JUDGMENT OF THE COURT (First Chamber)

9 July 2009 *

In Case C-511/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 11 December 2006,

Archer Daniels Midland Co., established in Decatur, Illinois (United States), represented by C.O. Lenz, Rechtsanwalt, L. Martin Alegi, E. Batchelor and M. Garcia, Solicitors, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by A. Bouquet and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (First Chamber),

composed of A. Tizzano, acting as President of the First Chamber, M. Ilešič, A. Borg Barthet, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 8 May 2008,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2008,

gives the following

Judgment

1 By its appeal, Archer Daniels Midland Co. ('ADM') seeks to have set aside the judgment of the Court of First Instance of the European Communities in Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627 ('the judgment under appeal') which dismissed in part its action for the partial annulment of Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18,'the contested decision'), in so far as that decision relates to the appellant.

Legal context

2 Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provided:

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

(a) they infringe Article [81](1) [EC] or Article [82 EC], …

…

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

3 The Commission notice of 14 January 1998 entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3, 'the Guidelines'), states, inter alia:

'The principles outlined … should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

4 According to Section 1A 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.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

…

It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

…

Where an infringement involves several undertakings (e.g. cartels), it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

…'

5 Section 2 of the Guidelines, headed 'Aggravating circumstances', states:

'The basic amount will be increased where there are aggravating circumstances such as:

…

— role of leader in, or instigator of the infringement,

…'

6 Section 3 of the Guidelines, headed 'Attenuating circumstances', is worded as follows:

'The basic amount will be reduced where there are attenuating circumstances such as:

…

— termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks),

…'

7 Under Section B of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), headed 'Non-imposition of a fine or a very substantial reduction in its amount':

'An [undertaking] which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the [undertakings] involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another [undertaking] to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if [it] had not cooperated.'

8 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.

…'

9 Section E(2) of that notice is worded as follows:

'Only on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met, and thus whether or not to grant any reduction in the fine, or even waive its imposition altogether. It would not be appropriate to grant such a reduction or waiver before the end of the administrative procedure, as those conditions apply throughout such period.'

The facts

The cartel

10 The Commission addressed the contested decision to five undertakings producing citric acid, namely ADM, Cerestar Bioproducts BV ('Cerestar'), F. Hoffmann-La Roche AG ('HLR'), Haarmann & Reimer Corporation ('H & R') and Jungbunzlauer AG ('JBL').

11 Citric acid is an acidulant and preservative used in food and beverages, household detergents and cleaners, pharmaceuticals and cosmetics, and in various industrial processes.

12 In August 1995, the Commission was informed of the initiation of an investigation by the United States Department of Justice regarding the citric acid market in the United States. Having admitted to participating in a cartel, ADM, Cerestar, HLR, H & R and JBL paid fines pursuant to agreements concluded with that department. In addition, certain individuals were fined.

13 On 6 August 1997 the Commission sent requests for information under Article 11 of Regulation No 17 to the four largest producers of citric acid in the European Community.

14 Further to a subsequent request sent during July 1998, Cerestar informed the Commission of its intention to cooperate. At a meeting with Commission representatives of 29 October 1998, Cerestar's representatives described from

memory the cartel activities in which the five undertakings referred to in paragraph 10 of this judgment had participated ('the cartel') and certain mechanisms by which that cartel operated. In addition, that undertaking drew attention to the role played by ADM during certain multilateral meetings of those undertakings. Cerestar confirmed that testimony in a written statement of 25 March 1999 ('Cerestar's statement').

15 On 11 December 1998, ADM's representatives described during a meeting with Commission representatives the anti-competitive activities in which that company had participated in the context of the cartel. That company confirmed that account by letter of 15 January 1999 ('ADM's statement').

16 On the basis of the information communicated by the five undertakings in reply to the Commission's additional requests for information, the Commission sent them a statement of objections dated 29 March 2000 ('the statement of objections'), in which it alleged that they had infringed Article 81(1)(EC) and Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994, L 1, p. 3), from March 1991 until May 1995 in the case of four of them, including ADM, and from May 1992 until May 1995 as regards Cerestar, by participating in a secret cartel on the citric acid market. The Commission complained, in particular, that they had allocated specific sales quotas in respect of each undertaking and had adhered to those quotas, had fixed target and/or floor prices, eliminated discounts and exchanged specific customer information. None of those parties requested an oral hearing, nor did they substantially contest the facts as set out in the statement of objections. They merely replied in writing to the allegations made in the statement of objections.

The statement of objections

17 In Section C of Part I of the statement of objections, the Commission set out the facts to which its objections related. At point 50 of that statement, it listed the five principal

items of documentary evidence on which it based its factual findings; those items were appended to that statement along with six other documents, amongst them a report of the statements made by an ADM representative at the meeting of 11 December 1998 with Commission representatives, namely ADM's statement, the report of 5 November 1996 of the statements made by a former ADM representative before representatives of the United States Department of Justice and Federal Bureau of Investigation (FBI) agents during the antitrust proceedings carried out by the United States authorities ('the FBI report'), and Cerestar's statement.

18 Moreover, it was stated in points 161 and 162 of the statement of objections that, in assessing the gravity of the infringement, the Commission would take into account the facts as described and assessed in Section C and that, in assessing the fine to be imposed on each undertaking, it would take account, inter alia, of the role played by each in the collusive agreements as described in Part I of that statement.

19 Lastly, points 57 and 58 of that statement referred to the bilateral meetings held in January 1991 between ADM and JBL, HLR and H & R respectively with a view to implementing the cartel.

ADM's statement

20 ADM's statement contains a detailed description with figures of the cartel arrangements, and more specifically of the decisions adopted by the undertakings in question at the meetings held by them from March 1991 until May 1995.

The FBI Report

21 The FBI Report contains the detailed description given by a former ADM representative of the cartel arrangements and, in particular, of the information on the meetings between the undertakings in question. That report mentions, inter alia, that meetings attended by representatives of each undertaking participating in the cartel were organised, including 'Masters' meetings attended by the highest level of those representatives, and concerned the direction and arrangements of the cartel, whereas 'Sherpa' meetings were attended by representatives responsible for the practical implementation of those arrangements. Also according to that report, it appeared to the individual questioned that another former ADM representative, called the 'The Wise Old Man', who participated in both types of those meetings, had had the idea of the cartel arrangement known as the 'G-4/5 arrangement' and had had a fairly active role in the implementation of that arrangement.

Cerestar's statement

22 Cerestar's statement contains a concise description of the multilateral meetings between the representatives of the undertakings in question and the decisions adopted at those meetings. It states that it appeared to the Cerestar representative that the ADM representative played a leading role in those meetings.

The contested decision

23 According to the first paragraph of Article 1 of the contested decision, the five undertakings to which that decision was addressed 'have infringed Article 81(1) of the Treaty … by participating in a continuing agreement and/or concerted practice in the sector of citric acid'.

24 The second paragraph of Article 1 of that decision states that the infringement lasted from March 1991 until May 1995 in the case of ADM, HLR, H & R and JBL, and from May 1992 until May 1995 in the case of Cerestar.

25 Article 3 of that decision is worded as follows:

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

(a) [ADM]:EUR 39.69 million

(b) [Cerestar]: EUR 170 000

(c) [HLR]:EUR 63.5 million

(d) [H & R]:EUR 14.22 million

(e) [JBL]:EUR 17.64 million'

26 In the contested decision, in order to set the fines, the Commission applied the methods set out in the Guidelines and in the Leniency Notice.

27 In the first place, the Commission determined the basic amount of the fine by reference to the gravity and duration of the infringement.

28 As regards the gravity of the infringement, first, the Commission, in recital 230 of the contested decision, described the infringement as very serious, taking into account its nature, its actual impact on the citric acid market in the European Economic Area and the geographical extent of the market concerned.

29 Next, the Commission considered, at recital 233 of that decision, that it was necessary to take account of the actual economic capacity of the offenders to cause significant damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, taking as its basis the worldwide turnover of the undertakings concerned from the sale of citric acid in 1995, the last year of the infringement, the Commission divided them into three categories. It placed H & R, with a worldwide market share of 22%, in the first category, ADM and JBL, with market shares of [confidential], and HLR, with a market share of 9%, in the second category, and Cerestar, with a worldwide market share of 2.5%, in the third category. On this basis the starting amounts fixed by the Commission were EUR 35 million for the undertaking in the first category, EUR 21 million for those in the second and EUR 3.5 million for that in the third category.

30 In addition, those basic amounts were adjusted to ensure that the fine had a sufficient deterrent effect. To that effect, taking account of the size and the worldwide resources of the undertakings concerned, as expressed by their total worldwide turnover, the Commission applied a multiplier of 2 to the starting amounts for ADM and HLR, and of 2.5 to the starting amount for H & R.

31 Moreover, it is apparent from recitals 249 and 250 of the contested decision that, in order to take account of the duration of the infringement committed by each undertaking, the resulting amounts were increased by 10% per year of participation in the cartel, giving an increase of 40% as regards ADM, HLR, H & R and JBL, and 30% as regards Cerestar.

32 Accordingly, at recital 254 of the contested decision, the Commission set the basic amounts of the fines at EUR 58.8 million for ADM, while those for Cerestar, HLR, H & R and JBL were set at EUR 4.55 million, EUR 58.8 million, EUR 122.5 million and EUR 29.4 million respectively.

33 In the second place, as is apparent from recital 273 of the contested decision, the basic amounts for ADM and HLR were increased by 35% on account of aggravating factors, on the ground that they had acted as leaders of the cartel.

34 In particular, the Commission found, at recitals 263 and 264 of that decision, that the bilateral meetings between ADM and three other undertakings participating in the cartel were evidence that ADM had had an instigator role in the cartel, adding that other elements contributed to showing that ADM had acted as a leader of the cartel.

35 In this respect, at recitals 265 and 266 of the contested decision, the Commission referred to certain facts taken from the FBI Report and Cerestar's statement.

36 In the third place, at recitals 274 to 291 of the Decision, the Commission examined and rejected the requests of certain undertakings to benefit from attenuating circumstances.

37 In the fourth place, pursuant to Article 15(2) of Regulation No 17, the Commission, at recital 293 of the contested decision, adjusted the resulting amounts for Cerestar and H & R so that they did not exceed the 10% limit of their total annual worldwide turnover.

38 Lastly, in the fifth place, the Commission granted the undertakings in question a reduction of their respective fines under the Leniency Notice.

39 Thus, it is apparent from recitals 305 and 310 of the contested decision that Cerestar obtained, under Section B of the Leniency Notice, a 'very substantial' reduction, namely 90% of the fine which would have been imposed if it had not cooperated, on the ground that it was the first undertaking to provide the Commission with decisive evidence of the cartel's existence.

40 Consequently, at recital 306 of the contested decision, the Commission rejected ADM's arguments that it should be regarded as the undertaking which was the first to adduce that evidence and, under Section D of the Leniency Notice, granted it only a 'significant' reduction, namely 50% of the fine which would have been imposed if it had not cooperated.

41 In addition, JBL, H & R and HLR obtained a reduction of the fines which would have been imposed if they had not cooperated of 40%, 30% and 20% respectively.

The procedure before the Court of First Instance and the judgment under appeal

42 On 28 February 2002 ADM brought an action before the Court of First Instance against the contested decision.

43 In that action, ADM sought the annulment of Article 1 of the contested decision in so far as it finds that it agreed to restrict capacity in the citric acid market and to designate a producer who was to lead price increases in each national segment of the said market, the annulment of Article 3 of that decision in so far as it pertains to ADM and, in the alternative, the reduction of the fine imposed on it.

44 In support of that action, ADM submitted various pleas in law relating to the amount of its fine and directed, inter alia, against the assessment of the gravity of the infringement, its classification as a leader of the cartel, the assessment of attenuating circumstances and of the cooperation which it provided during the administrative procedure.

45 In the first place, as regards the gravity of the infringement, ADM claimed that, when assessing the actual impact of the cartel, the Commission erred in its definition of the relevant market, in that it did not define that market beforehand and therefore failed to take account of citric acid substitutes in that definition.

46 After finding, at paragraph 201 of the judgment under appeal, that ADM had failed to demonstrate that the impact of the citric acid cartel on the wider market to which it referred was non-existent or at least negligible, the Court of First Instance rejected that plea.

47 In the second place, as regards the classification as a leader of the cartel, ADM complained that the Commission erred in its assessment of the evidence taken into account in arriving at such a classification. First, the appellant claimed that the Commission had made use of a document compiled by the authorities of a non-Member State, namely the FBI Report, in breach of its procedural safeguards, in so far as, in particular, it had not been afforded an opportunity to comment on the validity of that document. Second, it submitted that the Commission had infringed its rights of defence because it had not mentioned in the statement of objections either ADM's classification as a leader of the cartel or the evidence taken from the FBI Report and Cerestar's statement to prove that role of leader.

48 The Court of First Instance pointed out at paragraph 215 of the judgment under appeal that the Commission had relied on three elements in arriving at such a classification, namely the bilateral meetings, the FBI Report and Cerestar's statement.

49 As regards the bilateral meetings, the Court of First Instance held, at paragraph 226 of the judgment under appeal, that the Commission had not committed a manifest error of assessment in finding that it was evidence in addition to the two other elements, namely the FBI Report and Cerestar's statement, proving that ADM had acted as a leader in the cartel.

50 Regarding the FBI Report, the Court of First Instance found, at paragraph 268 of the judgment under appeal, that by annexing that report to the statement of objections the Commission had enabled ADM to comment on its validity, in particular as regards any procedural irregularities which would result from the fact that the report had been taken into consideration. Having found that ADM had not challenged that report at any stage of the administrative procedure, the Court of First Instance held at paragraph 270 of that judgment that the Commission had not infringed the appellant's procedural rights.

51 The Court of First Instance found, at paragraph 290 of the judgment under appeal, that the content of Cerestar's statement is consistent with that of the FBI Report, so that the Commission had not committed a manifest error of assessment by attaching greater

evidential value to that statement than to other evidence put forward by the appellant in its attempt to show that it had not taken on the role of a leader of the cartel.

52 Moreover, the Court of First Instance held, at paragraphs 436 to 439 of the judgment under appeal, that the statement of objections sent to the undertakings in question contained the principal elements of fact and of law that could justify the fine that the Commission planned to impose on them. First, there was no obligation on the Commission, at that stage of the procedure, to inform ADM that it would be classified as a leader of the cartel. Second, since it is common ground that the FBI Report and Cerestar's statement had been annexed to that statement, the Court held that ADM could not properly claim infringement of its rights of the defence, even if the Commission had not expressly stated in the part of that statement relating to the facts that it might regard ADM as a leader of the cartel or set out the factors that it would take into account in concluding that it had such a role.

53 The Court of First Instance therefore rejected ADM's plea relating to its classification as a leader of the cartel.

54 In the third place, ADM claimed that the Commission had wrongly denied it the benefit of the attenuating circumstance provided for in the third indent of Section 3 of the Guidelines, even though it had terminated the infringement as soon as the United States antitrust authorities intervened.

55 The Court of First Instance, in paragraphs 335 and 336 of the judgment under appeal, interpreted the third indent of Section 3 of the Guidelines, and concluded, in paragraph 338 of that judgment, that the benefit of that attenuating circumstance cannot be granted automatically, but depends on the particular circumstances of the specific case. According to the Court of the First Instance, the secret nature of the cartel at issue shows that the undertakings concerned committed the alleged infringement intentionally, so that, in accordance with its case-law, the fact that such an infringement was terminated cannot be regarded as an attenuating circumstance where it was

terminated as a result of the Commission's intervention. Consequently, the Court of First Instance rejected ADM's plea relating to the failure to take that factor into account as an attenuating circumstance.

56 In the fourth place, ADM complained that the Commission did not grant it a 'very substantial reduction', within the meaning of Section B of the Leniency Notice, in the fine which would have had to be imposed if it had not cooperated, even though it had been the first undertaking to provide the Commission with decisive evidence of the cartel's existence.

57 The Court of First Instance also rejected that plea, holding at paragraphs 377 and 378 of the judgment under appeal that the Commission had been right to rule out the benefit of a 'very substantial' reduction in the fine in the light of ADM's role of a leader in the cartel.

58 Lastly, as to the remainder, the Court of First Instance upheld ADM's plea that the Commission had unlawfully taken into consideration, at recital 158 of the contested decision, certain factors which had not been mentioned in the statement of objections. Accordingly, it annulled Article 1 of that decision in so far as, read in conjunction with recital 158, it finds that ADM froze, restricted and closed down citric acid production capacity and designated the producer who was to lead price increases in each national segment of the relevant market. However, considering that those factors were superfluous in view of the essential characteristics of the cartel, the Court of First Instance held that it was not necessary to modify the amount of the fine as set by the Commission in the case of ADM. Finally, it ordered ADM to pay all the costs with the exception of one tenth of its own costs, which was to be paid by the Commission.

Forms of order sought

59 ADM claims that the Court should:

— set aside the judgment under appeal in so far as the Court of First Instance dismissed the action for annulment of the contested decision;

— annul Article 3 of the contested decision so far as it pertains to it;

— in the alternative, modify Article 3 by cancelling or reducing the fine imposed on ADM;

— in the further alternative, refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice;

— in any event, order the Commission to pay its own costs and ADM's costs relating to the proceedings before the Court of First Instance and before the Court of Justice.

60 The Commission contends that the Court should:

— dismiss the appeal, and

— order ADM to pay the costs.

The appeal

61 The appellant puts forward nine pleas in law in support of its appeal:

— in the case of the first five pleas, various errors of law by the Court of First Instance in relation to ADM's classification as a leader of the cartel;

— in the case of the sixth plea, an error of law by the Court of First Instance as regards the refusal to grant ADM the benefit of attenuating circumstances relating to the termination of its participation in the cartel;

— in the case of the seventh and eighth pleas, infringement of the principle of the protection of legitimate expectations and an error of law by the Court of First Instance as regards the application of the rules laid down in the Leniency Notice, and

— as regards the ninth plea, infringement of the principle that the Commission must follow self-imposed rules concerning the definition of the relevant market when assessing the gravity of the infringement.

First plea: error of law as regards the assessment of observance of ADM's rights of defence in relation to its classification as a leader

Arguments of the parties

62 By this plea, which is subdivided into two parts, ADM claims infringement by the Court of First Instance of its rights of defence.

63 In the first part, the appellant criticises the Court of First Instance for finding, at paragraphs 437 and 438 of the judgment under appeal, that the Commission had indicated in the statement of objections the principal elements of fact material to the gravity of its conduct, even though no mention was made in that statement of the fact that it might be considered a leader of the cartel. Leadership is a principal element of fact which must be set out in the statement of objections, failing which the rights of defence of the undertaking concerned are infringed.

64 In the second part, ADM claims that the Commission gave it no warning, in the statement of objections, of the facts that would be taken into account in the contested decision to find that it acted as a leader. The mere presence, in an annex to that statement, of the documents from which those facts are apparent was not sufficient to ensure observance of the appellant's rights of defence.

65 The Commission takes the view that this plea is unfounded. As regards the first part, by mentioning, at point 158 of the statement of objections, that it would take account of the role played by each undertaking participating in the infringement on an individual basis when assessing the gravity of the infringement, it fulfilled, as the Court of First Instance held, the requirements of the case-law to which the appellant itself drew attention.

66 The second part is ineffective, the Court of First Instance having moreover held that the Commission was not required to set out in the statement of objections the facts which would lead it to classify the appellant as a leader of the cartel. In any event, that part is unfounded, since those facts were known to the appellant, given that they were apparent from the documents annexed to that statement. In addition, various points of that statement explicitly referred to the appellant. Consequently, the appellant was afforded an opportunity to raise its objections to the documents used to prove its leadership role at the stage of the administrative procedure, and its rights of defence were not therefore infringed.

Findings of the Court

— The first part of the first plea

67 It is apparent from the findings set out in paragraph 437 of the judgment under appeal that, in the statement of objections sent to ADM, the Commission classified the infringement alleged against the undertakings in question as very serious and stated its intention to set the fines at a level of sufficient deterrence. In that respect, it is also clear from points 158, 161 and 162 of that statement that the Commission would take account of the role played individually by each undertaking which participated in the infringement.

68 In accordance with the Court of Justice's settled case-law, referred to by the Court of First Instance in paragraph 434 of the judgment under appeal, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (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, paragraph 428 and Joined Cases C-101/07 P and C-110/07 P *Coop de France Bétail and Viande* v *Commission* [2008] ECR I-0000, paragraph 49).

69 Moreover, it is apparent from the case-law that to oblige the Commission to give to undertakings under investigation specific indications of the level of the contemplated fines at the stage of the statement of objections would in effect require it inappropriately to anticipate its final decision (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

70 In this respect, classification as leader of a cartel has significant consequences regarding the amount of the fine to be imposed on an undertaking described as such. Thus, under Section 2 of the Guidelines, it constitutes an aggravating circumstance which leads to a significant increase in the basic amount of the fine. Similarly, under Section B(e) of the Leniency Notice, such a classification automatically excludes the granting of a very substantial reduction of the fine, even if an undertaking classified as a leader fulfils all the conditions set out in that provision to qualify for such a reduction.

71 Accordingly, it is for the Commission to set out in the statement of objections the evidence which it considers relevant to enable an undertaking under investigation which may be classified as a leader of the cartel to respond to such an objection. However, in light of the fact that that statement remains a step in the adoption of the final decision and does not therefore constitute the Commission's definitive position,

the Commission cannot be required, already at that stage, to carry out a legal classification of the evidence on which it relies in its final decision in classifying an undertaking as leader of the cartel.

72 It follows that the Court of First Instance cannot be accused of committing an error of law by holding that the Commission was entitled not to indicate in the statement of objections that it might classify ADM as a leader.

73 Consequently, the first part of the first plea must be rejected as unfounded.

— The second part of the first plea

74 In this part, ADM submits that, by holding at paragraph 439 of the judgment under appeal that it had been afforded an opportunity to comment on certain facts used to describe it as a leader in the cartel given that those facts were apparent from documents annexed to the statement of objections, the Court of First Instance infringed its rights of defence.

75 In order to classify ADM as a leader of the cartel, the Commission relied, at recitals 265 and 266 of the contested decision, on facts which it took from the FBI Report and Cerestar's statement.

76 Thus, first, recital 265, citing the FBI Report, states that 'the mechanics of the G-4/5 arrangement seemed to be [the ADM representative]'s idea, and at the 6 March, 1991 meeting in Basel, where the [citric acid] arrangement was formulated, [that representative] took a fairly active role' and, further, that that representative 'was viewed as "The Wise Old Man", and was even dubbed "the Preacher"'.

77 Second, recital 266 contains an extract from Cerestar's statement according to which 'although [the representatives of HLR and JBL] normally chaired "Masters" meetings, it was [Cerestar's] clear impression that [the representative of ADM] played a leading role. [The latter] chaired the "Sherpa" meetings and tended to prepare matters and make the proposals for the price lists to be agreed'.

78 It should be pointed out at the outset that, contrary to what the Commission submits, the Court Of First Instance did not assert the principle that the Commission was not required, in the statement of objections, to set out the facts which led it to classify ADM as a leader. The Court of First Instance expressed itself as follows in the judgment under appeal:

'438 Observance of the rights of defence of the undertakings concerned does not require the Commission to state more precisely in the statement of objections the manner in which it will take account, where relevant, of [the principal elements of fact and law that could justify a fine] when setting the level of the fine. In particular, the Commission was not required to state either that ADM could be considered to be a ringleader of the cartel or the size of the increase which it might apply to ADM's fine for that reason …

439 … it should be recalled that the Commission annexed [the FBI Report and Cerestar's statement] to the statement of objections and that the parties were therefore able to express a view on this point, including as regards their use as evidence.'

79 Accordingly, the Court of First Instance held that the Commission had observed ADM's rights of defence, since it had annexed to the statement of objections the items of evidence from which the facts emerge on which it relied in the contested decision in order to classify ADM as a leader of the cartel.

80 That stated, and although the Court of First Instance cannot be accused of committing an error of law in holding, at paragraph 438 of the judgment under appeal, that the Commission was not required to state in the statement of objections the manner in which it would take account of the facts when setting the level of the fine or, in particular, whether it intended, on the basis of those facts, to classify an undertaking as a leader of the cartel, the Commission was none the less required, at the very least, to state those facts.

81 However, it must be found that, contrary to what the Commission submits, the facts on which it relied in recitals 265 and 266 of the contested decision, which were taken from the FBI Report and Cerestar's statement, were not referred to in the statement of objections.

82 As the Advocate General stated at point 40 of his Opinion, the Court of First Instance did not consider, at paragraph 439 of the judgment under appeal, that the decisive facts had been set out in the statement of objections, but held that the mere fact that the Commission had annexed to that statement the documents from which those facts are apparent, meant that the appellant had been afforded an opportunity to comment on the use of those documents as evidence and also on the factual circumstances described in them.

83 It is therefore necessary to ascertain whether the Court of First Instance erred in law in holding that the Commission had observed the appellant's rights of defence by proceeding in this manner.

84 It should be recalled that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (see, in particular, Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 70).

85 Observance of the rights of the defence requires, in particular, that the undertaking under investigation has been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10; Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 44; and *SGL Carbon* v *Commission*, paragraph 71).

86 It is, inter alia, the statement of objections that allows the undertakings under investigation to acquaint themselves with the evidence which the Commission has at its disposal and to render the rights of the defence fully effective (see, to that effect, Joined Cases C 238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 315 and 316, and also 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, paragraphs 66 and 67).

87 In this regard, that statement must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure (see *Musique Diffusion française and Others* v *Commission*, paragraph 14).

88 Observance of the rights of the defence thus requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement (see *Dalmine*, paragraph 44).

89 However, it must be stated that, in the circumstances of the present case, the mere fact that the documents containing the facts used as a basis for classifying ADM as a leader of the cartel were annexed to the statement of objections is not sufficient to satisfy the abovementioned requirements, since that statement did not enable ADM to dispute those facts and, consequently, to exercise its rights effectively.

90 It should be noted that the items of evidence which are the source of the facts used as a basis for classifying ADM as a leader of the cartel in the contested decision necessarily, by their nature, have a subjective aspect, since they consist of testimonies of persons involved in the infringement procedure initiated by the Commission or other national competition authorities.

91 Thus, the FBI Report is the result of the interview with a former ADM representative who enjoyed immunity in the procedure conducted by the United States antitrust authorities.

92 The second item of evidence consists of an unsolicited statement by Cerestar, a competitor of ADM on the citric acid market, which itself participated in the cartel in question.

93 The mere fact that those documents were annexed to the statement of objections did not enable the appellant to assess the credence which the Commission gave to each of the items of evidence set out in those documents.

94 Accordingly, in the circumstances of the present case, it cannot be considered that the Commission, by merely annexing to the statement of objections the documents and items of evidence from which it took the facts on which it relied in the contested decision in order to classify the appellant as a leader in the cartel but without referring

to those facts expressly in the wording itself of that statement, afforded ADM the opportunity to exercise its rights.

95 Consequently, it follows from the foregoing that the Court of First Instance erred in law in holding that the Commission had not infringed the appellant's rights of defence in classifying it as a leader of the cartel on the basis of the items of evidence that it had adduced for that purpose, but which had not been referred to in the statement of objections sent to the appellant.

96 The second part of the first plea must therefore be upheld.

The second to fifth pleas, alleging errors of law or distortion of evidence in relation to the classification of ADM as a leader of the cartel

97 In the light of the response to ADM's first plea, it is not necessary to consider the second to fifth pleas of the appeal, which also concern the classification of ADM as a leader of the cartel on the basis of evidence taken from the FBI Report and Cerestar's statement.

The sixth plea: error of law regarding the Court of First Instance's assessment of the failure to take into account attenuating circumstances

Arguments of the parties

98 ADM submits that, by holding at paragraph 346 of the judgment under appeal that the Commission was not under an obligation to grant it the benefit of attenuating circumstances provided for by the Guidelines in the event of termination of the cartel, the Court of First Instance misinterpreted the Guidelines. Contrary to what it held at paragraphs 335 to 340, the granting of attenuating circumstances cannot be a mere option open to the Commission, which can take account of the secret nature of the cartel when deciding whether or not to grant the benefit of such circumstances.

99 The Commission submits that the Court of First Instance was correct to hold that ending the infringement does not automatically imply a reduction of the fine. The Commission has in that regard a discretion in relation to, inter alia, the conduct of the undertaking in question. In the present case, ADM did not make any critical contribution to the administrative procedure and so could not have the benefit of attenuating circumstances.

Findings of the Court

100 It must be recalled that, under Section 3 of the Guidelines, the basic amount of the fine set by the Commission is to be reduced when, for example, the undertaking which is the subject of the complaint terminates the infringement as soon as the Commission intervenes.

101 In that regard, the Court of First Instance held, at paragraph 338 of the judgment under appeal, that that provision should be interpreted as meaning that solely the particular circumstances of the specific case in which the infringement actually terminates as soon as the Commission intervenes can warrant that termination being taken into account as an attenuating circumstance.

102 Accordingly, the Court of First Instance rejected the appellant's argument that termination of the cartel must automatically imply a reduction of the basic amount of the fine under Section 3 of the Guidelines, and stated, at paragraph 337 of the judgment under appeal, that the interpretation of that provision advocated by ADM would undermine the effectiveness of Article 81(1) EC.

103 In so doing, the Court of First Instance did not err in law.

104 It is clear that the grant of such a reduction of the basic amount of the fine is necessarily linked to the circumstances of the particular case, which may lead the Commission not to grant that reduction to an undertaking which is party to an unlawful agreement.

105 To recognise an attenuating circumstance in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if their conduct were discovered they could expect, by then curtailing the infringement, their fine to be reduced. Such a recognition would deprive the fine imposed of any deterrent effect and would undermine the effectiveness of Article 81(1) EC (see Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-0000, paragraph 149).

106 Consequently, the Court of First Instance was correct to rule that, in the circumstances which it established, the appellant could not claim that the Commission was obliged to grant it the benefit of a reduction of the basic amount of the fine on the ground that it had ended its unlawful conduct as soon as the United States antitrust authorities intervened.

107 The sixth plea must therefore be rejected as unfounded.

The seventh plea: error of law in the application of Section B of the Leniency Notice

Arguments of the parties

108 Taking the view that it was wrongly classified as a leader, ADM criticises the Court of First Instance for not upholding its plea that it should have benefited from the application of Section B of the Leniency Notice.

109 According to the Commission, that plea is a repetition of the first plea on appeal and must therefore be declared inadmissible.

Findings of the Court

110 As was held at paragraph 95 of this judgment, the Court of First Instance was wrong to hold that the Commission had been entitled, without infringing ADM's rights of defence, to use the facts emanating from the FBI Report and Cerestar's statement in order to classify ADM as a leader of the cartel, even though those facts had not been referred to in the statement of objections.

111 Since the Court of First Instance held, at paragraphs 225 and 226 of the judgment under appeal, that, apart from the abovementioned items of evidence, the fact that bilateral meetings took place amounted only to circumstantial evidence and did not of itself lead to the conclusion that the appellant had acted as a leader, it follows that the Court was wrong to uphold the classification of ADM as a leader of the cartel.

112 Consequently, since the appellant was not classified lawfully as a leader of the cartel, the Court of First Instance could not, without erring in law, rule out the application of Section B of the Leniency Notice on the grounds that ADM had had a leadership role in the cartel.

113 Accordingly, this plea must be upheld.

The eighth plea: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

114 According to ADM, the findings made by the Court of First Instance in paragraphs 386 to 391 of the judgment under appeal should have led it to conclude that the Commission had created a legitimate expectation on the part of ADM that its fine would be reduced under Section B of the Leniency Notice. In this regard, the appellant submits that the stage of the procedure at which the cooperation takes place is not relevant as regards the creation of such expectations, contrary to what the Court of First Instance held in paragraph 394 of the judgment under appeal. It refers in this respect to Case C-182/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraphs 147 to 167).

115 The Commission submits that, since it is not objectively in a position to define precisely the role of each member of a cartel before the administrative procedure is completed, ADM could not properly entertain any hopes that a 'very substantial' reduction, within the meaning of Section B of the Leniency Notice, in its fine might be applied.

Findings of the Court

116 First, as the Advocate General pointed out in point 208 of his Opinion, it must be noted that, by this plea, ADM seeks to obtain, at the appeal stage, a review of the facts assessed by the Court of First Instance, in respect of which the Court of Justice has no jurisdiction except in cases of distortion of evidence.

117 In this instance, on the basis of the evidence examined in paragraphs 386 to 391 of the judgment under appeal, the Court of First Instance was reasonably entitled to infer that the Commission intended to encourage the appellant to cooperate but did not give it any precise assurances that it would benefit from a reduction under Section B of the Leniency Notice of the fine which would be imposed on it.

118 Second, under Section E of that notice, it is only on its adoption of the final decision that the Commission determines whether or not the conditions set out in Sections B, C and D of that notice are met. Accordingly, the Court of First Instance did not err in law in holding that the Commission could not give the appellant any precise assurance that any reduction of fine would be granted in the phase of the procedure prior to the adoption of the final decision.

119 Accordingly, the eighth plea must be rejected as in part inadmissible and in part unfounded.

The ninth plea: infringement of the principle that the Commission must follow self-imposed rules

Arguments of the parties

120 ADM criticises the Court of First Instance for not finding that the Commission had failed — wrongly — to define the relevant market when assessing the impact of the cartel, even though that is an essential precondition for a finding that the cartel had an adverse effect on the market. If the Commission had defined that market, it would have had to take account of citric acid substitutes and found, in the light of the evidence put forward by the appellant, that the cartel had no impact on the prices charged in the citric acid sector.

121 The Commission claims, first, that that plea is inadmissible, since the appellant is in fact asking the Court of Justice to examine the assessment of the evidence that it adduced. Second, ADM's approach is based on a misunderstanding of the objective pursued by the definition of the relevant market. In this instance, it is necessary to draw a distinction between whether there has been an infringement of Article 81 EC, which requires the relevant market to be defined, and the assessment of the gravity of the infringement.

Findings of the Court

122 It should be noted at the outset that the Guidelines provide that the actual impact of the infringement on the market is a factor which must be taken into account in assessing the gravity of the infringement when setting the amount of the fine.

123 At paragraph 198 of the judgment under appeal, the Court of First Instance stated that the Commission confined itself to the citric acid market when determining the actual impact of the cartel. In so doing, it did not take account of the wider market that the appellant advocated be taken into consideration, encompassing the citric acid substitutes that the appellant identified.

124 Thus, the Court of First Instance referred, in paragraphs 152 to 156 and 180 to 193 of the judgment under appeal, to the analysis carried out by the Commission in the contested decision which led the Commission to find that there had been a change in citric acid prices in parallel with the establishment of the cartel, a finding which was not disputed by ADM.

125 In this respect, first, although the actual impact of the infringement on the market is a factor to take into consideration when assessing the gravity of that infringement, it is one criterion among others, namely the nature of the infringement and the size of the

geographic market. Similarly, the Guidelines state that that actual impact on the market is to be taken into account only where this can be measured.

126 Second, as the Advocate General pointed out at points 200 and 201 of his Opinion, the appellant did not dispute that, at least on a part of the market, the cartel had had effects on citric acid prices.

127 In those circumstances, the Court of First Instance was right to hold at paragraphs 200 and 201 of the judgment under appeal that the appellant's arguments could not succeed, since it had failed to demonstrate that the Commission would have had to find that the cartel had had no impact if it had defined the relevant market in the manner advocated by the appellant.

128 In so doing, contrary to what ADM submits, the Court of First Instance held merely that the evidence adduced by ADM was not sufficient to rebut the Commission's analysis, and it did not reverse the burden of proof.

129 Accordingly, the ninth plea must be rejected as unfounded.

130 In the light of all the foregoing considerations, the judgment under appeal should be set aside in so far as it rejects the appellant's pleas in support of its action for annulment of the contested decision inasmuch as that decision classifies ADM as a leader of the cartel and, on that ground, increases the basic amount of its fine and refuses to apply Section B of the Leniency Notice to the appellant.

The action before the Court of First Instance

131 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the Court of First Instance is set aside the Court of Justice may give final judgment in the matter where the state of the proceedings so permits. That is the case here.

The plea alleging incorrect classification as leader of the cartel

132 The plea in support of the action against the contested decision on which the Court of First Instance incorrectly adjudicated is part of the appellant's challenge to its classification as a leader of the cartel and to the application, on that ground, of an increase of 35% in the basic amount of its fine.

133 Since it is clear from paragraph 94 of this judgment that the Commission did not afford ADM an opportunity to exercise its rights with respect to the evidence emanating from the FBI Report and Cerestar's statement that it used in the contested decision to classify the appellant as a leader of the cartel, it is necessary to ascertain whether, in addition to that evidence, the Commission submitted evidence making it possible to arrive at such a classification.

134 In this respect, it is apparent from recitals 263 and 264 of the contested decision and from points 56 to 58 of the statement of objections that the Commission also referred to

the fact that a round of bilateral meetings took place between ADM and HLR, H & R and JBL respectively during January 1991 in order to initiate or develop the cartel.

135 However, at recital 264 of the contested decision, the Commission added that 'the fact that a round of bilateral meetings took place between ADM and its competitors shortly before the first multilateral cartel meeting is not sufficient to show that ADM was the instigator of the cartel, even though it strongly suggests that this was the case'. At recitals 265 and 266 of that decision, the Commission then referred to specific evidence taken from the FBI Report and Cerestar's statement.

136 As is apparent from paragraphs 94 and 95 of this judgment, the Commission could not, without infringing ADM's rights of defence, rely on the decisive evidence used in recitals 265 and 266 of the contested decision to classify ADM as a leader of the cartel, when that evidence had not been mentioned in the statement of objections.

137 Consequently, since the existence of the round of bilateral meetings referred to in recitals 263 and 264 of that decision is not, of itself, sufficient to classify ADM as a leader of the cartel, the Commission has failed to prove that that classification is well founded and was not therefore entitled to apply to the basic amount of the fine imposed on the appellant an increase of 35% on account of the aggravating circumstance stemming from that classification.

138 The Court of Justice therefore upholds this plea.

The plea alleging misapplication of Section B(b) of the Leniency Notice

The contested decision

139 On the basis of the findings in recital 305 of the contested decision, the Commission, under Section B of the Leniency Notice, allowed Cerestar a 'very substantial reduction', namely 90%, of the fine which would have been imposed if it had not cooperated. The Commission found in that recital that Cerestar had been the first to adduce decisive evidence of the cartel's existence at a meeting with the Commission on 29 October 1998. In the following recital, it went on to state that the 'information provided by [Cerestar] at the meeting of 29 October 1998, which corresponds to the information provided later in the written statement of 25 March 1999, was sufficient to establish the existence of the cartel and was communicated to the Commission before ADM provided such information'. Accordingly, at recital 308 of that decision, the Commission rejected ADM's argument that it fulfilled the conditions laid down in Section B in order to qualify for a 'very substantial reduction' of the fine.

Arguments of the parties

140 In support of its action before the Court of First Instance, ADM submitted that the Commission had misapplied Section B(b) of the Leniency Notice. It had been 'the first to adduce decisive evidence of the cartel's existence', within the meaning of that provision, at the meeting of 11 December 1998, since the evidence adduced by Cerestar at the meeting of 29 October 1998 was not 'decisive' within the meaning of that provision.

141 First, Cerestar provided no information on the cartel in respect of the period prior to 12 May 1992, the date when Cerestar first became involved in it. The Commission's

knowledge of the cartel in respect of that period therefore resulted only from information first provided by ADM.

142 Second, Cerestar's statement, which is consistent with the information communicated orally at the meeting of 29 October 1998, was inconclusive and inaccurate regarding the dates of meetings and members of the cartel. Cerestar thus specified 32 meetings on various dates between 14 November 1991, that is before its participation in the cartel, and 17 July 1996, that is to say well after the cartel was disbanded. Cerestar states that 9 of them were definitely meetings of the cartel, 8 were 'possible' cartel meetings, whereas the 15 others were not or 'increasingly unlikely to be' cartel meetings. The identity of the participants was given for 3 of the 17 meetings described as 'definite' or 'possible' cartel meetings. Six of the meetings described as cartel meetings did not in fact take place at all, according to the evidence of the other undertakings concerned and the Commission's findings.

143 Third, Cerestar later admitted, in a letter of 7 May 1999 to the Commission, that a number of the meetings identified as cartel meetings had not taken place.

144 Fourth, Cerestar's statement is vague and inconclusive as to the object of the meetings. No details were given of agreed prices or quotas, except those fixed for Cerestar itself.

145 Fifth, it is unclear whether, like ADM, Cerestar provided the Commission with direct testimony. Moreover, Cerestar subsequently found it necessary to amplify and clarify its oral statement of 29 October 1998.

146 Sixth, the Commission sent a further request for more detailed information to Cerestar itself on 3 March 1999 on the basis of ADM's submissions. Cerestar thus had the opportunity to study that request, which referred to specific meeting dates and places and was based on the evidence adduced by ADM, before sending the Commission its final statement of 25 March 1999.

147 The appellant maintains that its own evidence was, by contrast, decisive. At the meeting of 11 December 1998 it gave the Commission direct testimony, contemporary documentary evidence from the material time and documents evidencing the context and implementation of the cartel agreement. ADM's evidence provided extensive and accurate details of meetings, those present, compensation and monitoring systems, and cartel prices and quotas.

148 The Commission claims that, as regards the assessment of the 'decisive' nature of the evidence adduced within the meaning of Section B(b) of the Leniency Notice, it is irrelevant that that evidence emanates from an undertaking which did not participate in the cartel in question throughout its whole duration. It is necessary that that evidence relates to the existence of the cartel, and not to its duration.

149 Similarly, the incomplete nature of the information communicated to the Commission does not preclude its being considered decisive.

Findings of the Court

150 It is necessary to point out at the outset, as the Advocate General did at points 221 and 222 of his Opinion, that the express wording of Section B(b) of the Leniency Notice does not require that the 'first' undertaking has provided all the evidence demonstrating every detail of the operation of the cartel. Pursuant to that provision, in order to be

considered such, it is sufficient for an undertaking to adduce 'some' decisive evidence of the cartel's existence. Nor does that section require that the evidence adduced be sufficient in itself in order to draw up the statement of objections or for the adoption of a final decision establishing the existence of an infringement. However, although the evidence referred to in Section B(b) need not be sufficient in itself to establish the cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement.

151 It should also be pointed out that, in the context of Section B(b), the fact that decisive evidence was provided orally is of no significance.

152 Lastly, the Commission has a certain discretion in assessing whether an undertaking's cooperation has been 'decisive', within the meaning of that provision, for a finding that an infringement has existed and has come to an end, so that only a manifestly excessive use of that discretion can be censured.

153 It is in the light of the foregoing considerations that it is necessary to consider whether, in the present case, the Commission committed a manifest error of assessment in deciding that Cerestar had been the first to adduce decisive evidence of the cartel's existence.

154 The Commission stated in recitals 305 and 306 of the contested decision that Cerestar had been the first the provide it with decisive evidence of the cartel's existence at a meeting on 29 October 1998; that undertaking's statements were confirmed in writing on 25 March 1999.

155 First, it must be pointed out that ADM cannot contest the decisive nature of the information provided by Cerestar for the sole reason that the latter only joined the cartel one year after its implementation.

156 As the Commission rightly pointed out, Section B(b) of the Leniency Notice requires that the decisive evidence adduced relates to the actual existence of the cartel, not to its duration.

157 Moreover, Cerestar's statement contains information about multilateral meetings which took place before it participated in the cartel, information which was corroborated by ADM's statements at the meeting between its and the Commission's representatives.

158 Second, as regards the actual content of Cerestar's statement, it should be noted that it describes the cartel arrangements, namely the price-fixing system, the allocation of market shares, the information exchange system and the compensation arrangements. Moreover, that statement contains a list of the various meetings which took place between the undertakings participating in the cartel.

159 Although it is true that the information in Cerestar's statement is, in part, of an approximate nature and does not systematically contain figures regarding the decisions taken during the cartel meetings, the fact remains that the Commission was entitled to find, without committing a manifest error of assessment, that that material was decisive evidence of the cartel's existence.

160 The information provided by Cerestar at the meeting of 29 October 1998 enabled the Commission to become aware of the existence of the cartel in the European citric acid

sector, to know its approximate duration, arrangements and the manner in which it was conducted.

161 Accordingly, although it does not in itself constitute sufficient evidence of all aspects of the infringement, the material provided by Cerestar is more than an indication as to the direction which the Commission's investigation should take, since it could be used directly by the latter as evidence of the cartel's existence.

162 In this respect, the fact that that information does not emerge from a direct testimony or that it was subsequently supplemented or clarified is not relevant to the assessment of whether it is decisive.

163 Accordingly, the appellant's plea that the Commission misapplied Section B(b) of the Leniency Notice must be rejected.

164 It follows from all the foregoing that, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, it is necessary to annul Article 3 of the contested decision in so far as it sets the amount of the fine payable by ADM at EUR 39.69 million in the light of a 35% increase in the basic amount of its fine on account of its status as a leader in the cartel and, accordingly, to reduce that fine to EUR 29.4 million.

Costs

165 Pursuant to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Pursuant to Article 69(3) of those rules, if the parties are each unsuccessful on one or more heads of claim, the Court may order that the costs be shared or that the parties bear their own costs.

166 Since both parties have been partly unsuccessful in their pleas in the appeal proceedings, the Commission should be ordered to pay half of the appellant's costs and the latter should be ordered to pay the Commission's costs and to bear half of its own costs.

167 As regards the proceedings before the Court of First Instance, since the judgment under appeal has been set aside in part and the form of order sought by the appellant at first instance has been upheld in part, the Commission should be ordered to pay one quarter of the costs of the appellant at first instance and the latter be ordered to pay the Commission's costs and to bear three quarters of its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 27 September 2006 in Case T-59/02 *Archer Daniels Midland* v *Commission* inasmuch as it rejects the plea of Archer Daniels Midland Co. relating to the infringement of its rights of defence during the administrative**

procedure which led to Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) in so far as the Commission of the European Communities did not afford it an opportunity to exercise its rights concerning the facts on which it relied when classifying Archer Daniels Midland Co. as a leader of the cartel;

2. **Sets aside the judgment of the Court of First Instance of the European Communities of 27 September 2006 in Case T-59/02 *Archer Daniels Midland* v *Commission* inasmuch as it rejects as ineffective Archer Daniels Midland Co.'s plea relating to the misapplication by the Commission of the European Communities of Section B(b) of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases;**

3. **Annuls Article 3 of Decision 2002/742 in so far as it sets the amount of the fine payable by Archer Daniels Midland Co. at EUR 39.69 million;**

4. **Sets the amount of the fine payable by Archer Daniels Midland Co. for the infringement found in Article 1 of Decision 2002/742 as annulled in part by the judgment of the Court of First Instance of the European Communities of 27 September 2006 in Case T-59/02 *Archer Daniels Midland* v *Commission* at EUR 29.4 million;**

5. **Dismisses the remainder of the appeal;**

6. **Orders Archer Daniels Midland Co. to bear three quarters of its own costs and to pay those of the Commission of the European Communities in relation to the proceedings before the Court of First Instance of the European Communities, and to bear half of its own costs and to pay those of the Commission of the European Communities in relation to the appeal proceedings;**

7. Orders the Commission of the European Communities to pay one quarter of the costs of Archer Daniels Midland Co. relating to the proceedings before the Court of First Instance of the European Communities and to pay half of the costs of Archer Daniels Midland Co. relating to the appeal proceedings.

[Signatures]