevant circumstances into account in the contested decision. Contrary to the applicant's assertion, the Commission's contention that 'the agreement on sales and quotas was in the nature of a "gentlemen's agreement", in that the members did not put into practice any specific kind of enforcement mechanism' (paragraph 67 of the statement of objections) is, in fact, reproduced in substance in recital 72 to the contested decision. The statement that the applicant attributes to the Commission — which was in fact made by Union Pigments — to the effect that the cartel was based on the principle 'only quantities, no prices' (paragraph 99 of the statement of objections) is repeated in recital 104 to the contested decision. Moreover, the Commission took account of the fact that quotas were applied solely at European level and that the undertakings concerned had not partitioned their respective national markets (recitals 267 and 273 to the contested decision). It also took account of the argument that only one customer had been allocated to any member of the cartel (recitals 270 and 277). Moreover, contrary to the applicant's assertion, the Commission did give its view on its arguments in the contested decision (recitals 104, 274, and 290 to 298).

66 Furthermore, it must be borne in mind that, according to settled case-law, the gravity of an infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (see Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 117, and the case-law there cited).

67 The applicant does not deny that the cartel fixed prices and established quotas at European level and that at least one customer was allocated. It must be borne in mind, in that connection, that the first examples of cartels mentioned in Article 81 (1)(a), (b) and (c) EC and expressly declared to be incompatible with the common market are precisely those which:

'(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investments;

(c) share markets or sources of supply;

...'.

68 That is why infringements of that kind, particularly in the case of horizontal cartels, are classified by the case-law as 'particularly serious' (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 675), or 'clear infringements of the Community competition rules' (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraphs 303 and 338).

69 It is also important to bear in mind that 'very serious' infringements within the meaning of the Guidelines are 'generally horizontal restrictions such as price cartels and market-sharing quotas or other practices which jeopardise the proper functioning of the single market, such as partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly' (Section 1 A, second paragraph, third indent).

70 It follows that the Commission was right to classify the infringement at issue as very serious, having regard to its nature. It is nevertheless necessary to examine the allegedly moderate aspects referred to by the applicant.

71 First, with regard to the applicant's argument that the infringement consisted of an informal agreement for which the undertakings concerned had not applied any specific enforcement mechanism, it must be observed that, in order for an agreement between undertakings to be a prohibited agreement, it is not necessary for it to be binding in nature. It is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-59/99 *Ventouris* v *Commission* [2003] ECR I-5257, paragraph 52). The absence of formal measures for monitoring implementation will not necessarily affect the gravity of the infringement. The fact that an unlawful cartel is implemented informally does not stop it from being effective.

72 Although the Commission adjusted the fine in the Polypropylene decision, as stated in paragraph 41 above, its practice in earlier decisions does not itself serve as a legal framework for the fines imposed in competition matters.

73 In this case, as far as the agreement on sales and quotas is concerned, it must be pointed out that the Commission conceded in the contested decision that that agreement was 'in the nature of a "gentleman's agreement", in that the members did not put into practice any specific kind of enforcement mechanism' (recital 72). However, the Commission found that '[e]nforcement of the sales quotas was achieved through pressure brought to bear on the members during cartel meetings' (recitals 72 and 276 to the contested decision). The applicant does not deny that 16 meetings were held among cartel members in the period from March 1994 to May 1998 (recital 70 to the contested decision) and that, at those meetings, the undertakings concerned exchanged information concerning sales and discussed their respective market shares. In fact, those undertakings exchanged their zinc phosphate sales data by using zinc producers' associations as intermediaries and they were thereby able to ensure mutual adherence to their market shares (recitals 69 and 284). Moreover, Union Pigments indicated that the cartel members often argued with each other and accused each other of exceeding the agreed quotas and, therefore, the enforcement of those quotas was achieved through pressure brought to bear at those meetings (paragraph 67 of the Union Pigments statement).

Although Trident emphasises that there was no compensation system, it confirms that the participants made accusations against each other at cartel meetings and complained if their market shares had fallen (paragraph 2.4.19 of the Trident statement).

74 Moreover, according to the contested decision, '[c]ustomer allocation was used as a form of compensation in the event of a company not having achieved its allocated quota' (recital 72). That statement is corroborated by the Union Pigments statement according to which, in 1995, the customer Tekno Winter (hereinafter 'Teknos') was allocated to SNCZ to ensure that it had its quota of 24% (paragraph 67). Union pigments also states that it did not endeavour to obtain new customers at a given time because that would have implied retaliation from the other undertakings concerned (paragraph 77 of the Union Pigments statement).

75 In addition, the applicant does not deny that, on an annual basis, the real market shares of the undertakings concerned closely followed their allocated shares (recital 72 to the contested decision). This shows that the system for implementing the sales agreement was effective even if it was not accompanied by a formal system of penalties.

76 As regards the agreements on prices and the allocation of customers, it is true that the Commission does not in the contested decision (see, for example, recitals 285 and 286) or in its pleadings, identify any particular enforcement mechanism. It must however be observed that it is clear from the case-law that the Commission has a margin of discretion when fixing fines, in order that it may channel the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, and *Archer Daniels Midland and Archer Daniel Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraph 56). In view of the nature of the infringement concerned and the case-law cited in paragraphs 68 and 71 above, and the consequences and repercussions thereof (see paragraphs 111 to 118 and 129 below), the Court considers that the Commission did not exceed that margin of discretion in this case.

77 Second, with regard to the applicant's argument that the risk for competition was limited in that the quotas set by the cartel were established only at European level, it must be borne in mind that the Guidelines refer to infringements intended to partition national markets only indicatively, as examples of infringements which may be classified as very serious (Section 1 A, second paragraph, third indent). Moreover, the Court held in *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, that a cartel which involved, amongst other things, the setting of price objectives cannot escape classification as a very serious infringement on the simple ground that it was a worldwide cartel which involved no partitioning of national markets within the common market (paragraphs 123 to 125). The same reasoning applies in this case.

78 As regards the Cement decision referred to by the applicant, the fact that the Commission classified the partitioning of national markets in that decision as very serious is not relevant to this case. If the cartel at issue in this case had resulted in the partitioning of national markets, the Commission could have imposed a still higher fine. It must be observed, in that connection, that the Guidelines state inter alia that '[w]ithin each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed' (Section 1 A, third paragraph).

79 Moreover, it should be noted that, according to Union Pigments, it had been decided at the first meeting of the cartel on 24 March 1994 that 'prices should not be too different from one country to another so those products would not be shifted across borders' (paragraphs 51 and 74 of the Union Pigments statement). It is therefore clear that the undertakings concerned sought, to some extent, to partition the national markets in this case.

80 Third, with regard to the argument that the infringement should not have been classified as very serious because the price agreement played only a secondary role and related only to reference prices which, by their nature, have more limited

repercussions than fixed prices, it must be borne in mind that the Commission concluded, in the contested decision, that the cartel members had agreed on 'bottom' and/or 'recommended' prices for zinc phosphate (recital 65).

81 The fixing of a price, even one which merely sets a target, affects competition because it enables all the cartel participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 21). More generally, such cartels involve direct interference with the essential parameters of competition on the market in question (*Thyssen Stahl* v *Commission*, cited in paragraph 68 above, paragraph 675). By expressing the common intention to apply a given price level to their products, the producers concerned do not independently determine their policy in the market, thus undermining the concept inherent in the provisions of the Treaty relating to competition (*BPB de Eendracht* v *Commission*, cited in paragraph 68 above, paragraph 192).

82 In view of those considerations, the cartel at issue cannot escape classification as a very serious infringement merely because it fixed reference prices (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraphs 118 to 120).

83 As regards the applicant's argument that the price agreement played only a 'secondary' role, the Court would point out that the fact that the Commission stated that the allocation of sales quotas was the 'cornerstone' of the cartel (recital 66 to the contested decision) does not mean that the agreement on prices must be regarded as secondary. The quota agreement, the customer agreement and the price fixing agreement are three aspects of a single cartel. However, the gravity of the cartel must be appraised as a whole. In view of the nature of the infringement in this case, the Commission was entitled to classify it as very serious.

84 In any event, the Court finds that the price agreement was an important aspect of the cartel. The Commission, moreover, gathered written evidence showing that the recommended prices had been discussed at several cartel meetings (recitals 134, 139, 140, 162, 178 and 186 of the contested decision). Moreover, contrary to the applicant's assertion, the price agreement was one of the elements of the cartel as from 1994. Among the undertakings concerned, the applicant alone claimed in the administrative procedure that that agreement started only in 1996 (recital 268 to the contested decision). However, as indicated above, according to Union Pigments, the undertakings concerned had decided, at the first meeting of 24 March 1994, that prices should not be too different from one country to another (paragraph 51 of the Union Pigments statement). It is also clear from the Trident statement (paragraph 2.4.24) that the cartel fixed prices at each meeting. The documentary evidence of the first meetings is not as voluminous as for the later meetings. However, the agenda of the meeting of 27 March 1995 shows the intention to discuss price development in Germany, France, Benelux, the United Kingdom, the Nordic countries, the United States and the rest of the world (recital 121 to the contested decision).

85 Fourth, the fact that, with the exception of a single customer, Teknos, and one occasion when James Brown was allocated several small undertakings in the United Kingdom, there was no allocation of customers, does not mean that the Commission was not entitled to classify that infringement as very serious.

86 The applicant does not deny that Teknos was allocated, and it was one of the eight main paint producers in western Europe (recital 52 to the contested decision).

87 The undertakings concerned had regular discussions concerning the allocation of that client and made certain that deliveries to it should be made on a turn-by-turn basis (recitals 68, 96 and 97 to the contested decision; paragraphs 63 and 67 of the Union Pigments statement). They had a flexible system of allocation to ensure that Teknos 'did not become suspicious of the arrangement' (recitals 99 and 100 to the

contested decision). The Court notes that the price to be invoiced to Teknos was covered by that agreement and that it had been agreed that no producer other than the one whose turn it was could invoice a price lower than the one agreed (recital 96 to the contested decision and paragraph 2.4.22 of the Trident statement).

88 Furthermore, the applicant likewise does not deny that James Brown was allocated a number of small undertakings (recitals 180 and 277 to the contested decision). James Brown itself does not deny those allocations.

89 It must also be pointed out that the Commission states, on the basis of the Union Pigments note of 30 March 1995, that the allocation of Jotun was discussed (recital 277 to the contested decision). Although that note does not refer directly to the allocation of Jotun, the applicant does not directly contest that statement. Jotun is also listed as one of the eight main paint producers in western Europe (recital 52 to the contested decision).

90 It follows that the Commission was right to find that certain customers were allocated. The fact that such allocation involved only certain customers, and not all those present in the market, is not such as to detract from the conclusion that the cartel in question was classifiable as very serious.

91 In view of those considerations, the applicant's complaint that the infringement committed is not, by its nature, a very serious infringement must be rejected.

The effects of the infringement

— Arguments of the parties

92 As a preliminary point, the applicant observes that the Commission bases its conclusion concerning the very serious nature of the infringement mainly on its effects on the market. It claims that the Commission made errors of assessment in that connection. According to the case-law, the Commission should, when assessing the gravity of the infringement, take account of all circumstances which might be relevant to the effects on the market (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraph 4949). In its earlier decisions, the Commission, in compliance with that case-law, confirmed that the limited repercussions on the market and the failure to apply the agreements in full were factors to be taken into account in assessing the gravity of the infringement (Polypropylene decision, paragraph 108, and Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1998 L 109, p. 24, hereinafter 'the Greek Ferries decision', paragraph 162). In the Greek Ferries decision, the Commission considered that the fact that the parties did not apply the specific price agreements in full and that they engaged in price competition through differential discounting was a reason for classifying the infringement as serious and not as very serious. In contrast, in this case, the Commission took no account of the fact that the agreements at issue had not been strictly implemented or of the fact that they had only limited repercussions on the market.

93 First, regarding implementation of the infringement, the applicant claims that the Commission wrongfully found that the agreement concerning prices had been carefully implemented by the undertakings concerned. First, the Commission based its conclusion concerning implementation of the price agreements on the Trident Statement according to which its internal price list reflected the prices agreed (recital 285 to the contested decision). By so doing, it distorted that statement. In fact, Trident also stated that, in its experience, 'the prices discussed at meetings were not adhered to and it was generally accepted that sales would be made below the benchmark prices discussed' (paragraph 2.4.25 of the Trident Statement). That

statement is confirmed by the Union Pigments statement according to which, first, it was virtually impossible to fix prices and, second, the recommended prices were not observed in the Nordic countries (paragraph 60). The mere fact that Trident reproduced the indicative prices in its internal price list does not permit the inference, in the circumstances, that the agreements at issue were carefully applied.

94 Second, the undertakings concerned sold standard zinc phosphate below the agreed prices and price discounts were also regularly granted. In particular, the prices imposed by the applicant were significantly lower than the reference prices fixed by the cartel. The prices of zinc oxide, and therefore of zinc, had a predominant effect on zinc phosphate prices since they represented the essential component of production costs. Zinc prices underwent considerable fluctuations during the period from 1990 to 2000. The applicant maintains that the increase of its prices in 1997 was linked to the steep increase in the price of zinc and not to compliance with reference prices. Moreover, Trident forwarded to the Commission documents proving that the undertakings concerned regularly sold below the agreed prices. Third, the undertakings concerned were obliged to maintain prices at a rather low level because, in particular, of the risk of imports from third countries. In short, contrary to the Commission's conclusions, the undertakings concerned did not comply with the price agreements. The applicant observes that, in its defence, the Commission did not give its views on the arguments set out above.

95 In the Greek Ferries decision, the Commission decided to reduce the fine and to classify the infringement as serious, rather than very serious, on the ground that the agreements had not been fully implemented. The Commission should have followed that practice in this case. In response to the argument that the Commission is not bound by its practice in earlier decisions, the applicant repeats the view that the Commission must take account of all factors liable to affect assessment of the gravity of the infringement, including those which it considered to be relevant in its earlier decisions. The case-law of the Court of First Instance confirms that the specific impact of the effects of an infringement on the market must be taken into account in

calculating the fine (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 172 et seq.). As to the Commission's argument that a fine must be reduced only if no part of the agreement has been applied, the applicant claims that, even if only one part of an agreement is not implemented, that fact must be taken into consideration. In this case, the fact that the price agreement was not applied should have been taken into account to reduce the amount of the fine.

96 Second, with regard to the repercussions of the cartel on the market, the Commission also committed errors of assessment. First, the applicant contests the Commission's finding that the infringement had actual repercussions because the undertakings concerned were active in 90% of the EEA market. Although the undertakings involved account for a large share of the market, the infringement never concerned modified zinc phosphate but only standard zinc phosphate, which represents only 55% of the European zinc phosphate market. The infringement thus had effects only on a small part of the European zinc phosphate market. As regards the Commission's argument that the diverting of buyers towards modified zinc phosphate must be regarded as an actual repercussion on the market, the applicant replies, first, that that argument was not put forward in the contested decision and, second, that that finding does not in any way change the fact that the infringement concerned only a part of the market and that, therefore, its repercussions were necessarily limited. Second, the undertakings concerned did not attain their essential objectives. In that connection, the applicant states, first, that, as the market had never been shared out by reference to countries, there prevailed, in the various Member States, 'strong competition for customers and, accordingly, for market shares'. It has produced charts to demonstrate significant variations in its sales in the various Member States and, therefore, the strong competition that prevailed on the relevant market. Second, the sharing of customers was exceptional within the cartel. Finally, the reference prices were never attained, which proves the existence of strong competition.

97 The applicant claims that the repercussions of the cartel were limited for several reasons. First, buyers of zinc phosphate are large undertakings which have considerable power to negotiate prices and systematically seek the best offers. In

response to the Commission's argument that such purchasing power does not diminish the repercussions of the cartel, the applicant argues that infringements have significantly more limited repercussions when the other party in the market is powerful than when purchasers are weaker. Second, the presence of third party competitors in the market and the existence of substitution products, including calcium phosphate imported from third countries, brought considerable pressure to bear on the price of standard zinc phosphate. Third, the applicant repeats that, during the infringement, the price of zinc phosphate depended largely on that of zinc and significant fluctuations in the price of zinc influenced that of zinc phosphate. Thus, an agreement on the price of zinc phosphate could not really have any effect. Fourth, zinc phosphate accounts for only a small part of the cost of the final product, namely 0.08%. The minor changes made by the agreements therefore had practically no negative repercussions on the price of paint, or for consumers. In that connection, the applicant observes that, in contrast to its earlier practice, the Commission did not in this case consider whether consumers had suffered adverse effects.

98 In response to the Commission's statement that limited repercussions constitute an important factor in analysing the gravity of the infringement, the applicant argues that that does not in any way change the fact that the Commission must take account of the specific impact of the infringement on the market when determining its gravity. The more limited the impact on the market, the less the infringement should be classified as serious (*Cascades* v *Commission*, cited in paragraph 95 above, paragraph 172 et seq.).

99 Finally, the applicant states that it is necessary 'above all' to regard the non-implementation of agreements in practice as an attenuating circumstance justifying a reduction of the fine in accordance with Section 3 of the Guidelines. On the other hand, in its reply, it claims that the arguments put forward by it in support of that part of the first plea relate to 'the question whether the lack of full implementation of the agreements and the restricted nature of the effects of an infringement must be taken into consideration in assessing the gravity of the infringement' and not to the question of non-application in practice of the agreements as an attenuating circumstance.

100 The Commission contends that it is not required to reduce the basic amount of the fine when not all the parts of the agreement have been implemented and the intended results have not been fully attained on the market. It adds that there is no exhaustive list of criteria for assessing the gravity of an infringement.

101 Next, the Commission denies that its conclusions are vitiated by errors. First, it states that its conclusion concerning implementation of the agreement was not limited to price fixing but also extended to the allocation of market shares and the allocation of at least one customer (recitals 72, 284, 286 and 287 to the contested decision), factors which the applicant does not challenge. The actual implementation of indicative prices is demonstrated not only in the Trident statement, according to which its internal price list reflected the agreed prices (recital 285 to the contested decision), but also by the fact that the applicant's average prices followed the recommended prices for Germany, subject to a time lag. In any event, even if the indicative prices were not entirely attained, that does not mean that the applicant did not contribute to implementation of the agreements. By agreeing on market quotas and target prices, the undertakings concerned secured room for manœuvre in order to exploit their customers. It is clear from the case-law that an undertaking which does not behave in the market in the manner agreed within the cartel can simply endeavour to use the cartel for its own benefit (*Cascades* v *Commission*, cited in paragraph 95 above, paragraph 230). There can therefore be no question in this case of 'non-implementation in practice of the offending agreements' within the meaning of the Guidelines.

102 Second, the Commission denies having made errors of assessment regarding the repercussions of the cartel on the market. First, although the infringement related only to standard zinc phosphate and not to modified zinc phosphate, the fact remains that in practice the cartel controlled world production of zinc phosphate. Even if the infringement encouraged customers to fall back on modified zinc phosphate, that reaction must also be regarded as a real effect of the infringement. Second, the Commission points out that it conceded, in the contested decision, that the results sought by the undertakings concerned had not been fully attained (recital 297). However, the repercussions of the infringement on the market are significant. Those repercussions were demonstrated, first, by the fact that the market shares

actually obtained by the undertakings concerned were practically identical to the shares allocated to them under their agreement concerning quantities (recital 72 to the contested decision) and, second, by the fact that the applicant's average prices faithfully followed the recommended prices, subject to a time lag. That development of average prices also shows that, even if fluctuations in the price of zinc had influenced the price of zinc phosphate, that in no way changed the effects of the additional measures adopted by the cartel members. In any event, if the price of zinc phosphate was determined solely by the price of zinc, the applicant does not explain why the cartel set recommended prices for a period of four years (recitals 92 to 94, 104, 274 and 285 to the contested decision).

103 As regards the reasons for the limited repercussions of the infringement invoked by the applicant, the Commission contends that even limited effects, such as those of which the applicant admits the existence, are significant when determining the gravity of an infringement. It nevertheless contests the arguments put forward by the applicant in that connection.

— Findings of the Court

104 In Section 1 A of the Guidelines, the Commission committed itself explicitly to taking account, in assessing the gravity of infringements, not only of their nature and of the size of the relevant geographic market but also of their actual impact on the market, where this can be measured. In the present case, all those criteria are mentioned in recital 300 to the contested decision.

105 Contrary to the applicant's assertion, the Commission did not 'mainly' found its conclusion concerning the gravity of the infringement on the latter's effects. It

attributed no greater importance to the effects of the infringement than to the other factors. Indeed, it downplayed the significance of the specific impact, first, by pointing out that it was 'extremely difficult' to draw conclusions as to the relevant importance of the effects of cartels of that kind (recital 279) and, second, by taking into consideration the fact that the undertakings concerned had not achieved all the results they sought (recital 297).

106 It must be borne in mind that, according to settled case-law, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraph 150, and the case-law there cited).

107 As regards the sales quotas agreement, the Court considers that the Commission was entitled to conclude that it had been implemented 'carefully' (see paragraphs 73 and 74 above and recitals 72, 284 and 287 to the contested decision). As indicated in paragraph 75 above, it is common ground that, on an annual basis, 'the real market shares of the five producers closely followed their allocated share' (recital 72 to the contested decision). It follows that the Commission rightly concluded that the agreement on sales quotas had repercussions on the market. In addition, at the hearing the applicant admitted that that agreement affected competition in that it led to greater price stability (see also recital 114 to the contested decision). Thus, the stability of the market shares had the effect of making it unnecessary to apply the aggressive price reduction policy which operated during the price war in the years before the cartel came into being (see recitals 74, 75, 114 and 115 to the contested decision).

108 The applicant claims that the price variations on national markets show that the agreement had no effect. In that connection, it must be borne in mind that the quotas were established at European level. Accordingly, even if national prices did vary, that does not in any way change the fact that the European quotas were respected.

109 In those circumstances, the actual impact of the agreement on quotas, the 'cornerstone' of the cartel (recital 66 to the contested decision), must also be regarded as established to a sufficient legal standard.

110 As regards the price agreement, the Commission states, in the contested decision, that it was also carefully implemented (recitals 283 and 285). The applicant contests that statement.

111 It must be borne in mind that the Commission correctly pointed out that the agreement at issue related to price objectives (see paragraph 80 above). However, the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraph 271).

112 The Court considers that, in this case, the parties did endeavour to attain their price objectives. The price level was discussed at each meeting and recommended prices were set (see paragraph 84 above). That setting of prices necessarily affected competition in the market. Purchasers thus found that their room for negotiating prices was limited (see, to that effect, the judgment in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 745). Moreover, as indicated in paragraph 81 above, the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be (*Vereeniging van Cementhandelaren* v *Commission*, cited in paragraph 81 above, paragraph 21).

113 Furthermore, the Commission was entitled to rely on the instructions given by Britannia and Trident concerning their internal lists in support of its conclusion that the price agreement was implemented. Those instructions in fact follow almost exactly the bottom prices fixed at the meetings (see also paragraph 2.4.25 of the Trident statement and recitals 92 and 285 to the contested decision). Trident admitted that those instructions served as a basis for negotiating prices with customers (paragraph 2.4.26 of the Trident statement). It is clear from those lists that the prices contained in the instructions correspond to 'minimum price levels' and that they 'should not be reduced without prior discussions with (name of employee)', that being the person who attended cartel meetings on behalf of Trident (formerly Britannia). Although the Commission may not have demonstrated that all the undertakings concerned gave such instructions, the Court considers that Trident's and Britannia's instructions constitute an important piece of evidence (see, to that effect, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 340 to 342, and *Cascades* v *Commission*, cited in paragraph 95 above, paragraph 194).

114 Moreover, Trident states that the undertakings concerned fairly often complained at meetings regarding sales price levels. They used recommended prices as a point of reference in that connection (paragraphs 2.4.27 and 3.1.2 of the Trident statement).

115 It follows that even if the Commission has not demonstrated in detail that the price agreement was implemented 'carefully', and even if it did not identify a specific enforcement mechanism (see paragraph 76 above), it was entitled to conclude that that agreement was implemented.

116 As regards the repercussions of the price agreement, the Court emphasises that Union Pigments and Trident, being the undertakings which cooperated to the greatest extent with the Commission (recital 366 to the contested decision), noted in several instances that the agreement had either improved price 'coherence' or led to an increase in the prices charged on the market. Those undertakings admitted that one of the advantages of participating in the cartel was the end of the price war

(paragraph 49 of the Union Pigments statement and paragraph 3.1.1(c) of the Trident statement; see also recitals 84 and 103 to the contested decision). It follows that the cartel had the effect of increasing prices on the market. It must also be noted that it is clear from the Union Pigments note dated 30 March 1995, which thus dated back to the time of the material events, that the price initiatives led to an increase in the prices charged on the market. In the same note, Union Pigments mentions, among the advantages of the cartel, the fact that it was able to obtain 'higher prices in the first quarter of 1995'. Moreover, Union Pigments declared, in its statement, that, year after year, the result of the agreement was better price 'coherence', except in the Nordic countries (paragraph 73 of the Union Pigments statement). The applicant states that it was 'practically impossible', according to Union Pigments, to fix prices and that the reference prices were not complied with in the Scandinavian countries. In that connection, it must be pointed out that, in its statement, Union Pigments stated that it was 'difficult', and not 'practically impossible', to ensure that prices did not vary from one country to another as a result of currency fluctuations (paragraph 60 of the Union Pigments statement).

117 As the applicant indicated, Trident stated that the prices discussed at the meetings were not fully complied with and that it was generally accepted that sales might be made below the reference prices that had been agreed (paragraph 2.4.25 of the Trident statement). The Commission took into account, in the contested decision, the argument that the sales prices did not exactly follow the recommended prices (recitals 275, 291 and 297). The Court would point out, in that connection, that the cartel set only price objectives, not fixed prices. It cannot be inferred from the fact that the undertakings sold below the reference prices that the cartel had no effects. The benefit obtained by the cartel members derived from their knowledge of one another's approaches to pricing which governed their respective negotiations with their customers. Moreover, it must be pointed out that Trident accepts that the tables attached to its statement show that, from the start of 1995, its average prices were higher than previously. According to Trident, it may be concluded that price stability at a higher level was the result of cartel meetings (paragraph 3.2.7 of the Trident statement). Trident also states that the variations in its selling prices followed the prices recommended by the cartel (paragraphs 2.4.26 and 3.2.5 of the Trident statement).

118 It is thus clear from objective findings made by the main undertakings that cooperated with the Commission that the price initiatives had an effect on the level of market prices (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 112 above, paragraphs 746 and 747).

119 The applicant also maintains that the repercussions of the cartel were limited for several other reasons.

120 First, with regard to the applicant's argument that the buyers of zinc phosphate are large undertakings which have considerable power to negotiate prices and systematically seek the best offers, it must be noted that the Commission did not allege the contrary in the contested decision (recitals 51, 52 and 339). Despite the purchasers' power, the Commission was entitled to conclude that the conditions of competition had been distorted by the cartel.

121 Second, the applicant asserts that the presence in the market of third-party competitors and the existence of substitution products, including calcium phosphate imported from third countries, brought considerable pressure to bear on standard zinc phosphate prices. The applicant maintains that standard zinc phosphate represents only 55% of the European zinc phosphate market and that the infringement therefore only had effects on part of the market. In its response to a question put to it by the Court, the Commission accepts that it did not undertake a detailed analysis of the relevant market and confirms that the decision relates only to standard zinc phosphate. Although the Commission makes reference to partial substitutes in the contested decision, including calcium phosphate and modified zinc phosphates (recitals 45 and 46 to the contested decision), it does not examine the importance of those substitutes and, in particular, it does not establish whether standard zinc phosphate forms part of the same market as those substitutes.

122 It must be pointed out at the outset that the Commission has an obligation to define the market in a decision adopted under Article 81 EC where, without such a definition, it is impossible to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105, and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230). Furthermore, the turnover in products which have been the subject of a restrictive practice constitutes an objective criterion which gives a proper measure of the harm which that practice causes to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 91).

123 In this case, the applicant contests only the precise extent of the effects of the infringement (see paragraph 94 above). It admitted, both in its written submissions and at the hearing (see paragraph 107 above), that the infringement did have effects.

124 Moreover, it is common ground that the undertakings concerned controlled 90% of standard zinc phosphate production. Even if it were assumed that the market in the relevant products also included other products, a large part of that market would have been under the control of the undertakings concerned. As the Commission has produced specific evidence of the effects of the infringement (see paragraphs 107 to 118 above), in particular objective findings by the producers themselves at the material time, the Court considers that the Commission sufficiently demonstrated the effects of the infringement. It should be borne in mind in that connection that the Commission attenuated the importance of the effects of the infringement in the contested decision (see paragraph 105 above).

125 Also, in the contested decision, in response to an argument from SNCZ to the effect that the potential substitutability of other products for zinc phosphate proves that

the infringement had no real effect, the Commission found, first, that such substitutability had not been demonstrated and, second, that SNCZ admitted that calcium phosphate is still used only in relatively small quantities (recital 297 to the contested decision). In the present action, the applicant has not produced evidence that the alleged substitute products brought 'considerable pressure to bear on the price of standard zinc phosphate'. On the other hand, Union Pigments clearly stated that the applicant sought to obtain higher prices for standard zinc phosphate in order to make modified zinc phosphate more competitive (paragraph 59 of the Union Pigments statement and the Union Pigments note of 25 March 1995). Accordingly, the applicant's argument that the risk of substitution limited the impact of the cartel cannot be accepted. Moreover, it must be pointed out that it is clear from the Union Pigments statement that imports from third countries remain limited (paragraphs 33 and 34 of the Union Pigments statement).

126 Third, with regards to the applicant's assertion that the increase of its prices in 1997 was linked to a steep increase in the price of zinc and not to observance of the reference prices, it must be pointed out that the Commission stated expressly in the contested decision that several factors may effect the price development of the product at issue (recital 279 to the contested decision). It admits in particular that zinc phosphate was heavily dependent on the price of zinc metal (recital 339). The Commission was entitled to conclude that that factor should not be overestimated. There was only one substantial increase in the price of zinc metal in 1997, whereas the cartel was in force from 1994 onwards (recital 340 to the contested decision). Moreover, although there was a steep increase in the price of zinc in 1997, it is clear from Annex 6 to the application that there was also a steep fall in that price at the end of 1997 but it was not accompanied by a corresponding decrease in the price charged by the applicant for zinc phosphate (see also recital 340 to the contested decision).

127 In any event, the effects to be taken into consideration in determining the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted but those resulting from the whole of the infringement in which it participated (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999]

ECR I-4125, paragraph 152, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraphs 160 and 167).

128 Fourth, the applicant claims that zinc phosphate represents only a small part of the cost of the final product, namely 0.08%, and that the minor changes made by the agreements therefore had virtually no negative repercussions on the price of paints, or for consumers. Although the Commission has not contested that zinc phosphate represents only a small part of the cost of the final product (recitals 48 and 53 to the contested decision), it does not appear from the contested decision that it considered that factor in determining the amount of the fines. According to the case-law, the value of the product may, depending on the circumstances, be one of the factors for assessing the gravity of the infringement (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraphs 120 and 121). In this case, the Court does not consider that the Commission was required to take account of that factor in determining the gravity of the infringement and, in particular, in appraising the effects of the infringement. The fact that zinc phosphate represents only a small part of the cost of the final product has no repercussions on the gravity of the infringement and, as the Commission points out, in no way changes the fact that market conditions were distorted for customers. If zinc phosphate had been a larger cost factor, the infringement would have had even more far-reaching effects. Moreover, the Commission is not required to show that a cartel is harmful to consumers in order to be entitled to classify the infringement as very serious.

129 As regards the agreement concerning customers, although the Commission does not identify any particular mechanism for implementing it (see paragraph 76 above), the Court considers that that agreement was put into effect, at least to some extent. In particular, the price to be invoiced to Teknos was covered by that agreement and it was agreed that no producer other than the one whose 'turn' it was could invoice a price lower than the one agreed (see paragraph 87 above). The fact of prohibiting sales to a customer below an agreed price because that customer was allocated to another undertaking clearly has an impact on the degree of competition which would otherwise have existed.

130 As regards the agreements as a whole, and as the Commission noted in the contested decision (recital 298), the practices complained of were applied for more than four years. It is therefore very unlikely that the producers would, at that time, have considered that they were wholly ineffective and pointless (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 112 above, paragraph 748). Furthermore, it is common ground that the cartel originated from a price war and pursued, among other things, the ending of that war. As indicated in paragraph 116 above, one of the advantages accruing to the undertakings concerned from their participation was the end of that price war (paragraph 49 of the Union Pigments statement and paragraph 3.1.1(c) of the Trident statement; see also recitals 84 and 103 to the contested decision). The Court considers that participation in the cartel for more than four years also shows that the undertakings concerned did not, essentially, bring that price war to an end. It follows that the undertakings concerned adjusted their prices in order to attain a higher transaction price level than that which would have prevailed in the absence of a cartel.

131 Finally, the applicant claims in its application that its failure actually to give effect to the infringement should have been taken into account as an attenuating circumstance.

132 As is clear from the case-law, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623, and *Commission* v *Anic Partecipazioni*, cited in paragraph 127 above, paragraph 150) in order to determine whether aggravating or attenuating circumstances exist in relation to them.

133 Section 3 ('Attenuating circumstances') of the Guidelines contains a non-exhaustive list of circumstances which may lead to reduction of the basic amount of the fine, including non-implementation in practice of the offending agreements (Section 3, second indent). It is necessary to check, in that connection, whether the circumstances relied on by the applicant are capable of showing that during the

period in which it was a party to the infringing agreements it actually avoided applying them by adopting competitive conduct in the market (see, to that effect, *Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraphs 4872 to 4874, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraph 268).

134 However, the applicant has not shown that it did in fact avoid applying the cartel by adopting competitive conduct in the market. It denies neither that it participated in the cartel meetings nor that it exchanged information concerning its sales with the other undertakings concerned. It participated in the agreement on sales and the customer allocation agreement. The Court has already rejected the applicant's assertion that it had not applied the price agreement. It follows that that argument cannot be accepted.

135 It follows from all the foregoing that the Commission was right to consider that the cartel had specific effects.

The failure to take account of the crisis in the sector as an attenuating circumstance

— Arguments of the parties

136 The applicant criticises the Commission for not taking into account, as an attenuating circumstance, the crisis in the European zinc phosphate sector. In the past, the Commission considered that the existence of structural crises constituted an attenuating circumstance when determining the amount of the fine (Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article

81 of the EC Treaty (Case IV/E-1/35.860-B — Seamless steel tubes) (OJ 2003 L 140, p. 1, hereinafter 'the Seamless steel tubes decision'), and Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy surcharge) (OJ 1998 L 100, p. 55, hereinafter 'the Alloy surcharge decision'), paragraph 83. The economic situation in the zinc phosphate industry is directly comparable to the crisis situation described in the Alloy surcharge decision, where the difficult economic situation in the sector was taken into account, entailing a reduction of the fine of 10% to 30%. The crisis in the zinc phosphate market was greater and existed for the whole duration of the infringement. The price of zinc, universally known through its quotation on the commodities exchange, is constantly subject to fluctuations. The applicant claims that, because of the economic strength of the purchasers of zinc phosphate, it was difficult to pass on to purchasers the frequent increases in the price of zinc, and the purchasers brought great pressure to bear on zinc phosphate producers to ensure that decreases in the price of zinc were passed on to purchasers. The applicant states that the crisis was exacerbated by certain factors described above, including the risk of low-price imports from countries outside the EEA and the fact that calcium phosphate was increasingly substituted for standard zinc phosphate. Consequently, the applicant's turnover in standard zinc phosphate fell by about 20% during the 1990s.

137 The applicant states that most of the active zinc phosphate producers confirmed that the sector was experiencing an economic crisis (recital 337 to the contested decision). It is clear from the contested decision that the Commission itself admits that the economic situation in the market was difficult (recital 339 to the contested decision). However, it refused to recognise that crisis as an attenuating circumstance justifying a reduction of the fine. By so doing, the Commission disregarded the Community case-law (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 340) and its practice in earlier decisions.

138 The Commission rejects that complaint, observing that it never accepted that the zinc phosphate market was experiencing a structural crisis (recitals 339 and 340 to the contested decision). Moreover, it contends that its analysis of any crisis in the market is a complex economic appraisal and that, therefore, any review by the Community judicature is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 34). However, the applicant has made no such pleas or complaints.

— Findings of the Court

139 The Court considers that the applicant cannot rely on the alleged crisis affecting the zinc phosphate sector. It need merely be borne in mind that, in its judgment in *Lögstör Rör* v *Commission*, cited in paragraph 33 above (paragraphs 319 and 320), delivered in the Pre-insulated pipe case, the Court held that the Commission was not required to regard the poor financial state of the sector in question as an attenuating circumstance. The Court has also confirmed that the fact that in previous cases the Commission had taken account of the economic situation of the sector as an attenuating circumstance did not mean that it necessarily had to continue to follow that practice (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 372). As the Commission rightly pointed out, as a general rule, cartels come into being when a sector encounters problems (*Tokai Carbon and Others* v *Commission*, cited in paragraph 37 above, paragraph 345).

140 In any event, contrary to the applicant's assertion, the Commission did not accept that there was a crisis in the zinc phosphate sector. It merely observed that the economic context was difficult because of the maturity of the market, its strong dependence on the price of zinc metal and the buying power enjoyed by the customers (recital 339 to the contested decision). On the other hand, it did not consider that structural problems existed in the market. Moreover, as stated in

recital 340 to the decision, there was only one significant increase in the price of zinc metal in 1997, whereas the cartel operated as from 1994. Moreover, it does not appear from the file that the market in question was experiencing great difficulties.

The comparison with other cartels

— Arguments of the parties

141 The applicant observes that an examination of recent cases in which infringements have been classified by the Commission as very serious shows that the infringement at issue in this case does not fall into that category. Those recent cases are distinguished from the present case by a higher degree of organisation, recourse to significantly more effective means of action and more significant repercussions on the market (Cement decision, cited in paragraph 56 above, paragraph 65, Pre-insulated pipes decision, cited in paragraph 29 above, paragraph 63, and Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1, hereinafter 'the Vitamins decision').

142 The Commission should not have placed the present case in the same category as those described above. First, the undertakings concerned in this case never fixed quotas for the various countries and never protected their national markets. Second, the infringement in question did not involve a whole series of products but only normal zinc phosphate. Third, given that zinc phosphate represents only a minimal proportion of the cost of paints, the only products in which zinc phosphate can be used, its importance in the paint market is limited and no consumer suffered any loss. Fourth, prices played only a secondary role and no penalising measure was envisaged. The applicant claims that the Commission accepts that the infringements in the cases mentioned in paragraph 141 above were even more serious than the one

at issue in this case. It does not therefore understand why the Commission imposed on it a much higher fine than those imposed on the undertakings in the abovementioned cases. It states, by way of example, that the fine imposed on it is, by reference to its total turnover, 21 times higher than that imposed on the 'ringleader' of the cartel in the Pre-insulated pipe case.

143 The Commission rejects that complaint, observing that the infringement at issue has already been classified as very serious by reason of its subject-matter, the allocation of market shares and the fixing of prices affecting the entire EEA. It contends that it was entitled, within the category of very serious infringements and in accordance with the Guidelines, to take account of the fact that the cartels referred to by the applicant displayed additional characteristics contributing to the gravity of the infringements committed, without thereby having to place the infringement committed by the applicant in the category of serious infringements. The Commission states that the point of departure set for the applicant was at the lower end of the scale of amounts provided for by the Guidelines for serious infringements. As regards the applicant's allegation that it received a more severe fine than the undertakings in the other cases referred to, the Commission replies that the determination of the fine is not the result of a simple arithmetic calculation based on turnover and, in that connection, refers to the arguments set out above.

— Findings of the Court

144 It must be borne in mind that the horizontal agreement to which the applicant was a party involved restrictions consisting in the fixing of sales quotas, the setting of price targets and the allocation of customers. As indicated in paragraphs 67 to 70 above, an infringement which covers quotas and the fixing of prices, even indicative prices, is of a particularly serious nature. Moreover, the infringement had effects on the market (see paragraphs 107 to 130 above) and covered the entire common market and, after its creation, the whole EEA. The Court therefore considers that the Commission was right to classify the infringement as very serious.

145 It cannot be inferred from the existence of other cases involving even more serious infringements of competition law that the infringement committed in this case is not very serious. It must be observed that the Guidelines provide that, within the minor, serious and very serious categories of infringement, the scale of penalties adopted makes it possible to apply differential treatment to undertakings according to the nature of the infringement committed (Section 1 A, third paragraph). Moreover, the fines imposed in this case were considerably lower than the minimum amount available for very serious infringements (see paragraph 40 above). Although the Commission chose to classify this infringement as very serious, it in fact distinguished this case from the other very serious cases in which much higher fines were imposed.

146 As regards the argument that the fine imposed on the applicant was more severe than those imposed on cartel members in earlier cases, it need merely be borne in mind that, provided it complies with the upper limit laid down in Article 15(2) of Regulation No 17, the Commission is not required to perpetuate any given practice in fixing the level of fines. As indicated in paragraph 41 above, the fact that the Commission may in the past have 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 (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraph 109, and *Europa Carton* v *Commission*, cited in paragraph 41 above, paragraph 89).

147 Moreover, 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 (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 278).

148 Furthermore, the gravity of infringements must be established by reference to numerous factors such as, notably, 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 (*Ferriere Nord* v *Commission*, cited in paragraph 43 above, paragraph 33, and *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 236). The Commission is not required to apply a precise mathematical formula, in relation either to the total amount of the fine imposed or its various components (Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 119).

149 It follows from all the foregoing that the first part of the first plea must be rejected.

(b) The second part: failure to take account of the fact that only a small proportion of the applicant's turnover was involved

Arguments of the parties

150 The applicant claims that, according to settled case-law, the Commission must, when determining the amount of a fine, take account of those cases in which the turnover of the undertaking in question for the products covered by the infringement represents only a small proportion of its total turnover (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraph 121, and Opinion of Advocate General Sir Gordon Slynn in that case, at page 1950; Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94, and *Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraph 5026). It observes that its turnover in standard zinc phosphate sales at European level in 2000 accounted for only 4.9% of its total turnover, namely EUR 3.48 million. However, the Commission took no account of that factor in determining the amount of the fine and therefore infringed Article 15(2) of Regulation No 17 and the Guidelines.

151 It is not sufficient that the Commission, when determining the specific weight of each undertaking, took account of the turnover in the product concerned at EEA level since, according to the case-law, it should consider, for each undertaking concerned, the turnover in the sector as compared with total turnover when determining the absolute amount of the fine. Moreover, the fact that the Commission expressed, in the contested decision, its intention to take account of the smaller size of the zinc phosphate market does not resolve the problem.

152 The applicant contests the Commission's argument that it took account of diversification in the contested decision and observes that that factor is not even mentioned in the decision. As regards the Commission's interpretation of the Opinion of Advocate General Sir Gordon Slynn in *Musique diffusion française and Others* v *Commission*, cited at paragraph 150 above, to the effect that it is not required to take account of diversification except when it fixes the fine on the basis of a percentage of total turnover, the applicant submits that the Commission implicitly admitted the contrary view in its defence. It there stated, first, that it also took account of diversification in this case and, second, that whilst diversification is of only 'little importance', it nevertheless is important.

153 The Commission contests the applicant's arguments. It contends, in particular, that it took account of the fact that a small proportion of its turnover derived from standard zinc phosphate, even if it does not explicitly mention that fact in the contested decision. The proportion of turnover corresponding to the goods covered by the infringement gives an indication of the extent of the infringement. However, in accordance with the case-law, the Commission did not attach disproportionate importance to the turnover in the products covered by the infringement as compared with the other factors of appraisal (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraph 121, and *Parker Pen* v *Commission*, cited in paragraph 150 above, paragraphs 89 and 94).

Findings of the Court

154 It must be borne in mind first that, according to settled case-law, disproportionate significance must not be attributed to one or other of the various turnover figures as compared with the other factors of appraisal, and consequently that the fixing of an appropriate fine cannot be the result of a simple calculation based on total turnover, in particular where the goods concerned represent only a small fraction of that turnover (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraphs 120 and 121, and *Parker Pen* v *Commission*, cited in paragraph 150 above, paragraph 94). Thus, in *Parker Pen* v *Commission*, the Court upheld the plea alleging breach of the principle of proportionality on the ground that the Commission had not taken account of the fact that the turnover in the products covered by the infringement was relatively low as compared with the total turnover achieved by the undertaking concerned.

155 In this case, as the Commission did not base its calculation of the amount of the fine to be imposed on the applicant on its total turnover, the applicant cannot rely on the judgment in *Parker Pen* v *Commission*, cited in paragraph 150 above (*ABB Asea Brown Boveri* v *Commission*, cited in paragraph 33 above, paragraph 156).

156 It is clear from the contested decision that, in accordance with the case-law, the Commission took account of a whole series of factors other than the total turnover in setting the fine, including the nature of the infringement, its actual effects, the importance of the undertakings concerned in the market, the dissuasive effect of the fines and the limited size of the relevant market (see recitals 262 to 309; see also, to that effect, *ABB Asea Brown Boveri* v *Commission*, cited in paragraph 33 above, paragraph 157; *Tokai Carbon and Others* v *Commission*, cited in paragraph 37 above, paragraph 202, and Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 60).

157 For those reasons, the second part of the first plea must be rejected.

(c) The third part of the plea: error in law through failure to take account of the economic capacity of the applicant

Arguments of the parties

158 The applicant maintains that the Commission, in breach of the Guidelines, failed to take account of its limited economic capacity when calculating the fine. It states that, by letter of 15 November 2001, it asked the Commission to take account of its economic difficulties in the sector concerned, including the fact that it had suffered considerable losses and a decrease of about 20% of its turnover in 2000 and 2001. The applicant's balance sheet as at 31 December 2000 shows a figure of EUR 40 million, of which EUR 21 million comprise debts resulting from bank loans. Its capital and reserves represented only 5% of the balance sheet total, a precarious situation. However, the Commission refused to take account of those difficulties in the contested decision, thereby infringing the Guidelines, in which it is stated that account should be taken, in determining the amount of the fine, of the specific characteristics of the undertakings in question, including 'their real ability to pay in a specific social context' (Section 5(b)), thereby erring in law. The applicant adds that, if it had to pay the fine, its survival would be jeopardised.

159 The Commission denies having erred in law in its appraisal of the applicant's financial situation. The applicant did not provide sufficient information on that matter during the administrative procedure. Moreover, in its letter of 15 November 2001, the applicant did not state either that it would not be able to pay a fine of a particular level or refer to the 'particular social context' mentioned in the Guidelines. In those circumstances, the Commission considers that it had no reason, when it adopted the contested decision, to seek more precise information on the applicant's financial situation, as it did in Trident's case (recitals 367 and 368 to the contested decision).

160 Even if account is taken of the information provided by the applicant in its application, a reduction of the fine, which the Court may make in the exercise of its unlimited jurisdiction, cannot be envisaged. The applicant has not shown that the survival of its business would be seriously threatened by the fine in question.

Findings of the Court

161 It should be borne in mind first that, according to settled case-law, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of the undertaking concerned, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 308; *HFB and Others* v *Commission*, cited in paragraph 33 above, paragraph 596, and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, hereinafter 'the *FETTCSA* judgment', paragraph 351, and the case-law there cited).

162 That case-law is not called in question by Section 5(b) of the Guidelines, which states that an undertaking's real ability to pay must be taken into consideration. That ability applies only in a 'specific social context', consisting of the consequences which payment of a fine would have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned (*Tokai Carbon and Others* v *Commission*, cited in paragraph 37 above, paragraph 371). It must be pointed out that the applicant has produced no evidence to enable the 'specific social context' to be examined.

163 Furthermore, the fact that a measure adopted by a Community authority brings about the insolvency or liquidation of a given undertaking is not prohibited as such by Community law (see, to that effect, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14, and Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031,

paragraph 38). Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value (*Tokai Carbon and Others* v *Commission*, cited in paragraph 37 above, paragraph 372).

164 Moreover, the applicant gave the Commission only scant information concerning its financial situation prior to the adoption of the contested decision. It did not make any reference to its actual ability to pay or to any 'specific social context'. Even in its pleadings in this case, the applicant has not produced any evidence to show that it could not pay the fine in question, which represents only 5.3% of its total turnover.

165 It must therefore be concluded that the Commission was entitled, in the exercise of its discretion, to consider that no account should be taken of the applicant's financial difficulties.

166 It follows that the first plea must be rejected.

2. *The second plea: breach of the principle of proportionality*

(a) Arguments of the parties

167 The applicant claims that, even if the contested decision does not infringe Article 15 (2) of Regulation No 17 and the Guidelines, the fine imposed is disproportionate in relation to the infringement committed, its size and the importance of the relevant market.

168 First, it asserts that the Commission disregarded the objectives of Article 15(2) of Regulation No 17 and thus infringed the principles of proportionality and appropriateness. When setting the amounts of the fines, the Commission should pursue the aims both of repression and deterrence (Case 41/69 *ACF Chemiepharma* v *Commission* [1970] ECR 661, at 703). Deterrence comprises both the general dissuasive aspect and specific prevention designed to encourage the undertaking concerned to revert to conduct in accordance with law. Such specific prevention would not be attained if the fine exceeded what the undertaking concerned has the economic capacity to pay. In this case, the Commission took account neither of the aims of specific prevention nor of the applicant's economic capacity, which is significantly limited as a result of the crisis prevailing in the market. In response to the Commission's contention that it took account of the size of the market and the applicant's economic capacity, the applicant submits that the Commission considered the size of the zinc phosphate market in only a limited manner and that it did not analyse the applicant's particular situation.

169 Second, the Commission did not, in the contested decision, take account of the fact that the applicant made almost no profit on standard zinc phosphate and had in fact incurred losses in some years. That omission runs counter to Section 5(b) of the Guidelines, in which the Commission expresses its intention to take account of offenders' lack of profits in determining the amount of the fine.

170 The applicant also states that the Commission continually contends that it is not required to take account of factors that are favourable to the applicant, even if they are relevant. Systematic failure to take account of such factors would lead to a fine of an inappropriate and disproportionate amount.

171 Third, the applicant submits that an examination of previous Commission decisions discloses a disproportion between, on the one hand, the fine imposed and, on the other, the infringement concerned and the applicant's economic capacity. In the Alloy surcharge decision, the Commission set the starting point at EUR 4 million,

although the undertakings concerned had much larger turnovers than that of the applicant (paragraph 76 of the Alloy surcharge decision). In the Volkswagen decision, the Commission found that Volkswagen had participated in a very serious infringement and had infringed a principle of the Treaty, namely the creation of a common market (paragraph 213). Consequently, the Commission imposed a fine of EUR 102 million on Volkswagen, which represented only about 0.146% of the total turnover of the Volkswagen group. The fine imposed on the applicant is, in proportion to its turnover, 60 times higher than that imposed on Volkswagen. The manifestly disproportionate nature of the fine imposed on the applicant is even more clear if it is borne in mind that the fine imposed on Volkswagen was the largest fine ever imposed on an individual undertaking. Moreover, the latter fine was ultimately reduced to EUR 90 million by the Court of First Instance (*Volkswagen* v *Commission*, cited in paragraph 122 above). Moreover, British Sugar, the leader of a price-fixing cartel which held particularly large market shares, had attributed to it a starting point of EUR 18 million, namely 0.015% of its total turnover. The starting point used for the applicant is, in relation to its turnover for 2000, about 280 times higher than the amount imposed on British Sugar. There is nothing to justify such disproportion. The applicant refers to other Commission decisions in support of its view that the fine imposed on it breaches the principle of proportionality (Pre-insulated pipes decision, cited in paragraph 29 above, and Seamless steel tubes decision, cited in paragraph 136 above). In short, the Commission did not take sufficient account of the applicant's overall size in this case and therefore breached the principle of proportionality. Even if the Commission enjoys some discretion as regards increasing the level of fines, it is not entitled to do so without observing the principles of proportionality and appropriateness.

172 As regards the Commission's argument that a comparison with its previous practice is incorrect in that it is limited to turnover figures, the applicant replies that, essentially, the cases to which it refers concern circumstances even more serious than those of this case. Moreover, in those cases, the circumstances were not of a moderate nature, as in this case. However, the fine is much higher in this case than in the other cases. The applicant also rejects the Commission's argument that those

cases are not authoritative, because they date from 1998, observing that all the decisions on which it relies were adopted after the introduction of the Guidelines, which were followed by a significant increase in the level of fines.

173 Finally, the applicant contests the Commission's statement that it is comparing 'apples with pears'. It states that the Commission claims that the applicant calculated the fine, first, in the context of its fifth plea below, alleging lack of a statement of reasons, as a percentage of the relevant turnover in the product concerned in the EEA (paragraph 213 below) and, second, in the context of the present plea as a percentage of its total worldwide turnover. The applicant considers that both comparisons are valid and confirm that the amount of the fine is not appropriate. It certainly did not confuse the two comparisons. In its reply, the applicant draws attention, when making a comparison with the Commission's earlier practice, to the relationship between, first, the fine imposed on Volkswagen and its turnover in the product concerned in the EEA and, second, the fine imposed on the applicant and its turnover in the product concerned. Having regard to the turnover achieved by Volkswagen in the product concerned in the EEA, the fine imposed on the applicant is almost 450 times higher than that imposed on Volkswagen, constituting manifest evidence that the Commission erred in law by failing to take account of the applicant's diversification.

174 The Commission denies having infringed the principle of proportionality and making an error of assessment. First, as regards the aims of fines, it states that deterrence directed not only at the undertaking concerned but also at third parties is a legitimate objective (*ACF Chemiepharma* v *Commission*, cited in paragraph 168 above, paragraphs 172 to 176; Case 49/69 *BASF* v *Commission* [1972] ECR 713, paragraph 38, and *Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraphs 106 and 109). According to the Commission, if, despite its numerous decisions, such clear and significant infringements of the competition rules as the one in the present case are still occurring, it is clear that the deterrent effect of fines is particularly important (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraphs 144 and 145). It also contends that it took account of the applicant's economic

capacity by setting the point of departure at EUR 3 million, which is considerably lower than the amounts available under the Guidelines in cases of serious infringements.

175 Second, the Commission maintains that, whilst it may regard the receipt of profits as an aggravating circumstance, that does not mean that it is obliged to take account of the lack of any advantage as a factor giving rise to a reduction of the fine (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraphs 4881 and 4882, and *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 307).

176 Third, it is not apparent from a comparison with the Commission's practice in earlier decisions that the fine in this case infringes the principles of proportionality and appropriateness. The applicant merely compares the percentages of fines in relation to the turnovers of the undertakings concerned despite the fact that, according to the case-law, the proportionality of the fine must be assessed having regard to all the circumstances surrounding the infringement (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 112 above, paragraph 1215). Moreover, all the Commission decisions mentioned by the applicant concern fines imposed on large undertakings. The Commission considers that it cannot impose astronomic fines on large undertakings merely in order to preserve the proportionality in relation to turnover contended for by the applicant. Similarly, it cannot impose fines lower than the minimum threshold, which would have no deterrent effect, on smaller undertakings such as the applicant.

177 Referring to its arguments responding to the other pleas mentioned above, the Commission observes that the comparisons which the applicant draws with earlier decisions imposing fines are wholly irrelevant from the outset. It submits that it is precisely because it duly took account, in calculating the fine, of the different sizes of the undertakings concerned, contrary to the applicant's assertion, that the latter

cannot seriously claim that it should have divided the fine of EUR 3 780 000 by 450, arriving at a fine of EUR 8 400, in order to preserve proportionality in relation to the fine imposed on Volkswagen by reference to turnover achieved in the EEA.

(b) Findings of the Court

178 In the first part of its arguments concerning breach of the principles of proportionality and appropriateness, the applicant criticises the Commission for breaching those principles, in that it took no account of the objectives of specific prevention or of the economic capacity of the applicant.

179 According to the case-law, the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Article 81(1) EC or Article 82 EC is one of the means conferred on the Commission in order to enable it to carry out the task of supervision entrusted to it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraph 105).

180 It follows that the Commission has the power to decide the level of fines in order to reinforce their deterrent effect when infringements of a particular type, although established as being unlawful at the outset of Community competition practice, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraph 108).

181 As is clear from the abovementioned case-law, the objective of deterrence which the Commission is entitled to pursue when setting fines is intended to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the EEA. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of the undertaking sanctioned (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraph 110).

182 Moreover, Section 1 A, fourth paragraph, of the Guidelines provides, inter alia, that it is necessary, in assessing the gravity of an infringement, 'to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

183 It is clear from the contested decision that the Commission took account of the applicant's economic capacity to cause damage to competitors, and the need to set the fine at a level ensuring a deterrent effect (recitals 304 to 309). The Court considers that the fine imposed is not disproportionate in relation to the size of the undertaking concerned. The applicant's worldwide turnover in 2000 was EUR 71.018 million. The fine imposed, namely EUR 3.78 million, represents only 5.3% of its overall turnover. Moreover, it has not been established that the applicant is unable to pay such a fine (see paragraph 164 above). In any event, the Court considers, in the context of its unlimited jurisdiction, that, in view of the gravity and duration of the infringement, the amount of the fine is appropriate.

184 Next, with regard to the second part of this plea, alleging that the Commission infringed the principle of proportionality by not taking account of the fact that the applicant earned almost no profit from the product in question and that it had even, in some years, incurred losses in that segment of the market, it must be borne in

mind that, although the amount of the fine imposed must be proportionate to the duration of the infringement and the other factors capable of affecting the assessment of the gravity of the infringement, such as the profit that the undertaking was able to derive from its practices (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127), the fact that an undertaking did not benefit from the infringement cannot, according to the case-law, preclude the imposition of a fine, since otherwise it would cease to have a deterrent effect (*Ferriere Nord* v *Commission*, cited in paragraph 43 above, and *FETTCSA*, paragraph 340).

185 It follows that the Commission is not required, in order to fix fines, to take into consideration any lack of benefit from the infringement (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraph 4881, and *FETTCSA*, paragraph 341).

186 Although the Commission may, under its Guidelines (Section 2, first paragraph, fifth indent) and in respect of aggravating circumstances, increase the amount of the fine in order to exceed the amount of the gains improperly made as a result of the infringement, that does not mean however that it is then required to establish, in every case, for the purpose of determining the fine, the financial advantage linked to the infringement found to have been committed (*FETTCSA*, paragraphs 342 and 343). In other words, the absence of such a benefit cannot be regarded as an attenuating circumstance.

187 In those circumstances, the applicant's complaint concerning the failure to take account of the benefit derived from the infringement must be rejected.

188 Finally, so far as concerns, third, the argument concerning comparison with previous decisions of the Commission, it must be rejected for the reasons set out in paragraphs 41 to 43 above.

189 It follows from all the foregoing considerations that the second plea must be rejected.

3. *The third plea: breach of the principle of equal treatment*

(a) Arguments of the parties

190 First, the applicant claims that the Commission infringed the principle of equal treatment by failing to take account of its turnover in the product in question in comparison to its total turnover for the purpose of applying the upper limit of 10% mentioned in Article 15(2) of Regulation No 17. It observes that the amount of the fine imposed on SNCZ was reduced from EUR 4.2 to EUR 1.7 million in accordance with that upper limit because that company had a total turnover of only EUR 17.08 million in 2000. On the other hand, the applicant was granted no such reduction on account of its total turnover of EUR 71.018 million. The applicant claims that that unequal treatment derives from structural differences between the two undertakings. It is at a disadvantage as a family undertaking carrying out most of its business through a limited partnership (GmbH & Co. KG) since it has a comparatively high turnover. In determining the fine to be imposed on it, the Commission relied exclusively on its high total turnover, whereas the major part of its business has no link with the products involved in the infringement. In contrast, the group to which SNCZ belongs had a turnover of EUR 278.8 million, but that group divided its business among a number of companies and SNCZ therefore had a turnover amounting to only EUR 17.08 million. SNCZ's turnover in the product in question nevertheless represents about 22.9% of its total turnover. Thus, the fine imposed on the applicant, 'compared with the turnover in the product concerned', is more than two times higher than that imposed on SNCZ. According to the applicant, the case-law requires that the ratio between turnover in the product concerned and total turnover should be taken into consideration by the Commission to avoid such instances of unequal treatment.

191 The applicant contests the relevance of the judgments relied on by the Commission to show that there was no unequal treatment. In those cases, the applicants contested the fact that the basic amounts of the fines for certain undertakings were unfairly fixed above the maximum limit of 10% of the turnover referred to in Article 15(2) of Regulation No 17, whereas that was not the case as far as others were concerned (*Brugg Rohrsysteme* v *Commission*, cited in paragraph 33 above, paragraph 155, and *ABB Asea Brown Boveri* v *Commission*, cited in paragraph 33 above, paragraph 185). In contrast, the present case concerns unequal treatment deriving from the failure to take account of the differing levels of diversification of the undertakings concerned which affect the calculation of the fine.

192 Second, although four of the six undertakings concerned held equivalent market shares, the Commission adopted totally different basic amounts for each of them. The basic amounts before application of the Leniency Notice varied between EUR 700 000 and EUR 4 200 000. The applicant's high level of diversification should have been taken into account in order to avoid such unequal treatment.

193 The Commission challenges this plea. In particular, it objects to the effort made by the applicant, in its reply, to distinguish the *Brugg Rohrsysteme* v *Commission* and *ABB Asea Brown Boveri* v *Commission* cases, cited in paragraph 33 above, from the present case. As in the present case, the Commission decision in the case which gave rise to those judgments was adopted against a larger and more diversified undertaking, to which the upper limit of 10% had not been applied, and a smaller and less diversified undertaking, whose fine was reduced to 10% of its turnover (*Brugg Rohrsysteme* v *Commission*, cited in paragraph 33 above, paragraphs 155 to 156).

194 The Commission also rejects the applicant's argument that it imposed different fines on five of the six undertakings concerned, which held equivalent market shares, without taking account of the extent to which those undertakings were diversified. If such reasoning were to be accepted, the result would be that the variable duration of the infringement and the upper limit of 10% of turnover could not be taken into account.

(b) Findings of the Court

195 According to settled case-law, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 66 above, paragraph 69, and the case-law there cited).

196 According to the case-law, the upper limit laid down by Article 15(2) of Regulation No 17 is designed to prevent fines from being disproportionate in relation to the size of the undertaking concerned. Since only the total turnover can effectively give an appropriate indication of that size, the aforementioned upper limit must be understood as referring to the total turnover (*Musique diffusion française and Others* v *Commission*, cited in paragraph 41 above, paragraph 119, and *HFB and Others* v *Commission*, cited in paragraph 33 above, paragraph 541).

197 The applicant's argument concerning breach of the principle of equal treatment cannot be upheld. The Commission applied Article 15(2) of Regulation No 17 by reference to total turnover both in the applicant's case and in that of SNCZ. The fact that SNCZ benefited from a reduction of the basic amount is objectively justified as direct application of Article 15(2) of Regulation No 17 (see, to that effect, *ABB Asea Brown Boveri* v *Commission*, cited in paragraph 33 above, paragraph 185).

198 In addition, the applicant is three times larger in terms of turnover than SNCZ. Accordingly, the fact that the Commission imposed a fine of EUR 1.53 million on the latter and a fine of EUR 3.78 million on the applicant cannot be regarded as a breach of the principle of equal treatment.

199 Moreover, the applicant cannot claim to have suffered unequal treatment from the fact that the Commission, when determining the upper limit of the fine, did not take account of its turnover in the product concerned rather than its total turnover. As regards the comparison with SNCZ, it is clear from the contested decision that the Commission imputed the infringement to SNCZ and not to the group to which it belonged (recital 240 to the contested decision). In the absence of evidence of implication of the group to which SNCZ belonged, it cannot be claimed that the Commission was guilty of discrimination by applying, for SNCZ, the ceiling of 10% of its turnover provided for in Article 15(2) of Regulation No 17 (see, to that effect, *ABB Asea Brown Boveri* v *Commission*, cited in paragraph 33 above, paragraph 181).

200 Finally, the applicant's argument that the Commission imposed different basic amounts on five of the six undertakings concerned despite the fact that they had the same market share cannot be upheld. The Commission imposed the same starting point on the applicant, Britannia, SNCZ and Trident, namely EUR 3 million (recital 309 to the contested decision). In view of the different duration of their participation in the infringement and the application of the upper limit of 10% of turnover, the basic amounts before application of the Leniency Notice varied. Those variations are the direct result of the application of Article 15(2) of Regulation No 17 and cannot therefore be regarded as a breach of the principle of equal treatment.

4. *The fourth plea: infringement of Article 7 of the ECHR*

(a) Arguments of the parties

201 The applicant accuses the Commission of infringing Article 7 of the ECHR by applying significant increases to the fines which were not available when the

infringement was committed. According to Article 7(1), 'a heavier penalty [shall not] be imposed than the one that was applicable at the time the criminal offence was committed.' The principle laid down in Article 7 falls within the protection of fundamental rights of the Community which the European Union expressly observes and which the Community institutions must also observe in competition cases (Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraphs 60 and 77). In the present case, the Commission considerably raised the level of fines when adopting the Guidelines in 1998. Then, in autumn 2001, without any legal basis and without any amendment of the Guidelines, the Commission raised the level of fines to an extent never before seen. In the contested decision, the Commission applied those two increases of the level of fines even though most of the conduct involved had already taken place before the adoption of the Guidelines in 1998. Those increases represent changes to the framework of the penalty and it is contrary to Article 7 of the ECHR to apply them to the infringement in this case.

202 The applicant adds that the Commission cannot claim that the fines in question do not exceed 10% of the worldwide turnover provided for in Article 15(2) of Regulation No 17. Only the Commission's decision-making practice determines the 'true framework for the penalty'. The upper limit for penalties laid down in that provision needs to be specifically clarified by decision-making practice in order to comply with the principle that penalties must be foreseeable. As regards the Commission's argument that it enjoys a discretion to increase the level of fines, the applicant maintains that any such increase must be limited by the principles of proportionality and appropriateness.

203 The applicant also states that the Commission did not adopt the contested decision until 11 December 2001, three and a half years after the end of the infringement (13 May 1998). If the Commission had delivered its decision several months earlier, the fine imposed would have been less high. That arbitrary delay should not adversely affect the applicant through the retroactive application of the Commission's new policies concerning the level of fines.

204 The Commission contends that the application of the Guidelines in this case does not infringe the prohibition of retroactivity of criminal provisions. First, it is clear from the case-law that the introduction by the Commission of a new method for calculating fines, which may in certain cases involve an increase of the amount of the fines, without thereby exceeding the maximum laid down in the same regulation, cannot be regarded as an aggravation, with retroactive effect, of the fines provided for by law in Article 15 of Regulation No 17 contrary to the principles of legality and legal certainty (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraphs 217 to 224 and 233 to 235). Second, the Commission rejects the applicant's argument that Article 15 of Regulation No 17 does not comply with the requirement of specificity and the obligation of foreseeability unless it is specifically circumscribed by administrative practice.

(b) Findings of the Court

205 It must be borne in mind that the principle that penal provisions may not have retroactive effect is one that is common to all the legal orders of the Member States and is enshrined in Article 7 of the ECHR and takes its place among the general principles of law whose observance is ensured by the Community judicature (Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22, and *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 219).

206 Even though it may be apparent from Article 15(4) of Regulation No 17 that Commission decisions imposing fines for infringement of competition law are not of a criminal nature (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235), the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition (see, by analogy, with regard to the rights of the defence, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7, and *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 220).

207 The Court considers that the Commission has not infringed the principles laid down in Article 7 of the ECHR. Undertakings involved in an administrative procedure which may give rise to a fine must take account of the possibility that the Commission may at any time decide to raise the level of fines above that applied in the past (see paragraph 42 above).

208 That applies not only when the Commission raises the level of fines in individual decisions but also where that increase is effected by the application of rules of conduct of general scope such as the Guidelines.

209 It must be concluded that the new method of calculating fines embodied in the Guidelines, even though it may have had an aggravating effect regarding the level of the fines imposed, was reasonably foreseeable for undertakings such as the applicant at the time when the infringement in question was committed.

210 It is irrelevant that the calculation of the amount of fines in accordance with the method set out in the Guidelines may lead the Commission to impose higher fines than in the past, because the Commission enjoyed a margin of discretion in fixing the amount of fines in order to guide the conduct of undertakings towards compliance with the competition rules (*LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 237, and *HFB and Others* v *Commission*, cited in paragraph 33 above, paragraph 494).

211 For those reasons, the plea alleging infringement of the principle of non-retroactivity must be rejected.

5. *The fifth plea: infringement of Article 253 EC*

(a) Arguments of the parties

212 The applicant maintains that the Commission did not fulfil its obligation to state reasons, laid down in Article 253 EC, in that it did not explain why it imposed a fine that was so much higher than those which it had imposed in accordance with its earlier practice.

213 It is clear from the case-law that the statement of reasons must be consonant with the nature of the measure in question and must clearly and unequivocally disclose the reasoning of the institution from which the measure emanated, so as to enable the persons concerned to ascertain the justification for the measure adopted and to enable the competent Community Court to exercise its power of review (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 51 above, paragraph 4725). It is desirable for undertakings to be able to determine in detail the method of calculation of the fine imposed on them (*Tréfilunion* v *Commission*, cited in paragraph 68 above, paragraph 142, and *Cimenteries CBR and Others* v *Commission*, paragraph 4734) and the statement of reasons should be particularly detailed where it goes beyond the confines of previous decision-making practice (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 71). In this case, the Commission imposed a fine of EUR 4.2 million before application of the Leniency Notice, that is to say 111% of the EEA-wide turnover achieved by the applicant in the product concerned in 1998. The sum of the basic amounts adopted for the undertakings concerned was 129 to 138% of the total value of the European market in the product concerned, namely EUR 15 to 16 million. Those amounts are far higher than the fines imposed by the Commission in the past for comparable cases. Given that it departed from its previous practice, despite numerous favourable circumstances in this case, the Commission should have given a more detailed statement of its reasons for imposing such fines.

214 The applicant also observes that the contested decision does not specify the method and the calculation basis used by the Commission to calculate the basic amounts. The Commission refers to the turnover in the product in question on an EEA-wide basis (recital 307 to the contested decision), but only in order to determine the relative weight of the various undertakings in the market. As regards the absolute importance of the starting point, the Commission does not clearly indicate whether it used the turnover for the product in question at EEA level or at worldwide level or whether it took into account the applicant's total turnover.

215 The Commission, referring to its arguments in response to the other pleas above, first contends that the applicant's argument that the calculation of the fine was based on an abnormally high level is very confusing because the applicant compared completely different reference values, both of which are used to assess the level of fines. However, even if it were to be considered that the contested decision involves a significant increase of the levels of fines, the Commission did not fail to fulfil its obligation to state reasons.

216 As regards the applicant's argument that the contested decision does not specify the turnover used to determine the absolute level of the starting point, the Commission contends that it determined that amount not on the basis of one turnover figure or another but having regard to the gravity of the infringement, which it assessed by reference to its nature, it effects on the market, the size of the geographical market concerned and the limited size of the market for the product concerned.

(b) Findings of the Court

217 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal

fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law there cited).

218 In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be established, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (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, and *LR AF 1998* v *Commission*, cited in paragraph 27 above, paragraph 378).

219 In the context of the relief sought in the present action, which concerns only the legality of the fine, its amount and the way in which it was calculated, this plea is manifestly unfounded. The contested decision contains 370 recitals, of which 118 (recitals 252 to 370) are devoted to the fines. In recitals 262 to 303, the Commission explains its assessment of the gravity of the infringement. Next, it states how it concluded that it was necessary to apply differential treatment to two categories of undertakings (recitals 304 to 309) and it gives its appraisal of the duration of the infringement (recitals 310 to 312) in order to arrive at the basic amounts (recital 313). It considers whether it is appropriate to identify aggravating and attenuating circumstances (recitals 314 to 336) and gives its decision as to the application of the Leniency Notice (recitals 346 to 366). It must be held that the contested decision contains a sufficient and relevant indication of the factors of appraisal relied on in

determining the gravity and duration of the infringement. It must also be held that the arguments put forward by the applicant in support of the first four pleas in this action show that the applicant perfectly well understood the reasoning underlying the contested decision.

220 The criticisms made by the applicant in support of this plea do not identify any difficulty in understanding the Commission's reasoning or the explanation of the information relied on. It mainly puts forward criticisms concerning the amount of its fine as compared with those imposed in the past in comparable cases. However, that comparison does not imply that the statement of reasons is in any way defective. In so far as it is relevant, it relates to the merits of the evaluation made by the Commission.

221 Even if it is presumed that the decision involves a significant increase in the level of fines by comparison with earlier decisions, it must be pointed out that the Commission explicitly and fully set out the reasoning which prompted it to set the applicant's fine at that level (see, to that effect, Case 73/74 *Fabricants de papiers peints* v *Commission* [1975] ECR 1491, paragraph 31).

222 The applicant correctly observes that the contested decision does not explain the method or the calculation which prompted the Commission to adopt, when determining the gravity of the infringement, a starting point of EUR 3 million for the 'main producers' group (recitals 308 and 309). However, the essential procedural requirement to state reasons does not mean that the Commission must set out in its decision the figures showing the method of calculating the fines, but merely that it must indicate the factors which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 73 and 76, and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1558).

223 The fifth plea must also be rejected as unfounded.

224 It follows from all the foregoing that the application must be dismissed in its entirety.

**Costs**

225 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

**1. Dismisses the application;**

**2. Orders the applicant to pay the costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 29 November 2005.

E. Coulon P. Lindh

Registrar President

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