JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

30 September 2009*

In Case T-161/05,

Hoechst GmbH, formerly Hoechst AG, established in Frankfurt am Main (Germany), represented initially by M. Klusmann and U. Itzen, and subsequently by M. Klusmann, U. Itzen and S. Thomas, lawyers,

applicant,

v

Commission of the European Communities, represented initially by A. Bouquet, F. Amato and M. Schneider, and subsequently by M. Bouquet and M. Kellerbauer, acting as Agents,

defendant,

APPLICATION, principally, for annulment of Articles 2 and 3 of Commission Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to

* Language of the case: German.

Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 — MCAA) and, in the alternative, application for reduction of the fine imposed on the applicant,

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

composed of N.J. Forwood, President, D. Šváby (Rapporteur) and L. Truchot, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2008,

gives the following

Judgment

Background to the dispute and the contested decision

1 In Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 — MCAA) ('the contested decision'), the Commission of the European Communities found that the parent company Akzo Nobel NV and its subsidiaries Akzo Nobel

Nederland BV, Akzo Nobel Chemicals BV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Base Chemicals AB, Eka Chemicals AB and Akzo Nobel AB (together, 'the Akzo Nobel Group'), Elf Aquitaine SA and its subsidiary Arkema SA (formerly Elf Atochem SA and subsequently Atofina SA), Clariant AG and its subsidiary Clariant GmbH, and the applicant, Hoechst AG, had infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) by taking part in a cartel in the market for monochloroacetic acid (Article 1 of the contested decision).

2 Monochloroacetic acid ('MCAA') is a strong organic acid used as a chemical intermediate, in particular, in the manufacture of detergents, adhesives, textile auxiliaries and thickeners used in foods, pharmaceuticals and cosmetics (recitals 3 to 6 of the contested decision).

3 The Commission began its investigation of the MCAA market after Clariant GmbH informed it, by letter of 6 December 1999, of the existence of a cartel with regard to that market and submitted an application to it for favourable treatment under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice') (recital 43 of the contested decision).

4 Subsequently, Clariant GmbH provided the Commission with documents and information relating to the cartel (recitals 44 and 45 of the contested decision).

5 On 14 and 15 March 2000, the Commission carried out on-the-spot inspections at the premises of Elf Atochem and at those of Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals (recital 46 of the contested decision).

6 On 28 May 2003, the Commission addressed a request for information to Hoechst on the arrangements and its involvement therein, to which it received a reply on 10 July 2003. An additional request was sent by the Commission on 19 November 2003, to which Hoechst replied on 5 and 15 December 2003 (recitals 53 and 55 of the contested decision).

7 As part of its investigation, the Commission sent several requests for information to some of the participants in the cartel and their competitors (recitals 52 to 55 of the contested decision).

8 On 7 and 8 April 2004, the Commission sent a statement of objections to the following 12 addressees: 7 companies in the Akzo Nobel Group (namely the parent company, Akzo Nobel NV, and its subsidiaries Akzo Nobel Nederland, Akzo Nobel Functional Chemicals, Akzo Nobel Chemicals, Akzo Nobel AB, Eka Chemicals and Akzo Nobel Base Chemicals), and also to Clariant GmbH and Clariant AG (together, 'Clariant'), Hoechst and Elf Aquitaine and its subsidiary Atofina. All the addressees replied.

9 In the light of the evidence available to it, the Commission found that the aforementioned undertakings had participated in a cartel to maintain market shares through a volume and customer allocation system, that they exchanged price information and reviewed the actual sales volumes, as well as price information, at regular multilateral meetings so as to monitor the implementation of the arrangements (recitals 84 to 90 of the contested decision).

10 In the case of Hoechst, the Commission found that it had directly participated in the infringement from 1 January 1984 until 30 June 1997, that is until it sold its MCAA business to Clariant AG (recitals 246 and 272 of the contested decision).

11 The Commission rejected Hoechst's argument in its reply to the statement of objections that it could not be held liable for the alleged infringements as liability for those infringements had been transferred in its entirety to Clariant on the basis of explicit contractual arrangements. The Commission considered, first, that Hoechst had participated directly in the infringement and had to be held responsible for the period in which it was involved prior to the transfer of the MCAA business and, second, that Hoechst's liability under competition law for its infringing behaviour was not affected by contractual arrangements existing between the parties or the particular structure of the transaction (recital 248 of the contested decision).

12 The amount of the fines was fixed by the Commission in accordance with its guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines') and the Leniency Notice.

13 In recitals 276 and 277 of the contested decision, the Commission set out the general criteria in the light of which it fixed the amount of the fines. It pointed out that it was required to have regard to all relevant circumstances and particularly the gravity and duration of the infringement which are the criteria explicitly referred to in Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962), p. 87) and Article 23(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and assess on an individual basis the role played by each undertaking party to the infringement. It stated that, in doing so, it took account, when fixing the amount of the fines, of any aggravating or attenuating circumstances and as appropriate, the Leniency Notice.

14 With regard to the gravity of the infringement, the Commission considered that, having regard to its nature, which consisted of market sharing and price fixing, its intentional character, its actual impact on the MCAA market and the fact that it covered the whole of the common market and, following its creation, the whole of the EEA, the

undertakings concerned by the contested decision had committed a very serious infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement (recitals 280, 281 and 288 of the contested decision).

15 When setting the starting amount of the fines, the Commission stated that in the circumstances of the present case, which involved several undertakings, it was necessary to take account of the specific weight, and therefore the real impact on competition, of each undertaking's offending conduct (recital 290 of the contested decision).

16 For that purpose, the Commission considered it appropriate in the present case to use the EEA market shares of the undertakings that participated in the infringement as a basis for comparison to determine their respective weight. The comparison was based on shares of the EEA market for the product at issue in the last full calendar year of the infringement (1998). For Hoechst, the year taken into consideration was however 1996 (recitals 291 and 292 of the contested decision).

17 The Akzo Nobel Group, with an estimated EEA market share of 44%, was considered to be the largest producer and was therefore placed in the first category of the undertakings concerned. Hoechst and Clariant, which were considered to be the second largest MCAA producers, with market shares of 28% and 34% respectively, were placed in a second category. Atofina, with an estimated market share of 17%, was placed in the third category (recitals 293 to 295 of the contested decision).

18 The starting amounts of the fines were determined as follows: EUR 30 million for the Akzo Nobel Group, EUR 21 million for Hoechst and Clariant, EUR 12 million for Atofina/Elf Aquitaine and EUR 1.33 million for Eka Nobel (the words 'basic amounts' appear by error in recitals 296 and 297 of the contested decision).

19 The Commission also increased the starting amount of the fines for each undertaking according to the length of time in which they participated in the infringement, since it considered that the starting amounts of their fines should be increased by 10% for each full year of infringement and by 5% for any period of six months or more but less than a year. It therefore increased by 150% the starting amount of the fine imposed on the Akzo Nobel Group and of that imposed on Atofina/Elf Aquitaine, that imposed on Hoechst by 135% and that imposed on Clariant by 15% (recital 302 of the contested decision).

20 After aggravating circumstances were taken into account, Hoechst and Atofina received an increase of 50% in the basic amount of the fine to be imposed on them for repeated infringement, since both those undertakings had been subject to previous Commission decisions establishing their participation in cartels (recitals 308 and 314 of the contested decision).

21 To this end, the Commission noted that Hoechst had been an addressee of Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (OJ 1994 L 239, p. 14; 'the *PVC II* decision') and of Commission Decision 69/243/EEC of 24 July 1969 relating to a proceeding pursuant to Article [81 EC] (Official Journal 1969 L 195, p. 11; 'the Dyestuffs decision') (recital 309 of the contested decision).

22 The Commission rejected the arguments put forward by the applicant in its reply to the statement of objections that the businesses, products and personnel involved in the decisions cited were different from the MCAA business, products and staff and that the Dyestuffs decision was too old. In the Commission's view, the requirement that infringements be of the 'same type' laid down by the Guidelines was satisfied by the fact that the previous decisions cited and the contested decision related to cartel cases, which involved similar infringements of Article 81 EC. There was no requirement that the business, products and personnel should be the same. It sufficed that the undertaking is the same, which was the case here (recital 312 of the contested decision).

23 The Commission also rejected the applicant's argument that the principle of *ne bis in idem* has been infringed in the present case because the Commission had already taken account of the earlier decisions as aggravating circumstances in Commission Decision 2005/493/EC of 1 October 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.370 — Sorbates), a summary of which is published in the Official Journal of 13 July 2005 (OJ L 182, p. 20). According to the Commission, if undertakings continue to commit the same type of infringement and previous penalties have not prompted a change in their conduct, that is an aggravating circumstance irrespective of whether it has been regarded as such in previous cases (recital 313 of the contested decision).

24 With regard to the application of the Leniency Notice, the Commission granted a reduction of 100% of the amount of Clariant's fine under Section B because that undertaking was the first member of the cartel to provide evidence of its existence, functioning, duration and implementation. The Commission considered that Clariant GmbH had informed it about a secret cartel at a time when it had not undertaken an investigation and did not have sufficient information to establish the existence of the cartel (recitals 328 to 332 of the contested decision).

25 The Commission considered that Atofina qualified for a significant reduction in its fine, namely 40%, as it had been the second undertaking to provide the Commission, before the statement of objections, with information and evidence that contributed to the establishment of the existence of the cartel and as it had not substantially contested the facts that the Commission relied upon to establish the existence of the cartel in its statement of objections (recitals 337, 338 and 340 of the contested decision).

26 The Commission found that the Akzo Nobel Group had been the third undertaking to provide it, before the statement of objections was issued, with information and evidence that corroborated the existence of the MCAA cartel, and had not substantially contested the facts that the Commission had relied upon to establish the existence of the cartel in its statement of objections. It therefore found that the Akzo Nobel Group fulfilled the conditions set out in the first and second indents of Section D.2 of the

Leniency Notice so that it benefited from a 25% reduction in the fine that would have been imposed on it if it had not cooperated with the Commission (recitals 342 to 346 of the contested decision).

27 However, the Commission rejected Hoechst's arguments that it was prevented from making an application under the Leniency Notice as it had sold its MCAA business to Clariant AG before the start of the procedure, in 1999, and that, moreover, it was covered by the application submitted in this respect by Clariant GmbH. The Commission considered that Hoechst had the opportunity to make such an application when it still owned the MCAA business and that it could not be covered by Clariant GmbH's application because the MCAA business unit had been owned by Hoechst then by Clariant AG, two independent legal entities (recitals 325 and 326 of the contested decision).

28 The Commission concluded in Article 1 of the contested decision:

'The following undertakings infringed Article 81 [EC] by allocating volume quotas, allocating customers, agreeing concerted price increases, agreeing on a compensation mechanism, exchanging information on sales volumes and prices, and participating in regular meetings and other contacts to agree and implement the above restrictions. The following undertakings' behaviour also constituted an infringement of Article 53(1) of the EEA Agreement as from 1 January 1994.

...

...

(c) Hoechst …, from 1 January 1984 to 3[0] June 1997;

…

(e) Clariant AG, Clariant GmbH, from 1 July 1997 to 7 May 1999.'

29 The amounts of the fines were fixed as follows in Article 2 of the contested decision:

'(a) Akzo Nobel Chemicals …, Akzo Nobel Nederland …, Akzo Nobel NV, Akzo Nobel Functional Chemicals …, Akzo Nobel Base Chemicals …, Eka Chemicals … and Akzo Nobel AB:

EUR 84.38 million;

(b) Hoechst …:

EUR 74.03 million;

(c) Elf Aquitaine … and Arkema … (formerly known as Atofina …) jointly and severally:

EUR 45.00 million;

(d) Arkema … (formerly known as Atofina …):

EUR 13.50 million;

(e) Clariant AG and Clariant GmbH jointly and severally:

EUR 0.

…'

30 According to Article 3 of the contested decision:

'The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.'

Procedure and forms of order sought

31 By an application lodged at the Registry on 25 April 2005, the applicant brought the present action.

32 The composition of the Chambers of the Court of First Instance was changed and the Judge-Rapporteur was assigned to the Seventh Chamber, to which this case was therefore allocated.

33 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

34 The parties presented their oral arguments and their replies to oral questions put by the Court at the hearing on 18 June 2008.

35 The applicant claims that the Court should:

— annul Articles 2 and 3 of the contested decision;

— in the alternative, reduce the amount of the fine;

— order the Commission to pay the costs.

36 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

37 The applicant puts forward seven pleas in support of its action: (i) it was not liable for the cartel sanctioned because it had sold its MCAA business, (ii) the fine imposed is illegal, (iii) failure to comply with the Leniency Notice, (iv) error of assessment in the calculation of the basic amount of the fine, (v) an unjustified increase in the fine for repeated infringement, (vi) procedural irregularities and (vii) the illegality of the order in Article 3 of the contested decision to bring the infringement to an end.

The first plea: the applicant was not liable for the cartel sanctioned because it had sold its MCAA business

Arguments of the parties

38 The applicant submits that it is no longer liable for the infringements committed in respect of the MCAA side of the business, since responsibility for those infringements was transferred on an unlimited basis to Virteon GmbH when that side of the business was separated and sold. Thus, it observes that the MCAA side of the business was legally dismantled and sold, on 30 May 1997, to a wholly-owned subsidiary, Virteon, at the same time as four other large areas of business related to speciality chemicals. Virteon then continued the operation of the business as an independent undertaking under the same conditions. Virteon therefore took the applicant's place, both in legal and economic terms. Clariant AG's takeover of Virteon in no way alters the liability of Virteon, which became Clariant GmbH. The change to the shareholding following Clariant AG's takeover of Virteon has no effect on the company's liability, since the economic identity and, therefore, the continuity of the undertaking concerned remain intact. Thus, Virteon, which became Clariant GmbH, continued to exist within the group with the same legal identity, without any legal or economic interruption.

39 According to the applicant, if the undertaking is transferred as a whole, so that the new legal person replaces its predecessor and continues the business in its place, the principle of economic continuity leads to the simultaneous transfer of the undertaking's liability for a cartel. In order to determine liability, it is then a matter of 'tracing the undertaking as an actual economic concept and not a legal concept'. In the present case, following the dismantling and sale of the MCAA business, Virteon, then Clariant GmbH, are the legal entities liable for the infringements of cartel law, and not Hoechst.

40 The applicant also observes that the fact that Clariant continued to participate in the existing arrangements demonstrates the continuity of the undertaking.

41 It is not possible to draw other conclusions from the judgment in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, cited by the Commission. According to that judgment, the principle that a director of an undertaking can be held liable notwithstanding the sale of his business concerns exclusively the sale of an undertaking to third parties and not to a legal person belonging to the group, as in the present case. In this respect, the applicant stated at the hearing that the Court of Justice confirmed in one of its recent judgments (Case C-280/06 *ETI and Others* [2007] ECR I-10893) that the principle of economic continuity had to apply in the light of the structural links between the entity which committed the infringement and its economic successor at the time of the transfer.

42 The applicant also observes that the transfer of liability is set out in the contract of transfer in which the parties expressly acknowledge that Virteon releases the applicant from its liability within the group. According to the case-law, such an assumption of liability within the group must be taken into consideration when imputing the fine.

43 As regards the Commission's argument that the applicant tried to escape liability by transferring its MCAA business, the applicant replies that the restructuring of the group which was being carried out step by step from 1996 onwards was a process which was not influenced or motivated by any specific features of certain particular areas of business. The restructuring consisted in externalising all areas of business unrelated to the pharmaceutical and agricultural business sectors.

44 The case-law and the Commission's practice in previous decisions confirm the applicant's position. If the Commission were to have discretion in terms of determining the addressees of a fine, that would constitute an infringement of the principle that the administration is bound by its own decisions, a principle laid down in the preamble to, and in Article 20 of, the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

45 The applicant added at the hearing that, contrary to what the Commission contended, the Commission does not have discretion to determine the authors of an infringement of Article 81 EC, since those authors are to be determined according to specific provisions of law.

46 The applicant also submits that, when it owned the MCAA side of the business, the latter was organised and functioned autonomously and assumed sole responsibility for its results. Moreover, outside of that side of the business, the applicant had no knowledge of the infringement, and the conduct of the employees of the MCAA side of the business who participated in the infringement is indeed contrary to the policy of the Hoechst Group, which is directed at compliance with competition law.

47 The Commission replies, in essence, that the applicant's argument that the restructuring of its MCAA business completely released it from any liability cannot be accepted. If the applicant's interpretation were correct, it would provide large undertakings with an easy means of escaping the legal consequences of a cartel or at least of minimising the commercial risks in the event of its discovery.

48 It also observes that the applicant's plea relates in reality only to the month of June 1997 out of a total of 149 months of infringement, and that, in those circumstances, annulment of the contested decision in respect of only one month is not justified.

49 In this respect, the applicant submits that it was entitled to presume, in the light of well-established case-law, that a wholly-owned subsidiary, as Virteon was in the present case from 30 May 1997 until 30 June 1997, carried out in all material respects the instructions given to it by its parent company, without having to ascertain whether the parent had actually exercised its power. Accordingly, Hoechst ought to have established that its former subsidiary had in actual fact decided independently upon its own conduct on the market in June 1997; Hoechst failed to establish this.

Findings of the Court

50 According to settled case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 37, and Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 103).

51 None the less, for the effective enforcement of competition law it may become necessary, by way of exception, to attribute a cartel offence not to the initial operator but to the new operator of the undertaking which participated in the cartel if the new operator may in fact be regarded as the successor to the original operator, that is if he continues to operate the undertaking which participated in the cartel (see, to that effect, the Opinion of Advocate General Kokott in *ETI and Others*, paragraphs 75 and 76). If there was no possibility of imposing a penalty on an entity other than the one which committed the infringement, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes (see, to that effect, *ETI and Others*, paragraph 41).

52 Thus, the Court of Justice has held that the 'economic continuity' test only applies in cases where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed (*Commission* v *Anic Partecipazioni*, paragraph 145, and *HFB and Others* v *Commission*, paragraph 104) or in cases of internal restructuring of an undertaking where the initial operator has not necessarily ceased to have a legal existence but no longer carries out an economic activity on the relevant market and in view of the structural links between the initial operator and the new operator of the undertaking (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 359, and *ETI and Others*, paragraph 41).

53 In the present case, it is apparent from the contested decision and the applicant's observations on the statement of objections that Hoechst itself manufactured MCAA through its chemical division until 30 May 1997. That division and others were transferred to Virteon, a wholly-owned subsidiary of Hoechst, on 30 May 1997. On 30 June 1997, through the sale of all Virteon's shares, Hoechst sold its entire MCAA business to Clariant AG.

54 As regards, first of all, the applicant's liability as a result of its participation in the cartel for the period until 30 May 1997, the applicant states merely that the MCAA side of the business was organised and functioned autonomously and that it had no knowledge of the infringement. It also submits that the conduct of the employees who participated in the infringement was contrary to the group's policy of striving for compliance with competition law.

55 It should none the less be noted that, until the transfer of the chemicals side of the business to Virteon, on 30 May 1997, the applicant was the legal person directly liable for the operation of its MCAA side of the business and for the employees who committed the infringement in question. Accordingly, the applicant was presumed to have been aware of their actions and could not rely on the malfunctioning of its internal organisation (see, to that effect, Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 35). Accordingly, the infringements committed by its employees of the MCAA side of the business must be regarded as attributable to the applicant.

56 It should also be noted that, for the purpose of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality (see, to that effect, 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 978). The Commission was therefore right to impute liability for the infringement committed in the MCAA side of the business to the applicant, who was in fact the legal person responsible for that business.

57 As regards next the period from 30 May until 30 June 1997, the applicant merely states that, during that period, the MCAA and other sides of the business were transferred to a subsidiary, Virteon, which was wholly-owned by Hoechst, before Virteon's sale to Clariant AG on 30 June 1997.

58 In this respect, it must be stated the Commission took that period into consideration by relying, at recitals 217 to 219 of the contested decision, on the concept of undertaking within the meaning of Article 81 EC and Article 53 of the EEA Agreement. In the light of that concept, which underlies all the Community case-law on the imputability of liability for infringements to the legal entities constituting the same undertaking, the Commission was correct to impute the infringement to Hoechst for the period from 30 May to 30 June 1997. The concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see, to that effect, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311, and *HFB and Others* v *Commission*, paragraph 54).

59 In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG Telefunken* v *Commission* [1983] ECR-3151, paragraph 50, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 961 and 984), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* (not published in the ECR), paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 29).

60 In the present case, it must be stated that Virteon was, from 30 May until 30 June 1997, a wholly-owned subsidiary of Hoechst. Since, as is stated in the applicant's reply to the statement of objections, Hoechst then sold Virteon to Clariant AG, a transaction which was definitively concluded by contract of 17 June 1997 and executed by transfer of the shares on 30 June 1997, the incorporation of the MCAA side of the business into a subsidiary was clearly part of an objective of selling that subsidiary's shares to a third undertaking. Accordingly, it must be considered to be established that the applicant has failed to rebut the presumption that the parent company exercised decisive influence over the conduct of its wholly-owned subsidiary (*AEG-Telefunken* v *Commission*, paragraph 50, and judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 59) by demonstrating the autonomy of its subsidiary Virteon GmbH.

61 The applicant's argument that the transfer of its MCAA economic unit to another undertaking also results in the transfer of liability for the anti-competitive conduct to the new operator must also be rejected. In the light of the case-law cited at paragraph 50 above, it falls to the applicant, the legal person managing the undertaking in question when the infringement was committed, to answer for that infringement, even if, when the decision finding the infringement was adopted, Clariant AG had assumed responsibility for operating the undertaking. The principle of personal liability cannot be called into question by the principle of economic continuity in cases where, as in the present case, an undertaking involved in the cartel has transferred a part of its business to an independent third party and there is no structural link between the initial operator and the new operator (see, to that effect, Opinion of Advocate General Kokott in *ETI and Others*, paragraph 82).

62 Contrary to what the applicant submits, it does not fall within one of the exceptional cases in which the Court of Justice has been able to hold that it was appropriate to use the economic continuity test in order to attribute the anti-competitive conduct of the initial operator to the new operator of the business in question. Although the MCAA business was initially transferred within the group to Virteon, Hoechst's subsidiary, in order subsequently to be transferred to Clariant AG, Hoechst continued to exist as a separate legal person after the infringement had been committed (see, to that effect, Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 88).

63 Moreover, contrary to what the applicant claims, it may not rely on the case-law that, where all or part of the economic activities are transferred from one legal entity to another, liability for the infringement committed by the initial operator, in the context of the activities in question, may be imputed to the new operator if it constitutes with the initial operator one economic entity for the purpose of the application of the competition rules, even if the initial operator still exists as a legal entity (*ETI and Others*, paragraph 48). It must be stated that, following the transfer of Virteon to Clariant AG, on 30 June 1997, no structural or organisational links bound Clariant AG and Hoechst. They are two separate undertakings for the purposes of Article 81 EC whose only economic link is that the former acquired the entire capital of Virteon and, accordingly, the MCAA side of Hoechst's business.

64 In any event, the power to impute to the new operator an infringement committed by the former operator is a power granted to the Commission, under certain circumstances, by the case-law, and not an obligation; this is particularly so where, as in the present case, the initial operator committing the infringement continues to exist in law and economically (for the purposes of *ETI and Others*, paragraph 40). In addition, in the present case, the risk that the undertaking committing the infringement might escape penalties which the principle of economic continuity is intended to combat (see paragraph 51 above) does not exist, since Hoechst continues to exist both in law and economically.

65 Nor can the applicant claim that its liability was transferred by the contract with Virteon which transferred its area of business. First, such a contract cannot be relied upon against the Commission in order to escape the penalties incurred under competition law inasmuch as it seeks to apportion liability between the companies for participating in a cartel. Second, the alleged transfer of liability effected in the present case under the terms of the contract of transfer has no bearing on the determination of the applicant's liability, since that contract was concluded between Hoechst and a wholly-owned subsidiary, whose offending conduct can therefore be imputed to Hoechst in its capacity as parent company. In any event, unlike Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 62, relied upon by the applicant, in which the Court of First Instance had held that the Commission was, by way of exception, entitled to impute to a company liability

for the unlawful conduct of its predecessor, it is not apparent from the file that Clariant AG had accepted liability for Hoechst's actions prior to the transfer of its MCAA side of the business.

66 It follows that the applicant's argument that liability for the anti-competitive conduct of its MCAA side of the business was transferred at the time of its sale to Clariant AG must be rejected.

67 Accordingly, since the Commission was right to impute to Hoechst liability for the infringement committed from 1 June 1984 until 30 June 1997, the first plea must be rejected as unfounded.

The second plea: the fine imposed is illegal

Arguments of the parties

68 The applicant submits that the fine imposed is illegal in so far as Virteon's new parent company, which became Clariant GmbH, obtained complete exemption from the fine and the applicant itself, as former parent company, did not obtain such an exemption. The Commission thus infringed the principle of equal treatment, laid down in Article 20 of the Charter of Fundamental Rights, and the meaning and purpose of the Leniency Notice.

69 Since the MCAA business owned by Hoechst then transferred to Virteon, which became Clariant GmbH, before being operated by Clariant AG constituted an economic unit, the application for exemption from the fine lodged by Clariant AG relates to all the legal persons included in the 'Hoechst/Virteon/Clariant undertaking'. That analysis is supported by the fact that the Commission (recital 332 of the contested

decision) extended the exemption granted to Clariant GmbH to its parent company, Clariant AG, on account of the link between the latter and Virteon, which became Clariant GmbH, Virteon and Clariant GmbH, and through its practice in previous decisions. Accordingly, by not taking the view that the applicant was part of the same economic unit as Clariant GmbH and Clariant AG, the Commission infringed the concept of undertaking, within the meaning of Article 81 EC, as established by the case-law.

70 The applicant also observes that the cartel was implemented in the same way by the same persons on a continuous basis throughout the entire duration of the infringement and that, consequently, Clariant GmbH's application for exemption from the fine did not relate solely to the period after Virteon's takeover. The facts relied upon by Clariant GmbH in support of its application for exemption relate also to the entire period of infringement. Accordingly, in the light of the information communicated, it is the applicant who ought to have benefited from favourable treatment, by virtue of its cooperation. Moreover, the application for exemption was lodged on behalf of the 'the business'.

71 The applicant states that it was not in a position to lodge its own application for exemption prior to the second half of 1997, since it was not aware of the cartel before then. Moreover, it was not in a position to make such an application subsequently, given that it had transferred all its MCCA assets, on 30 June 1997, to Clariant AG.

72 Lastly, if the grant of the exemption arising from the Leniency Notice did not relate also to the period during which Hoechst was owner of the MCAA business, the Leniency Notice would be rendered meaningless, since the perpetrator of the infringement, namely the MCAA business unit, had cooperated with the Commission and lifted the lid on the secrecy of the infringement.

73 The Commission contends that this plea should be rejected.

Findings of the Court

74 First of all, it must be stated that, as was established in the examination of the first plea relating to the alleged illegality of the imputation to Hoechst of the infringements committed in the course of its MCAA business (see paragraphs 53 to 60 above), the applicant's liability for the period 1 January 1984 to 30 June 1997 cannot be regarded as having been transferred to Clariant AG from the date that the latter took over Hoechst's MCAA business, on 30 June 1997.

75 Accordingly, since it is not possible to accept the applicant's argument that the MCAA business owned by Hoechst and then transferred to Clariant AG constituted an autonomous economic unit, Clariant GmbH's application lodged by letter of 6 December 1999 ('the Leniency Letter') under the Leniency Notice did not concern the company which previously held the MCAA business, namely Hoechst. It should be pointed out that Hoechst and Clariant AG are two companies with separate legal personalities which participated consecutively in the MCAA cartel and which are part of two separate undertakings within the meaning of Article 81 EC (see paragraph 63 above). Clariant GmbH's application under the Leniency Notice can therefore benefit only the undertaking of which it was a part, but not Hoechst.

76 That conclusion cannot be undermined by the applicant's argument that it is apparent from the wording of the Leniency Letter that Clariant GmbH was referring to the period when the applicant was active on the MCAA market. It is apparent from Section B of the Leniency Notice, relating to the non-imposition of a fine or a very substantial reduction in its amount, that it is the undertakings that fulfil the conditions referred to in that section which will benefit from a reduction of the fine or even from total exemption. As was noted at paragraph 75 above, the author of the letter is not Hoechst, but Clariant GmbH, which was at that time part of the Clariant undertaking. It is undisputed that when that letter was sent, Hoechst no longer exercised any authority over the company which reported the cartel. Consequently, and irrespective of the fact that reference is made in the letter to the period during which Hoechst was active on the

MCAA market, Clariant GmbH could not, in this way, involve Hoechst or, therefore, procure for it the benefit of the favourable treatment provided for by the Leniency Notice.

77 The applicant's argument that it was not itself in a position to lodge an application under the Leniency Notice during the period in which the MCAA business was under its control must also be rejected. The applicant adduces no evidence in support of its assertion and, in any event, does not prove that the MCAA business, which was not carried out by a subsidiary prior to 30 May 1997, was autonomous and not its responsibility.

78 Like the Commission, the Court of First Instance also considers that the contested decision in no way calls into question the spirit and purpose of the Leniency Notice. Since Clariant AG and its subsidiary Clariant GmbH constitute an economic unit, they can benefit, in so far as they form an undertaking, from the advantages provided for by the Leniency Notice, without compromising its purpose. That does not hold true for the applicant, given the absence of links between it and the author of the Leniency Letter, namely Clariant GmbH.

79 Lastly, as regards the argument that the Commission infringed the principle of equal treatment, it should be borne in mind that that principle is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209 paragraph 28, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 96). In the present case, given that the applicant, being a separate undertaking from Clariant, is not in a comparable situation to Clariant since the latter was the first to adduce decisive evidence of the cartel's existence, the complaint alleging infringement of the principle of equal treatment must be rejected.

80 In the light of all the foregoing, the second plea alleging that the fine imposed is illegal must be rejected.

The third plea: failure to comply with the Leniency Notice

Arguments of the parties

81 The applicant criticises the Commission for not granting it a reduction in its fine of at least 10% under the Leniency Notice. In accordance with the second indent of Section D 2 of that notice, it informed the Commission that it was not substantially contesting the facts of the infringement in its reply to the statement of objections, and should, on this basis, like the other parties to the cartel, have obtained a reduction in its fine.

82 It observes that it is clear from point 9 of its reply to the statement of objections that it did not contest the facts set out by the Commission in that statement. That cannot be called into question by the fact that it stated, in point 9, that it reserved for itself the possibility of adopting a different legal assessment from that of the Commission as regards the facts substantially acknowledged.

83 As regards the argument that it did not admit the facts since it claimed not to have been aware of them, it replies that that lack of actual knowledge of the facts cannot call into question its acknowledgement of them.

84 It claims, in addition, that neither the wording of the Leniency Notice nor the Commission's practice in previous decisions or the case-law requires that the grant of a reduction in the fine for not contesting the facts depends on the submission of a separate application. Accordingly, it could reasonably expect a reduction in its fine under the Leniency Notice.

85 Moreover, the Commission has failed to explain why it did not take account, for the purposes of setting the fine, of the fact that the applicant did not contest the facts and has not stated how it proceeded in that respect. It states that the Court of First Instance has held that the assessment of the applicant's conduct in not contesting the facts should be included in the recitals relating to the undertaking's cooperation (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 414 et seq.).

86 The Commission replies that if the applicant wished to take advantage of the Leniency Notice, it should have lodged a formal application under Section E of that notice. However, throughout the administrative procedure, it defended itself by claiming that it had learnt of the existence of the infringements alleged against it only in 2003 and that it had not therefore been able to lodge an application in its own name.

87 Moreover, the Commission submits that the applicant did not expressly state that it was not substantially contesting the facts within the meaning of the Leniency Notice. In this respect, it observes that at point 9 of its reply to the statement of objections, Hoechst, whilst claiming that it was not contesting the facts, stated that those facts were not sufficient to substantiate some of the legal conclusions reached by the Commission. In addition, at point 8 of its reply to the statement of objections, the applicant stated that it was completely incapable of commenting on the details of the alleged infringement, apart from the information that it was able to deduce from the statement of objections itself, since it had sold the MCAA side of the business to Clariant in 1997, together with all its staff and assets. Nor does the applicant expressly recognise before the Court of First Instance that it had participated in the cartel.

88 The Commission recalls that, according to the case-law, a reduction in the fine under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned can be considered to demonstrate genuine cooperation on its part. As it is, the applicant provides neither details nor

evidence of its cooperation with the Commission and even contradicts itself by stating that it did not have any documents or contacts to which it could resort in order to clarify the situation.

89 Lastly, the Commission contends that the contested decision is not vitiated by a defective statement of reasons. At recitals 324 to 326 of the contested decision, the Commission refers to the applicant's main objections, in particular those which were in fact advanced during the administrative procedure concerning the application of the Leniency Notice. Since the applicant had not contested the facts expressly and unequivocally, the Commission submits that it was not necessary to provide a more detailed statement of reasons than that which was already in the contested decision. Moreover, the reference to the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission* is irrelevant.

Findings of the Court

90 Section D of the Leniency Notice, headed 'Significant reduction in a fine', provides:

'1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

91 It should be recalled that in order to receive a reduction in the fine on the ground of not contesting the facts, in accordance with the second indent of Section D 2 of the Leniency Notice, an undertaking must expressly inform the Commission, after perusing the statement of objections, that it has no intention of substantially contesting the facts (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 303).

92 In the present case, the following statement is contained in the applicant's reply to the statement of objections:

'Hoechst wishes to make clear that it does not substantially contest the facts established by the Commission in the statement of objections. Hoechst will however demonstrate that those facts are not sufficient in law to substantiate some of the Commission's legal conclusions. The points that Hoechst will subsequently raise relate therefore solely to the legal assessment of the facts of this case.'

93 It should also be pointed out that the applicant stated, in its reply to the statement of objections:

'Hoechst is completely incapable of commenting on the factual details of the alleged infringement other than in the light of the information which it is able to deduce from the statement of objections itself, since it sold the MCAA side of the business to Clariant in 1997, including its staff and its assets. Hoechst therefore has no source of information on the alleged participation in the cartel other than certain basic accounting data such as turnover, etc.'

94 The Commission submits however that such a statement not contesting the facts set out in the statement of objections cannot be considered to be express, clear, unequivocal and capable of constituting genuine cooperation by the applicant.

95 The Court none the less notes that, in its reply to the statement of objections, the applicant expressly stated that it was not contesting the facts set out in that statement. The fact that the applicant was not in a position to comment on facts other than those of which it was accused in the statement of objections or to adduce other evidence of the infringement cannot detract from the fact that the applicant did not substantially contest the facts found in the statement of objections. Regarding the applicant's claim that the facts found by the Commission were insufficient to provide a basis for some of its legal conclusions, it should be pointed out that its aim was in essence not to dispute substantially the facts alleged, but to contradict the Commission's interpretation of them and the legal conclusions which it reached with regard to its role of leader in the cartel, the high hierarchical level of the participants in the cartel or the classification of Hoechst's infringing conduct as repeated infringement. An objection to the Commission's legal assessment of certain facts cannot indeed be treated in the same way as a challenge to the very existence of those facts. Moreover, contrary to what the Commission submits, in its action before the Court of First Instance the applicant has not disputed that it participated in the cartel on the MCAA market.

96 As the Commission submits, however, it is not sufficient for an undertaking to state in general terms that it does not contest the facts alleged for the purposes of the Leniency Notice if, in the circumstances of the case, that statement is not of any help to the Commission at all (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 193). In order for an undertaking to benefit from a reduction of the fine for its cooperation during the administrative procedure, its conduct must facilitate the Commission's task of identifying and penalising infringements of the Community competition rules (see Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 505 and the case-law cited).

97 In the present case, whilst it must be conceded that the applicant did not help the Commission to clarify the applicant's participation in the cartel by providing it with evidence which it did not have, its declaration of non-contestation of the facts set out in the statement of objections is worded expressly and unequivocally in the reply to the statement of objections and could not but facilitate the Commission's task. In order to establish the facts on which it intended to base its accusations against the applicant, the Commission was able to refer, in its final decision, to all the facts as set out in the statement of objections, as a result of the express and unequivocal acknowledgement of those facts, and was not obliged to take further steps to demonstrate their existence. Moreover, it should be pointed out that the Commission has not specified how the applicant's contribution could not be regarded as facilitating its task of finding the existence of an infringement and bringing it to an end.

98 Thus, the grounds on which the Commission refused to apply Section D 2 of the Leniency Notice are not clear from the contested decision and in particular from Section 4, headed 'Application of the Leniency Notice'. Contrary to what the Commission submits, the appraisal of non-contestation of the facts by the applicant should have been included in the recitals relating to cooperation (see, to that effect, judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 415).

99 It should be added that, whilst it is true that the Commission has a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88), it was nevertheless not entitled to depart from self-imposed rules of practice without giving reasons (see, by analogy, Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91).

100 In the light of all the foregoing, the applicant was wrongfully denied a reduction in its fine for not contesting the facts, in accordance with the second indent of Section D 2 of the Leniency Notice.

101 In those circumstances, it is for the Court of First Instance to set an appropriate rate of reduction. Pursuant to Article 17 of Regulation No 17 and Article 31 of Regulation No 1/2003, the Court has unlimited jurisdiction within the meaning of Article 229 EC in relation to actions brought against decisions whereby the Commission has fixed a fine, and it may cancel, reduce or increase the fine imposed. Pursuant to its unlimited jurisdiction, the Court considers it appropriate to reduce the amount of the fine by 10%.

102 The specific consequences of that variation will be examined at a later stage (see paragraphs 196 to 198 below).

The fourth plea: error of assessment in the calculation of the basic amount of the fine

103 The applicant puts forward two complaints in this plea: (i) the basic amount of the fine is disproportionate in the light of the size of the market and (ii) that amount is

disproportionate in the light of the division into categories of the undertakings involved.

The first complaint: the basic amount of the fine is disproportionate in the light of the size of the market

— Arguments of the parties

104 The applicant submits that the basic amount of the fine is totally disproportionate and inappropriate in view of the relatively small size of the market. Given that that market has a value of EUR 106 million, the applicant finds it hard to understand how, in the contested decision, the Commission set the basic amount of the fine imposed on the first category of undertakings at EUR 30 million and that of the fine imposed on the second at EUR 21 million. It also observes that that amount bears no relation to the Commission's practice in previous decisions, and relies in this respect on Commission Decision C(2004) 4221 final of 26 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/F-1/38.338 — PO/Needles) ('the Needles Decision').

105 The applicant submits that the comparison made by the Commission in its pleadings is unconvincing, since it uses as a basis for comparison only the basic amounts applied to the undertakings in the first category. However, upon an analysis of the basic amounts of the same decisions cited by the Commission in respect of the undertakings in the second category, it is apparent that the amount applied to the applicant is disproportionate.

106 The Commission replies in essence that the basic amounts are not disproportionate to the size of the market and that the applicant's comparison with the Needles Decision is not admissible and, in any event, unfounded. The applicant relies on the decision

without appending it to its application, even though it has not yet been published in the Official Journal and the applicant makes mistakes when citing from it. Moreover, the Commission recalls that neither Regulation No 1/2003 nor the case-law or the Guidelines provide that fines must be set directly on the basis of the size of the market affected; that factor is merely one of a number of factors. Thus, when setting the starting amounts in its Needles Decision, the Commission took account not only of the effects of the infringements on the needle market, but also, at least temporarily, on the market for other haberdashery products.

— Findings of the Court

107 The first point to be noted here is that the applicant disputes the basic amount of the fine, which, pursuant to the fourth paragraph of Section 1.B of the Guidelines, is the sum of the amounts set for the gravity and the duration of the infringement. However, it is apparent from its line of argument that the amount of the fine being contested is the amount determined according to the gravity of the infringement, so that the amount to which this plea relates is in fact the starting amount of the fine.

108 It should be borne in mind that, pursuant to the second paragraph of Article 15(2) of Regulation No 17 and Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, regard is to be had both to the duration and gravity of the infringement. In addition, pursuant to the first paragraph of Section 1.A of the Guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

109 This legal framework does not require the Commission to take account of the size of the market for the purpose of setting the starting amount of the fine. The Commission's method, the essential feature of which is that fines are determined on a tariff basis, albeit one that is relative and flexible, does not require — but does not preclude — that the size of the affected market be taken into account for the purposes of determining the general

starting amount and still less does it require the Commission to set that amount according to a fixed percentage of the total turnover on the market (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 134).

110 It follows that, in the exercise of its discretion when setting the amount of the fines, the Commission was entitled to choose not to take account of the size of the affected market, in the present case the MCAA market.

111 Since the participants in the cartel do not dispute that they committed a very serious infringement, the Commission was entitled, in the light of the third indent of Section 1. A of the Guidelines, to impose on the applicant a fine with a starting amount in excess of EUR 20 million.

112 As regards the argument that the starting amount was disproportionate in the light of the Commission's practice in previous decisions, it should be borne in mind that this does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulations No 17 and No 1/2003 and in the Guidelines (see Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 292 and the case-law cited).

113 Accordingly, the complaint that the starting amount of the fine imposed on the applicant is disproportionate in the light of the size of the market must be rejected as unfounded.

The second complaint: the basic amount of the fine is disproportionate in the light of the division into categories of the undertakings involved

— Arguments of the parties

114 The applicant alleges that the Commission committed an error of assessment when dividing the undertakings which participated in the cartel into categories. In the light of the case-law, the setting of a lower basic amount for the first category, on account of the small size of the market, ought also to have had repercussions for the undertakings placed in the lower categories.

115 It also submits that, by placing it in the second category and by thus using an inappropriate basic amount, because it was too high, the Commission failed to observe the method that it itself established in order to determine the relative weight of the parties in the cartel. It ought to have applied its own method correctly, consistently and, in particular, in a non-discriminatory manner. Its classification infringes the principle of proportionality.

116 Thus, if the starting amount of the fine imposed on the Akzo Nobel Group had been set at EUR 20 million, in the light of the small size of the market, the starting amount of the fine imposed on the applicant ought also to have been reduced to EUR 12.6 million, so as to ensure that the starting amounts were proportionate to the market shares of the undertakings involved in the cartel.

117 Lastly, the applicant submits that the Commission has infringed the obligation to provide a statement of reasons laid down by Article 253 EC, since it did not set out precisely in the contested decision the criteria to enable the applicant to assess whether the division into categories of the undertakings involved was disproportionate in view of their market shares.

118 As regards the applicant's argument based on the difference in market shares, the Commission replies in essence that the Court of Justice held that the Court of First Instance had not erred in law by placing in the same category undertakings with market shares diverging by as much as seven percentage points (Case C-57/02 P *Acerinox* v *Commission* [2005] ECR I-6689, paragraphs 76 to 78). Accordingly, the Commission submits that the criterion used in the present case in order to devise the three categories, namely the market shares of the members of the cartel on the MCAA market during the last full calendar year of the infringement (recital 292 of the contested decision), is appropriate, so that the applicant's classification in the second category is justified.

119 The Commission submits that the applicant's argument that the lower starting amount of the fine imposed on the Akzo Nobel Group ought to lead to a reduction in its own fine is unfounded, since the starting amount selected for the applicant, relating to a very serious infringement, amounts to EUR 20 million, and the basic amount to EUR 21 million. In fact, the Guidelines state that the basic amount for very serious infringements will generally exceed EUR 20 million.

120 The Commission also submits that it fulfilled its obligation to state reasons, since, in accordance with the case-law, it indicated in the contested decision the factors on the basis of which the gravity of the infringement was assessed, and it is not required to include in it a more detailed account or the figures relating to the method of calculating the fines.

— Findings of the Court

121 It should be noted at the outset that for the abovementioned reasons (see paragraph 107 above), where the applicant refers to the basic amount, it should be understood as referring to the starting amount of the fine.

122 Under the Guidelines, where there are infringements involving a number of undertakings, the Commission may, as it did in this case, weight the starting amounts to take account of the specific weight of each undertaking by dividing the members of the cartel into groups 'particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type' (sixth paragraph of Section 1.A of the Guidelines). The Guidelines further state that 'the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetic calculation' (seventh paragraph of Section 1.A of the Guidelines).

123 It is the settled case-law of the Court of First Instance that, in determining the gravity of the infringement, the Commission is not required to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover. It may, however, divide them into groups (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385, and Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 57). The method of dividing the members of a cartel into categories in order to apply differential treatment when setting the starting amounts of the fines, the principle of which has been approved by decisions of the Court of First Instance even though it ignores differences in size between undertakings in the same category (*CMA CGM*, paragraph 385, and judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 217), results in a flat-rate starting amount for all the undertakings in the same category.

124 None the less, such a division into categories must comply with the principle of equal treatment, which prohibits similar situations from being treated differently and different situations from being treated in the same way, unless such treatment is objectively justified. Furthermore, according to the case-law, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement (judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 219).

125 In the present case, in order to identify the categories in which to place the undertakings concerned, the Commission decided to take account of their importance on the market in question on the basis of a single criterion, namely the worldwide market shares for MCAA during the last full calendar year of the infringement, 1998, except for Hoechst, in respect of which 1996 was the year taken into consideration.

126 On that basis, the Commission established three categories in the light of the Akzo Nobel Group's market share of 44%, Clariant's market share of 34%, Hoechst's market share of 28% and Atofina/Elf Aquitaine's market share of 17%. It set the following starting amounts:

— first category (Akzo Nobel): EUR 30 million;

— second category (Hoechst, Clariant): EUR 21 million;

— third category (Atofina/Elf Aquitaine): EUR 12 million (recitals 293 to 296).

127 The Court notes that there was a difference of 16 percentage points between the market share of the Akzo Nobel Group and that of Hoechst, and of 11 percentage points between the market share of Hoechst and that of Atofina/Elf Aquitaine. Thus, the Commission was entitled to create an intermediate category comprising undertakings with very similar market shares, namely 28% and 34% for Hoechst and Clariant respectively, between the first category, in which Akzo Nobel with the largest market share was placed, and the third category, in which Atofina/Elf Aquitaine with the smallest market share was placed.

128 Accordingly, in proceeding in this manner, the Commission chose a coherent method for dividing the members of the cartel into three categories, which is objectively justified by the difference between the market shares of each of the undertakings belonging to those three categories (see, to that effect, judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 220). Moreover, it must be stated that, in so doing, the Commission did not depart from its usual method set in the Guidelines, contrary to what the applicant submits. The method used was not therefore discriminatory.

129 Furthermore, it follows from the Court's analysis of the Guidelines that they do not lay down an arithmetical calculation method preventing the fines imposed on each undertaking concerned from being adjusted individually to take account of the relative gravity of its participation in the infringement. The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 15 of Regulation No 17 and Article 23 of Regulation No 1/2003 (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 266 and 267).

130 As regards the applicant's argument that the setting of the starting amount of the fine imposed on the Akzo Nobel Group at a low level, in the light of the small size of the market, ought also to have resulted in a reduction in the starting amount of its own fine, it should be pointed out, as is mentioned in paragraph 110 above, that the Commission was not required under Section 1 A of the Guidelines to take account of the limited size of the market when setting the starting amount of the fine. The Court therefore holds that, for an infringement classified as very serious, as defined in the third indent of the second paragraph of Section 1A of the Guidelines, the Commission was entitled to set a starting amount of EUR 30 million for the first category, of EUR 21 million for the second and of EUR 12 million for the third.

131 As regards the complaint that the Commission failed to state reasons regarding the division of the undertakings into categories, it must be noted that, at recitals 290 to 296 of the contested decision, the Commission stated that it was appropriate in the present case to take account of the EEA market shares of the undertakings which participated in

the infringement as a basis for comparison to determine their respective weights, and then, in view of the differences between those market shares, divided the undertakings which participated in the cartel into three categories. In this respect, it must be borne in mind that, as regards the calculation of the amount of fines imposed by the Commission for infringements of Community competition law, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschppij and Others* v *Commission* [2002] ECR I-8375; '*LVM*', paragraph 463). Contrary to what the applicant claims, that requirement does not oblige the Commission to indicate in its decision the figures relating to the method of calculating the fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment (*LVM*, paragraph 464; see also, to that effect, *Sarrió* v *Commission*, paragraphs 76 and 80).

132 It follows that the applicant is wrong to claim that the principle of proportionality has been infringed as regards the starting amount of its fine, given that the starting amount selected is justified in the light of the criterion applied by the Commission for the assessment of the size of each undertaking on the relevant market. In addition, the statement of reasons relating to the classification of the undertakings by categories provided in the contested decision is sufficient.

133 Accordingly, the complaint that the starting amount of the fine is disproportionate in the light of the classification by categories of the undertakings involved must be rejected.

134 In the light of all the foregoing, the plea alleging an error of assessment in the calculation of the starting amount of the fine must be rejected.

The fifth plea: unjustified increase in the fine for repeated infringement

Arguments of the parties

135 The applicant submits that the increase of 50% in the basic amount of the fine for an alleged repeated infringement is unjustified. A finding of repeated infringement was already made in respect of the applicant, on the same grounds, in Commission Decision 2005/493/EC of 1 October 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Chisso Corporation, Daicel Chemical Industries Ltd, Hoechst, The Nippon Synthetic Chemical Industry Co. Ltd and Ueno Fine Chemicals Industry Ltd (Case No COMP/E-1/37.370 — Sorbates), a summary of which is published in the Official Journal of 13 July 2005 (OJ 2005 L 182, p. 20; 'the Sorbates Decision'), so that the Commission infringes the principle *non bis in idem* in applying a second increase in the present case.

136 Moreover, the basis of the increase for repeated infringement is not very plausible, given that the decisions relied on in support of the increase concern other businesses in the Hoechst Group and furthermore had not become *res judicata* when the infringement was found to have come to an end, or go back so far in time that that they no longer constitute a ground for increasing the penalty.

137 The increase of the fine for repeated infringement depends on the material and temporal link between the earlier infringements and the infringement which gave rise to the fine. Thus, where an undertaking commits a fresh infringement several decades after the first one and long after expiry of the legal limitation period, and where the person involved in the first infringement has left the undertaking, it is not possible to punish the undertaking for a repeated infringement. Consequently, the fine imposed on it for the cartel in the Dyestuffs Decision is too old and is time-barred, and cannot therefore justify an increase in the penalty. Nor can the PVC II Decision lead to an increase of the fine for repeated infringement, first, because that decision merely repeats an earlier decision which was declared non-existent by the Court of First Instance and was annulled by the Court of Justice and, second, because the infringements which formed the subject-matter of those two decisions were definitively found to have existed only in the judgement in *LVM*.

138 The applicant also claims that none of the decisions relied on as an initial infringement displays a material connection with the present case. There is no reason that infringements committed within an autonomous part of a group with a different object and involving different persons be regarded as initial infringements for the purposes of considering whether there has been a repeat infringement. The MCAA business unit infringed Article 81 EC and that unit was in no way involved in the earlier decisions cited by the Commission. In making reference in this way to the earlier actions of other subsidiaries in the group and in imputing them again to the applicant by increasing the penalty, the Commission is promoting discrimination against groups which possess several independent areas of business under the control of a single legal person.

139 The Commission contends that this plea should be rejected.

Findings of the Court

140 It follows from the case-law that the taking into account of aggravating circumstances when setting the amount of the fine is consistent with the Commission's task of ensuring compliance with the competition rules (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 71). Thus, any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (*Aalborg Portland and Others* v *Commission*, paragraph 91).

141 As regards the complaint that a temporal connection between the initial infringement and the repeated infringement is essential and that the Dyestuffs decision imposing a fine for infringement of Article 81 EC relates to an infringement which is time-barred or too old to justify an increase in the penalty in the present case, it should be borne in mind that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and that the Commission cannot be bound by any limitation period when making such a finding. Repeated infringement is an important factor which the Commission must appraise, since the purpose of taking repeated infringement into account is to induce undertakings which

have demonstrated a tendency towards infringing the competition rules to change their conduct (Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 38 and 39).

142 The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency. In this respect, the Commission relied in the present case on two earlier decisions, namely the Dyestuffs and *PVC II* Decisions (see paragraph 21 above). Like the Commission, the Court of First Instance considers that the existence of those decisions and the applicant's infringement found in the present case show its tendency not to draw the appropriate conclusions from a finding that it had infringed the competition rules laid down in Article 81 EC, irrespective of the time which has elapsed since the Dyestuffs Decision.

143 As regards the complaint that the *PVC II* Decision cannot justify the finding of repeated infringement because it became final only after the end of the infringement at issue in the present case, it should be noted that it is sufficient that an undertaking has been found previously to be a perpetrator of an infringement of the same type, even if the decision is still subject to review by the courts. The assessment of the specific characteristics of a repeated infringement depends on an appraisal of the circumstances of the case by the Commission in the course of its discretion. Furthermore, Commission decisions are presumed to be valid until such time as they are annulled or withdrawn (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48).

144 Although the *PVC II* Decision — adopted by the Commission after its Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81 EC] (IV/31.865, PVC) (OJ 1989 L 174, p. 1) was annulled (*Commission* v *BASF and Others*) — was the subject of judicial proceedings which culminated, after the end of the infringement at issue, namely, for the applicant, on 30 June 1997, in *LVM and Others* v *Commission*, that cannot call into question the presumption that it was valid until that judgment was delivered. It should be pointed out that the judgments of the Court of First Instance and of the Court of Justice were delivered before the adoption of the contested decision. Accordingly, contrary to what the applicant submits, the Commission was entitled to rely on the *PVC II* Decision.

145 Consequently, the Commission was entitled to rely on the Dyestuffs and *PVC II* Decisions to find that the applicant's conduct constituted a repeated infringement.

146 The argument that the Dyestuffs and *PVC II* Decisions are not materially connected to the present case must also be rejected. The Guidelines refer to an infringement of the same type by the same undertaking. Moreover, the concept of repeated infringement, as understood in a number of national legal orders, implies that a person has committed new infringements after being punished for similar infringements (*Michelin* v *Commission*, paragraph 284).

147 Since Hoechst had been punished in the Dyestuffs and *PVC II* Decisions for infringement of Article 81 EC, it was indeed the same undertaking which, in the contested decision, was censured for the same type of infringement for participating in the cartel on the MCAA market, despite the fact that the infringements at issue concern subsidiaries (see, to that effect, *Michelin* v *Commission*, paragraph 290) or different markets (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF* v *Commission* [2007] ECR II-4949, paragraph 64). Notwithstanding the finding of an infringement of Community competition law, the undertaking, within the meaning of Article 81 EC (see paragraph 58 above), continued to infringe that provision.

148 In the light of the foregoing, the Commission was entitled to increase the basic amount of the fine by 50% in order to induce the applicant to comply with the Treaty competition rules.

149 As regards the alleged infringement of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset (*Aalborg Portland and Others* v *Commission*, paragraph 338).

150 In the present case, it should be noted that the facts are not identical. The Sorbates Decision, on which the applicant relies when submitting that there has been a breach of the principle *non bis in idem*, relates to a cartel with a different object, namely an infringement on a separate product market, the Sorbates market, and not the MCAA market at issue in the present case (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 339, and Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 292).

151 Accordingly, the contested decision was not adopted in breach of the principle *non bis in idem*.

152 Having regard to all the foregoing, the plea alleging an unjustified increase in the fine for repeated infringement must be rejected.

The sixth plea: the administrative procedure was vitiated by procedural irregularities

153 The applicant subdivides its plea of infringement of its procedural rights into two parts. The first part alleges that it had insufficient access to the file during the administrative procedure and the second part alleges that the Hearing Officer's report is illegal.

The first part: insufficient access to the file

— Arguments of the parties

154 The applicant submits, first, that it was not allowed access to Clariant's observations relating to the infringements committed by the MCAA side of the business, and, in particular, to the Clariant Group's reply to the statement of objections. It observes that it made a request to consult Clariant AG's and Clariant GmbH's replies to the statement of objections on 22 May 2004; that request was rejected by the Commission by letter of 9 July 2004.

155 It claims that that refusal prevented it from being able to cooperate with the Commission and from exercising its rights of defence. In the light of its specific situation on account of the sale of its MCAA business to Clariant AG, it could no longer consult the relevant commercial documents. It also requested Clariant AG's permission on several occasions to consult the documents and information relating to the period prior to the sale of its MCAA business, which Clariant AG refused.

156 According to the applicant, the addressee of a statement of objections who learns that the Commission possesses documents not in its investigation file which could be useful to its defence may also request access to those documents. It has been recognised by the case-law that replies by third parties to the statement of objections, but also documents from Commission files regarding other proceedings relating to cartels or even other areas of Commission activity, form part of the documents to which it might have access.

157 It states that access to documents does not relate solely to the consultation of the documents on which the statement of objections is based, but must enable the undertaking to search in the Commission's file for exculpatory documents in order to establish its own defence. It submits that in the present case it needed access to Clariant

AG's and Clariant GmbH's replies to the statement of objections in order to determine whether, in the absence of its own files on the MCAA sector, more extensive cooperation with the Commission would have been possible. Moreover, following the sale of its MCAA business to Clariant AG in 1997, it was no longer in a position to consult the commercial documents and no longer had an opportunity to pursue its research into the facts at issue.

158 As regards the argument that Clariant AG and Clariant GmbH's observations could only have been inculpatory documents, the applicant replies that since the Commission was not familiar with the applicant's defence strategy, it could not decide by itself what constituted inculpatory or exculpatory documents. According to the case-law and the Commission's practice in previous decisions, it cannot be for the Commission to decide the relevance of a particular document to an undertaking and its defence strategy.

159 The Commission replies that, since, after receiving the statement of objections, the applicant had access to the investigation file, its right of access to the file during the administrative procedure was observed. It states that the applicant was never entitled to have access to other written documents and in particular to the other addressees' replies to the statement of objections. According to the case-law, access to the file is limited to the documents contained in the file, namely the documents which might be inculpatory or exculpatory in relation to the complaints put forward.

— Findings of the Court

160 It must first be recalled that access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections. Access to the file is thus one of the procedural safeguards

intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (see Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 334 and the case-law cited).

161 The right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file that might be relevant for its defence (see, to that effect, Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 125, and Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 81). Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11; *Aalborg Portland and Others* v *Commission*, paragraph 68).

162 In the present case, the applicant does not contest that it had access to the file, including the documents and statements which were submitted to the Commission and the documents on which the Commission relied. The applicant asserts merely that it did not have access to Clariant's observations and, in particular, to Clariant's reply to the statement of objections, whereas it needed access to them in order to determine whether, in the absence of its own file concerning the MCAA business that it had transferred to Clariant AG, more extensive cooperation with the Commission would have been possible. The applicant claims that, as a former owner of the MCAA business, it had a higher interest in access to those documents than the other undertakings on which fines were imposed pursuant to Article 81 EC.

163 In this respect, it should be recalled that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, the other parties' replies to the statement of objections are not, in principle, included in the documents of the investigation file that the parties may consult.

164 However, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes evidence against the various parties alleged to have participated in the infringement (see 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 386, and *Avebe* v *Commission*, paragraph 50 and the case-law cited).

165 Thus, it would be for the undertaking concerned to show that the result at which the Commission arrived in its decision might have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 73).

166 Where an exculpatory document has not been communicated, it is settled case-law that the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision (see, to that effect, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 81, and *LVM*, paragraph 318).

167 However, the above-cited case-law is irrelevant in the present case, since, as mentioned at paragraph 163 above, at the stage of notification of the statement of objections the applicant had had access to all the elements in the file which it contained at that time, including those which might have enabled the applicant to cooperate with the Commission. In the light of the scope of the access to the file as described above, it must be held that the applicant's rights of defence were fully respected in the present case.

168 In any event, the applicant fails to show, nor does it claim in its pleadings, that the Commission relied in the contested decision on a part of Clariant's reply to the statement of objections to substantiate the evidence concerning its own infringing conduct, or that, had it had access to the documents which were not communicated, the Commission's decision would have had a different content.

169 The fact that the reply in question was not communicated could not, therefore, first, have prevented the applicant from expressing its views effectively on the conclusions reached by the Commission in its statement of objections in the light of the evidence in the investigation file and to which it does not dispute that it had access or, second, have influenced the course of the procedure and the content of the contested decision.

170 Accordingly, it cannot be considered that the Commission infringed the applicant's rights of the defence by not communicating to it Clariant's reply to the statement of objections.

171 That conclusion is not undermined by the circumstances relied upon by the applicant, namely the fact that it no longer had at its disposal the relevant commercial documents since the sale of its MCAA business and that Clariant had refused to communicate them to it. By virtue of a general duty of care attaching to any undertaking, the applicant was required to ensure, even in the circumstances of the sale of its MCAA business to Clariant AG, the proper maintenance of records in its books and files of information enabling details of its activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2003] ECR II-5761, paragraph 87).

172 The part of the plea alleging breach of the rights of the defence on the ground of lack of access to the file must therefore be rejected as unfounded.

The second part: the unlawfulness of the hearing officer's report

— Arguments of the parties

173 The applicant submits that the hearing officer's final report is incomplete and manifestly unlawful since it does not set out the applicant's complaints regarding the procedural infringements and does not address the arguments raised by the applicant.

174 Moreover, the conclusion of the hearing officer's report, which states that 'the right to be heard of the undertakings which participated in the concentration was observed', is incorrect, since the present case concerns a proceeding relating to Article 81 EC. If the hearing officer's report had been drawn up correctly, the Commission might have adopted a different decision. In any event, the College of Commissioners ought not to have adopted the decision before the Hearing Officer's legal error was rectified. It is therefore necessary to annul the contested decision for serious breach of the procedural rules.

175 The Commission contends that this part of the plea should be rejected.

— Findings of the Court

176 It should be noted at the outset that the hearing officer's report constitutes a purely internal Commission document, which is not intended to supplement or correct the

undertakings' arguments and which therefore does not constitute a decisive factor which the Community judicature must take into account when exercising its power of review (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 375, and *HFB and Others* v *Commission*, paragraph 40).

177 As regards the complaint that the hearing officer's report is incomplete, it should be borne in mind that, under Article 15 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21), the hearing officer is to draw up a final report in writing on the respect of the right to be heard, namely, in particular, on disclosure of documents and on access to the file, on time-limits for replying to the statement of objections and on the proper conduct of the oral hearing. That decision also provides that the hearing officer will consider in that report whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and the objectivity of any enquiry.

178 Article 16 of Decision 2001/462 further provides that the hearing officer's final report is to be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

179 It is apparent from these provisions that the hearing officer is not responsible for collecting all the objections of a procedural nature put forward by the parties concerned during the administrative procedure. He is required to communicate to the College of Members of the Commission only the objections relevant to the assessment of the lawfulness of the conduct of the administrative procedure (judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 53).

180 In the present case, it is apparent from the hearing officer's report that the parties were able to have access to the file by CD-ROM, that, although the applicant was initially served with an incomplete version of the statement of objections, a corrected version was sent to it and it was granted an extension of the deadline in order to reply to it. It is explicitly specified that, by letters of 22 June and 28 July 2004, the applicant requested access to Clariant AG's reply to the statement of objections and that it was informed that other parties' responses to the statement of objections were not part of the investigation file to which access was generally granted. The report also states that the parties participated in an oral hearing, with the exception of Elf Aquitaine and the applicant, and that a draft decision submitted to the Commission only contains objections in respect of which the parties were afforded the opportunity of making known their views.

181 Accordingly, it must be stated that the issues of a procedural nature raised by this case were mentioned by the hearing officer who, in any event, was not required, in the light of the case-law cited (see paragraph 179 above), to collect all the objections of that nature put forward during the administrative procedure.

182 Accordingly, the complaint that the report is incomplete and unlawful because it does not set out the content of the claims of breach of the procedural rules and contains no reply to the arguments raised cannot be upheld.

183 Next, as regards the complaint concerning the error affecting the hearing officer's report, which refers to a 'Zusammenschluss' (concentration), the Court notes, as the Commission points out, that that error appears only in the German version. As the Commission has established, there were other language versions, namely a French and an English version, which were also communicated to the College of Members of the Commission and did not contain an error.

184 In any event, the report refers in all the language versions, in the second paragraph, to 'a potential infringement of Article 81(1) [EC] and Article 53(1) [EEA] in the MCAA industry'.

185 Accordingly, in the light of the content of that report, which clarifies the legal framework of the case at issue, and given that the error alleged appears only in the German version, this complaint must be rejected.

186 The sixth plea alleging that the administrative procedure was vitiated by procedural irregularities must therefore be rejected.

The seventh plea: illegality of the order to bring the infringement to an end

Arguments of the parties

187 The applicant submits that the order to bring the infringement to an end issued to it in Article 3 of the contested decision infringes Article 3 of Regulation No 17 since it concerns an action which is impossible to carry out. In view of the complete termination in 1997 of its MCAA business, the order to bring the infringement to an end cannot be legal. Apart from the fact that the order gives third parties the false impression that other evidence subsists which had not been examined when the contested decision was adopted, the applicant submits that that order might harm the rights of the addresses of the contested decision under civil law.

188 In its submission, where, as in the present case, an undertaking no longer operates on the market and where, even theoretically, there is no possibility that that undertaking will participate again in cartels on the relevant market, it is no longer possible to issue an order to the applicant.

189 The Commission contends that this plea should be rejected.

Findings of the Court

190 Pursuant to Article 3(1) of Regulation No 17 and Article 7(1) of Regulation No 1/2003, if the Commission finds, upon application or upon its own initiative, that there is infringement of Article [81 EC] or of Article [82 EC], it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

191 It is settled case-law that the application of Article 3(1) of Regulation No 17 may include a prohibition on continuing certain activities, practices or situations which have been found to be unlawful, but also a prohibition on adopting similar future conduct. Moreover, since Article 3(1) of Regulation No 17 must be applied with reference to the infringement found, the Commission has the power to specify the extent of the obligations of the undertakings concerned in order to terminate it (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 1249 and 1250 and the case-law cited).

192 In the present case, according to Article 3 of the contested decision:

> 'The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so.
>
> They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.'

193 Such instructions fall clearly within the Commission's powers under Article 3(1) of Regulation No 17 and henceforth Article 7(1) of Regulation No 1/2003. By requiring the undertakings which participated in the cartel to refrain from repeating and to bring to an end any act or conduct described in Article 1, namely the allocation of volume quotas and customers, agreement on concerted price increases, agreement on a compensation mechanism, the exchange of information on sales volumes and prices, participation in regular meetings and other contacts to implement the above restrictions, as well as any act or conduct having the same or similar object or effect, the Commission merely indicated the consequences, regarding their future conduct, of the finding of illegality in Article 1 of the contested decision.

194 Moreover, the first paragraph of Article 3 of the contested decision states that it is only in the event that the undertakings had not yet brought the infringement to end that they would be required to do so. Accordingly, if the applicant had sold its MCAA business and brought to an end the infringement at the time of the contested decision, it was not concerned by that paragraph of Article 3 of the contested decision.

195 The plea that Article 3 of the contested decision is illegal cannot therefore be upheld.

The final amount of the fine imposed on the applicant

196 In the light of the conclusion in paragraph 102 above, it is necessary to vary the contested decision inasmuch as the Commission failed to take account, in the second indent of Section D 2 of the Leniency Notice, of the fact that the applicant did not dispute the facts. It is appropriate on this ground to reduce by 10% the fine imposed on the applicant.

197 The Commission's findings in the contested decision and the method of calculation applied are otherwise unchanged.

198 The final amount of the fine imposed on the applicant is thus calculated as follows: the starting amount of the fine of EUR 21 million is increased by 135% to take account of the duration of the infringement. The basic amount of the fine is therefore set at EUR 49.35 million. That basic amount of the fine is increased by 50% to take account of the applicant's repeated infringement, giving an amount of EUR 74.03 million. That total amount must lastly be reduced by 10% pursuant to the second indent of Section D 2 of the Leniency Notice, that is to say by EUR 7.403 million. The final amount of the fine is therefore EUR 66.627 million.

Costs

199 Under Article 87(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that costs be shared or that each party bear its own costs. In the circumstances of this case, each party must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

1. **Sets the amount of the fine imposed on Hoechst AG in Article 2(b) of Commission Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 — MCAA) at EUR 66.627 million;**

2. **Dismisses the remainder of the action;**

3. Orders each party to bear its own costs.

Forwood Šváby Truchot

Delivered in open court in Luxembourg on 30 September 2009.

[Signatures]

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