JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

16 June 2011 *

In Case T-197/06,

FMC Corp., established in Philadelphia, Pennsylvania (United States), represented by C. Stanbrook QC and Y. Virvilis, lawyer,

applicant,

v

European Commission, represented initially by F. Arbault, and subsequently by V. Di Bucci, V. Bottka and X. Lewis, acting as Agents, and by M. Gray, Barrister,

defendant,

APPLICATION for partial annulment of Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen peroxide and perborate), in so far as it concerns the applicant and, in the alternative, a reduction of the fine imposed on the applicant,

* Language of the case: English.

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of V. Vadapalas (Rapporteur), acting as President, A. Dittrich and L. Truchot, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 May 2010,

gives the following

Judgment

Facts of the case

1 The applicant, FMC Corp., is a United States undertaking which wholly controls, through FMC Chemicals Netherlands BV, formerly FMC Chemical Holding BV, FMC Foret SA, a company incorporated under Spanish law. At the material time FMC Foret SA sold hydrogen peroxide ('HP') and sodium perborate ('PBS').

2 In November 2002 Degussa AG informed the Commission of the European Communities of the existence of a cartel in the HP and PBS markets and requested the application of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

3 Degussa supplied to the Commission material evidence which enabled it to carry out investigations on 25 and 26 March 2003 at the premises of certain undertakings.

4 On 26 January 2005 the Commission sent a statement of objections to the applicant and to the other undertakings concerned.

5 After the hearing of the undertakings concerned, the Commission adopted Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa, Edison SpA, the applicant, FMC Foret, Kemira Oyj, L'Air liquide SA, Chemoxal SA, SNIA SpA, Caffaro Srl, Solvay SA, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/F/38.620 — Hydrogen peroxide and perborate) ('the contested decision'), a summary of which is published in the *Official Journal of the European Union* of 13 December 2006 (OJ 2006 L 353, p. 54). It was notified to the applicant by letter of 8 May 2006.

The contested decision

6 The Commission stated in the contested decision that the addressees thereof had participated in a single and continuous infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA), regarding HP and the downstream product, PBS (recital 2 of the contested decision).

7 The infringement found consisted mainly of competitors exchanging commercially important and confidential market and company information, limiting and controlling production as well as potential and actual production capacities, allocating market shares and customers and fixing and monitoring adherence to target prices.

8 The applicant was held liable for the infringement 'jointly and severally' with FMC Foret (recitals 389 to 395 to the contested decision).

9 To calculate the amounts of the fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines').

10 The Commission determined the basic amounts of the fines according to the gravity and duration of the infringement (recital 452 of the contested decision), which was categorised as very serious (recital 457 of the contested decision).

11 As part of a differentiating approach, the applicant and FMC Foret were placed in the third of four categories, in respect of which the starting amount was EUR 20 million (recitals 460 to 462 of the contested decision).

12 Since, according to the Commission, the applicant and FMC Foret participated in the infringement from 29 May 1997 to 13 December 1999, namely a period of two years and seven months, the starting amount of their fine was increased by 25 % (recital 467 of the contested decision).

13 No aggravating or attenuating circumstance was found to apply in the applicant's case.

14 Article 1(f) of the contested decision states that the applicant infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in the infringement concerned from 29 May 1997 until 13 December 1999.

15 In Article 2(d) of the contested decision, the Commission imposed on the applicant, jointly and severally with FMC Foret, a fine of EUR 25 million.

Procedure and forms of order sought by the parties

16 By application lodged at the Registry of the Court on 18 July 2006, the applicant brought the present action.

17 The composition of the Chambers of the Court having been altered, the Judge Rapporteur was assigned to the Sixth Chamber, and, after the parties had been heard, the case was referred to the Sixth Chamber (Extended Composition).

18 As a member of the Chamber was unable to sit, the President of the Court designated another Judge to complete the Chamber, pursuant to Article 32(3) of the Rules of Procedure of the General Court.

19 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 19 May 2010.

20 In accordance with Article 32 of the Rules of Procedure, one member of the chamber being prevented from attending the deliberations, the most junior Judge within the meaning of Article 6 of the Rules of Procedure abstained from taking part in the deliberations and the deliberations of the Court were conducted by the three Judges who have signed this judgment.

21 The applicant claims that the Court should:

— annul the contested decision, in so far as it concerns the applicant;

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

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

The claim that the contested decision should be annulled

23 In support of its claim that the contested decision should be annulled, the applicant puts forward two pleas, alleging, first, infringement of the obligation to state reasons and, second, errors of law and of assessment vitiating the finding that the applicant is liable for the infringement in question.

First plea: infringement of the obligation to state reasons

— Arguments of the parties

24 The applicant submits that, where a decision finds that a parent company is liable for the acts of another company, in particular by application of the presumption arising from the control of the capital of a subsidiary by its parent company, the statement of reasons must be particularly comprehensive.

25 The Commission was therefore not entitled merely to refer to the presumption, but was required to give adequate reasons capable of explaining how that presumption had not been rebutted by the arguments and evidence to the contrary put forward by the applicant.

26 However, the reasons put forward by the Commission in the contested decision in this respect are 'formally inadequate' and do not meet the requirements of Article 253 EC.

27 Whilst the Commission referred to the links between the companies concerned, relating to the functions assumed by three persons within the applicant, FMC Foret and FMC Chemical Holding (recitals 391 and 394 of the contested decision), it did not explain how those circumstances were capable of rebutting the arguments to the contrary put forward by the applicant.

28 In addition, the applicant submitted arguments rebutting the circumstances set out in recital 391 of the contested decision. In recital 394 of the contested decision, the Commission merely rejected those arguments, without explaining its reasons for doing so.

29 By merely reproducing the evidence advanced on both sides, the Commission does not set out the considerations on which it concluded that the presumption had not been rebutted by the applicant.

30 Furthermore, the reasons put forward by the Commission in recital 394 of the contested decision are not sufficient to support a finding that the applicant was jointly and severally liable.

31 First, the applicant referred to the existence of separate organisational structures, tending to demonstrate that the parent company and the subsidiary operated independently in different areas of activity in relation to the infringement. Yet the Commission failed to explain why, in the present case, that factor was not sufficient to rebut the presumption in question.

32 Second, the applicant submitted statements by its employees, confirming that FMC Foret operated independently. The Commission itself recognised, in recital 394 of the contested decision, that those statements demonstrated the independent status of FMC Foret. However, the contested decision contains no reason for rejecting them.

33 Third, the Commission's assertion that the applicant was also involved in the production of HP and PBS (recital 394 of the contested decision) is incorrect and is insufficient to support the conclusion that the applicant exercised decisive influence over

FMC Foret. The mere fact that companies produce the same products does not mean that they adopt a common commercial policy. Furthermore, the applicant produced evidence to the contrary, which was not challenged by the Commission, as to the distinct geographic nature of the markets, the different location of production sites, the historical evolution of the business and the profile of the customers.

34 Fourth, the Commission's statement that FMC Foret is a European subsidiary of the applicant (recital 394 of the contested decision) adds nothing to the fact that the subsidiary is wholly owned. The evidence produced by the applicant shows that there was no consultation or cooperation about the two companies' production of HP.

35 The reasoning set out in the contested decision is not only 'inadequate', but contains no explanation for rejecting the evidence submitted by the applicant. If the Commission now states, in its defence, that that evidence was not sufficient to rebut the presumption in question, that assertion is not to be found in the contested decision.

36 With respect to the circumstances to which the Commission refers in recital 391 of the contested decision, the applicant stated that, although one of the employees of FMC Foret, Mr A.B., was appointed as vice-president of the applicant, this was not an executive position, as his functions within the applicant and FMC Foret were purely administrative. Mr A.B. was merely responsible for overseeing the business and corporate strategy of the undertaking and was not involved in its day-to-day operations. Likewise, the fact that two other persons were directors, for limited periods, of both FMC Foret and FMC Chemical Holding is of no significance, as the only purpose of the latter undertaking is to hold shares and it does not exercise any commercial activity.

37 In submitting that evidence to the contrary, the applicant transferred the burden of proof to the Commission. However, the contested decision contains no reason as to why those arguments were rejected.

38 In the applicant's contention, it is necessary to reject the reasons put forward by the Commission for the first time before the Court, according to which the fact that Mr A.B. was made responsible for overseeing the business and corporate strategy of the subsidiary demonstrates that decisive influence was exercised. In any event, those new reasons relate solely to the applicant's theoretical ability to exercise decisive control over FMC Foret, whereas the applicant's argument was that the person concerned, Mr A.B., did not in fact exercise decisive control in the day-to-day operations or in the areas relating to the alleged infringement.

39 The question of decisive influence must be examined in the context of an activity relating to the infringement. The absence of involvement in day-to-day operations indicates that no decisive influence was exercised in relation to such an activity. Thus, the mere fact that an employee is made responsible for overseeing the business and corporate strategy of an undertaking is not sufficient to support the conclusion that decisive influence was actually exercised.

40 Mr A.B., as chairman and managing director of the subsidiary, was not necessarily involved in the day-to-day operations of its business. In the present case, it is clear from the evidence submitted by the applicant that he simply oversaw the business and corporate strategy of the undertaking. The position of Mr W.B., a member of the board of FMC Chemical Holding, is not relevant either, since the only purpose of that company was to hold shares in FMC Foret. Mr G.W., one of the directors of FMC Chemical Holding, was not employed within the applicant.

41 In the applicant's submission, where a decision finding an infringement is based on the existence of a relationship of control by one undertaking over another, the Commission is required to set out the considerations which led it to conclude that such control exists. In the present case, the Commission failed to meet that requirement, since it merely reiterated the position which it took in the statement of objections, without explaining why it rejected the arguments and evidence to the contrary produced by the applicant.

42 The Commission contests the applicant's arguments.

— Findings of the Court

43 In the first plea, the applicant claims that, in the contested decision, the Commission did not set out sufficient reasons for finding that the applicant was liable for the infringement in question and, in particular, that the Commission did not explain the reasons for rejecting the evidence adduced to rebut the presumption arising from the fact that the subsidiary which took part in the infringement was wholly owned by the applicant.

44 According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal

rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

45 Where, as in the present case, a decision taken in application of Article 81 EC relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of its addressees, in particular those of them who, according to the decision, must bear the liability for the infringement. Thus, in regard to a parent company held jointly and severally liable for the infringement, such a decision must contain a detailed statement of reasons for attributing the infringement to that company (see, to that effect, Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraphs 78 to 80).

46 In the present case, in recitals 370 to 379 of the contested decision, the Commission, referring to the case-law of the European Union, summarised the principles it intended to apply to identify the addressees of the contested decision.

47 The Commission recalled inter alia that a parent company can be held liable for the unlawful conduct of a subsidiary in so far as the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. The Commission stated that it can generally assume that a wholly-owned subsidiary essentially follows the instructions given by its parent company and that the latter can rebut the presumption by adducing evidence to the contrary (recital 374 of the contested decision).

48 As regards the finding that the applicant was liable for the infringement in question, the Commission stated that, in the statement of objections, it had based that conclusion on the fact that FMC Foret was a subsidiary wholly owned, although indirectly, by the applicant (recital 390 of the contested decision).

49 The Commission pointed out that, in that statement of objections, it had also relied on the fact that some of the management positions in the companies concerned were held by the same persons, namely as a result of the positions held by Messrs A.B., W.B. and G.W. Furthermore, the Commission noted the role of Mr A.B., who was both managing director and chairman of FMC Foret and vice-president of the applicant and had participated in certain cartel meetings (recital 391 of the contested decision).

50 Next, the Commission referred to evidence put forward by the applicant in order to demonstrate its subsidiary's independence (in recitals 392 and 393 of the contested decision). The Commission stated that it could not accept the applicant's arguments, since the exercise of decisive influence in question did not follow only from the entire ownership of the subsidiary's capital, but also from the links between the companies concerned, noted in recital 391 of the contested decision, that the applicant's arguments did not suffice to establish that its subsidiary was independent and that, in any event, the information in its possession, considered as a whole, corroborated the conclusion that the applicant had exercised such influence over its subsidiary (recital 394 of the contested decision).

51 Lastly, the Commission stated that, in view of those considerations, it was maintaining its conclusion that the applicant was jointly and severally liable for the infringement in question (recital 395 of the contested decision).

52 The Court considers that the aforementioned reasons disclose in a clear and unequivocal fashion the reasoning by which the applicant was held jointly and severally liable for the infringement.

53 As regards, first, the applicant's complaint alleging the equivocal nature of the reasoning which led to its being held liable, the Court would point out that it is clear from recitals 390 to 395 of the contested decision that the Commission maintained the conclusion set out in the statement of objections that the decisive influence exercised

by the applicant over its subsidiary stemmed from the presumption arising from its 100 % ownership of the subsidiary, since the evidence put forward by the applicant during the administrative procedure had not sufficed to establish that its subsidiary was independent and, therefore, to rebut that presumption.

54 Moreover, the Commission drew attention, in recitals 391 and 394 of the contested decision, to the existence of certain additional indicia stemming from the links in terms of personnel between the companies concerned and in particular from the position of Mr A.B., who took part in the illicit contacts.

55 The Court considers that those reasons explain sufficiently the circumstances in which the applicant was held liable for the infringement.

56 As regards, second, the complaint alleging insufficient reasons for the rejection of the evidence put forward by the applicant to rebut the presumption in question, the Court observes that it is clear from recitals 392 to 394 of the contested decision that the Commission took account of the evidence in question.

57 After describing, in recitals 392 and 393 of the contested decision, the arguments made by the applicant in its reply to the statement of objections, the Commission found, in recital 394 of the contested decision, that the evidence which emerged from those arguments did not constitute adequate proof that the subsidiary was independent and that the information used, viewed as a whole, had indeed corroborated the conclusion based on the presumption in question, and that that conclusion therefore had to be maintained.

58 The Court considers that, by those reasons, the Commission replied to the essential points of the applicant's arguments and took into consideration the evidence which the applicant had adduced.

59 The Commission cannot be criticised for not replying specifically to each individual argument relied on by the applicant. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 64; see also, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 44 above, paragraph 64).

60 Moreover, the Court observes that the applicant's complaint alleging that the statement of reasons in question is 'inadequate' is based in part on its argument that it succeeded in rebutting the presumption in question.

61 However, that argument concerns the substantive legality of the contested decision and cannot be taken into account in the context of the review of the statement of reasons.

62 Thus, in so far as the applicant criticises, on the substance, the Commission's rejection of the arguments and evidence put forward to rebut the presumption in question, its arguments must be analysed in the context of the second plea, alleging an error of law and an error of assessment.

63 In the light of all the above, the first plea must be rejected.

The second plea: error of law and error of assessment

— Arguments of the parties

64 The applicant contends that, in so far as the Commission found the applicant liable in the contested decision, that decision is flawed both in law and in fact.

65 First, the Commission appraised the evidence incorrectly, by giving different weight to statements provided by the applicant and statements provided by undertakings which made leniency applications. Second, the Commission relied on an incorrect test when assessing the control exercised by the applicant over its subsidiary. Third, it used evidence which did not relate to the relevant period. Fourth, it used evidence which was not notified to the applicant, in breach of its rights of defence.

66 The Commission incorrectly assessed each piece of evidence separately, instead of making a global assessment.

67 The Commission failed to take account of the fact that the exercise of decisive influence must be assessed by reference to the activity relating to the infringement. The evidence submitted by the applicant shows that FMC Foret was itself responsible for its own marketing of HP and of PBS, which, moreover, was not marketed by the applicant.

68 It follows from recital 394 of the contested decision that the Commission accepted that it was required to show more than merely that the applicant owned 100 % of the capital of the subsidiary. The central issue is therefore whether the other evidence supported the conclusion that the applicant had exercised decisive influence over FMC Foret.

69 In that regard, in the first place, the Commission incorrectly stated that the fact that the applicant had 'a separate department for the manufacturing of HP to be shipped to the American market … [was] not sufficient to establish that [it] did not exercise any control over the European [subsidiary]' (recital 394 of the contested decision). The applicant did not submit that it had a separate 'department', but maintained that there were '[t]wo entirely separate organisation[al] structures for producing and selling HP'.

70 The Commission thus distorted the applicant's argument and made an incorrect finding for which there was no evidence.

71 According to the applicant, its operations were split into branches and the markets served by those branches were determined by the location of production and the nature of the product. In the case of HP, its production is sold locally, as the logistics of transporting that product do not allow it to be shipped from the United States to Europe or vice versa. FMC Foret was not a 'department' of the applicant and did not even have a structure to report its activities to the applicant. There is no evidence in the file of any 'departmental separation' between the HP activities of the applicant and those of FMC Foret.

72 It follows from the witness evidence of employees submitted by the applicant that FMC Foret had developed its business and its product portfolio entirely separately

from the applicant's business and product portfolio. In most areas, there was no product overlap between the two companies. In the case of HP, the markets and customers were entirely different owing to the specific characteristics of the product and the location of production. The applicant provided annual corporate directories which showed that there was no overlap in personnel as between the applicant and FMC Foret in any area at any time during the relevant period. That witness evidence shows the independent and autonomous nature of FMC Foret's operations.

73 Given the two entirely separate organisational structures for the marketing of HP, there was no reason to suppose that the persons managing one of those structures exercised decisive influence over the management of the other. The Commission has failed to demonstrate that, in spite of the existence of the two separate structures, the applicant did in fact exercise decisive influence over FMC Foret in connection with the marketing of HP.

74 In the second place, the Commission made a manifest error of assessment in finding that FMC Foret's commercial activities were 'an integrated part' of those of the applicant, in so far as the applicant '[was] equally involved in producing the HP and PBS' and that FMC Foret 'operate[d] as [the applicant's] European subsidiary in this regard' (recital 394 of the contested decision).

75 A production overlap does not permit the inference that decisive influence was exercised. It cannot be assumed that two independent producers located in different countries control or exercise decisive influence over each other, merely because one of the products manufactured is the same.

76 In any event, the production overlap exists solely in relation to HP and not to PBS. That is confirmed by the witness evidence submitted by the applicant.

77 In asserting that the applicant produced both HP and PBS, the Commission probably relied on a statement made by one of the applicant's employees, Mr T.B., in the following terms:

'[FMC] Foret, moreover, sells a different product mix than that sold by [the applicant]. [The applicant], for example, does produce [PBS] in the United States, while [FMC Foret] has for many years produced and sold [PBS] in Europe.'

78 In the applicant's submission, that statement contains an obvious 'typographical error' and should read: '[The applicant], for example, does [not] produce [PBS].' The Commission incorrectly relied on that statement, containing an obvious 'typographical error', and disregarded other witness evidence stating the contrary.

79 The applicant maintains that the fact that the only product manufactured by both companies concerned was HP and that they did not operate on the same geographic markets led to the conclusion that they did not have to coordinate their activities.

80 Nor is the Commission's assertion that FMC Foret acted as the applicant's subsidiary relevant, since some subsidiaries, such as FMC Foret, are regarded as 'investments' and not as forming part of the parent company's activities.

81 The fact that a large company such as the applicant acquires another company solely for investment purposes means that it has no intention of being involved in its day-to-day operations. The relationship between the applicant and FMC Foret is a typical example of cases, such as acquisitions by investment funds, in which a company acquires 100 % of the capital of another company without exercising decisive influence over its management.

82 In the third place, in finding that the applicant itself presented FMC Foret's activities 'as an integrated part of its business', the Commission wrongly relied on new incriminating evidence, namely information taken from the applicant's website (recital 394 and footnote 379 of the contested decision).

83 First, that material relating to 2005 and 2006 is not capable of showing that the applicant exercised decisive influence over FMC Foret between 1997 and 1999. Second, the applicant did not have the opportunity to comment on that material during the administrative procedure. In using such material, the Commission therefore introduced new evidence against the applicant which, moreover, related to the period after the infringement.

84 In the fourth place, in asserting that the statements made by the applicant's employees were not sufficient to show that FMC Foret operated on an autonomous basis (recital 394 of the contested decision), the Commission rejected that evidence on the sole ground that it was demonstrated through statements by employees of the applicant. The Commission's dismissal of that evidence is incomprehensible, since evidence relating to FMC Foret's autonomy would inevitably come from those who were involved in its management.

85 Furthermore, in stating that FMC Foret's independent status was 'only demonstrated through [the] statements' in question, the Commission accepted that those statements did in fact demonstrate FMC Foret's independence and were therefore sufficient to rebut the presumption.

86 In addition, the dismissal of the evidence in question, on the sole ground that it came from statements made by employees, cannot be reconciled with the fact that the Commission used statements made by employees of the undertakings which made leniency applications.

87 Thus, the Commission 'discriminated' in its treatment of the evidence submitted by the applicant, by failing to apply the same rules as those which it applied to the statements of the undertakings which made leniency applications. The Commission ought to have acknowledged the particular credibility of the statements of the applicant's employees, in view of the fact that those statements emanated from direct witnesses, occupying posts in the highest ranks of the undertakings concerned, that the information was provided after mature reflection and that there was a body of consistent evidence.

88 The Commission failed to make an objective assessment of the qualitative value of the witness statements in question, and in particular to take into account the fact that it was direct evidence and that the witnesses accepted personal responsibility for their evidence and were prepared to be questioned at the hearing.

89 Furthermore, the evidence of FMC Foret's autonomy does not emerge only from the statements by the applicant's employees, but also from other supporting evidence, in particular:

— the fact that all the board minutes of FMC Foret were drawn up in Spanish, which is a unique case within the applicant, and that the content of those minutes also shows that operational matters were never discussed, as the effective and practical control of FMC Foret was entrusted to its managers;

— the fact that the corporate directories for each company, produced by the applicant for each of the years in issue, show that there were no employees working for both companies at the same time and, thus, that there were no areas in which the two companies collaborated institutionally;

— the fact that FMC Foret's activities and product range were developed independently of the applicant's and that they respond to FMC Foret's particular opportunities and customer requirements: FMC Foret began to produce PBS long before the applicant became a shareholder and therefore has a unique product range which overlaps the applicant's product range to only a small extent, the development of those products was not the consequence of collaboration between the two companies and FMC Foret's own literature (corporate brochure) confirms the independent nature of the operations;

— the fact that the customers of each company are geographically different.

90 In the contested decision, the Commission failed to examine certain arguments put forward by the applicant. It did not even deal with the fact that the board minutes of FMC Foret were drawn up in Spanish, that no employee had worked for both companies at the same time, that FMC Foret had developed its business independently of the applicant's, that FMC Foret had developed its product range independently and that each company was active in distinct geographic markets. The Commission dealt with those issues for the first time in its defence.

91 Lastly, as regards the burden of proof, the applicant contends that, in order to rebut the presumption, it was not required to produce evidence showing that it had not exercised influence over its subsidiary. It is sufficient for the applicant to demonstrate that it would not be consistent with legal certainty to rely on the presumption, by producing evidence capable of 'reveal[ing] that a perfectly reasonable conclusion would be' that it had not exercised decisive influence.

92 Furthermore, the Commission was not entitled to reject evidence to the contrary on the ground that it is not sufficient to establish that the applicant did not exercise 'any' control over its European subsidiary. Some types of control have nothing to do with the operation of the applicant's business, for example, the obligation to provide accounts, or to adhere to certain norms of good governance.

93 In that regard, the applicant maintains that it did provide sufficient evidence to rebut the presumption in question and it contends that the Commission did not apply the correct legal criterion with respect to the determination of the exercise of decisive influence.

94 The Commission contests the applicant's arguments.

— Findings of the Court

95 As a preliminary point, the Court would recall the criteria used in the case-law of the European Union in relation to the liability of a parent company for an infringement by its subsidiary.

96 According to settled case-law, the conduct of a subsidiary may be attributed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 58 and the case-law cited)

97 In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC (*Akzo Nobel and Others* v *Commission*, paragraph 96 above, paragraph 59).

98 In the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules of the European Union, the parent company is able to exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 96 above, paragraph 60 and the case-law cited).

99 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent exercises decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as liable

for the infringement in question, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 96 above, paragraph 61 and the case-law cited).

100 In order to assess whether a subsidiary decides independently upon its own conduct on the market, account must be taken of all the relevant factors relating to the economic, organisational and legal links between the subsidiary and the parent company, which may vary from case to case and which cannot, therefore, be exhaustively listed (*Akzo Nobel and Others* v *Commission*, paragraph 96 above, paragraph 74; see, also, to that effect, Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 65).

101 The Court observes that the applicant does not contest the Commission's right to rely, in the present case, on the presumption arising from the fact that the subsidiary which took part in the infringement in question was wholly owned by the applicant.

102 The applicant none the less puts forward certain arguments relating to the application of that presumption which should be examined first.

103 First, the applicant submits that the influence exercised by the parent company over its subsidiary's conduct must be analysed by reference to the management of the commercial activity of the undertaking which is concerned by the infringement in question.

104 It should be borne in mind that, according to the settled case-law cited in paragraph 100 above, in order to assess whether a subsidiary decides independently upon its own conduct on the market, account must be taken of all the factors relied on in the light of the organisational, economic, and legal links between the companies concerned, whose importance varies from case to case.

105 It is not necessary to restrict that assessment to matters relating solely to the subsidiary's commercial policy *stricto sensu,* such as the distribution or pricing strategy. In particular, the presumption in question cannot be rebutted merely by showing that it is the subsidiary that manages those specific aspects of its commercial policy, without receiving instructions (see, to that effect, Case T-112/05 *Akzo Nobel and Others* v *Commission*, paragraph 100 above, paragraphs 63 and 64, upheld by Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 96 above, paragraphs 65 and 75).

106 It follows that the independence of the subsidiary, for the purposes of the above-mentioned case-law, cannot be established merely by showing that it manages the specific aspects of its policy relating to the marketing of the products concerned by the infringement.

107 Second, the applicant submits that, in order to rebut the presumption in question, it was sufficient that it produce evidence of such a kind as to 'cast doubt' on the conclusion arising from that presumption and reveal that a 'perfectly reasonable conclusion' was that it had not exercised decisive influence over its subsidiary.

108 However, it follows from the settled-case law cited in paragraph 99 above that the presumption in question can be rebutted only by evidence sufficient to show that the subsidiary was independent. Accordingly, contrary to what the applicant's argument suggests, mere *prima facie* evidence cannot suffice to rebut that presumption.

109 Thus, where the parent company adduces a body of evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136, and Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 56), by demonstrating that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts independently on the market (Case T-112/05 *Akzo Nobel and Others* v *Commission*, paragraph 100 above, paragraph 62), the Commission will not be able to impute to it the conduct of the subsidiary unless the Commission rebuts that evidence.

110 The arguments raised in this plea will be examined by the Court in the light of those considerations.

111 In the first place, the applicant contests the relevance of the circumstances referred to in recital 391 of the contested decision, which relate to the links in terms of personnel between the companies concerned.

112 The Court would point out, in this respect, that, in support of the finding of the applicant's liability, the Commission did not rely merely on the presumption arising from the applicant's 100 % ownership, through FMC Chemical Holding, of FMC Foret but also on other circumstances.

113 The Commission observed inter alia, in recital 391 of the contested decision, that, at the material time, three persons carried out their functions within several companies concerned. Mr A.B., who participated directly in certain illicit contacts, was, at the material time, both vice-president of the applicant and chairman and managing director of FMC Foret. Mr W.B. was, during part of the period of the infringement, a member of the boards of FMC Foret and FMC Chemical Holding as well as executive vice-present of the applicant. Mr G.W. was a member of the boards of FMC Foret and FMC Chemical Holding during a part of the period of the infringement.

114 The Court observes that the applicant is not justified in claiming that, in relying on those additional circumstances, the Commission admitted that the presumption in question had been rebutted.

115 It is apparent from recitals 391, 394 and 395 of the contested decision that the Commission maintained its conclusion, set out in the statement of objections, that the finding of the applicant's liability was based on the presumption arising from the fact that FMC Foret was wholly owned, although indirectly, by the applicant.

116 That conclusion is in no way contradicted by the fact that the Commission set out other circumstances relating to the exercise of the applicant's influence over its subsidiary, namely, in the present case, the links in terms of personnel between the companies concerned and the role of Mr A.B. in the collusive contacts (see, to that effect, Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 96 above, paragraph 62).

117 Next, as regards the relevance of the circumstances described in recital 391 of the contested decision, the Court observes that an overlap between individuals on the boards of the companies concerned constitutes relevant evidence of the lack of independence of the subsidiary (see, to that effect, judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraphs 550 to 558).

118 The same is true of the direct participation of one of the individuals concerned in the illicit contacts. Indeed, the participation of a member of staff of the parent company in collusive meetings may amount to evidence that the parent company knew of its subsidiary's participation in the infringement and, therefore, that it was actively implicated in the anti-competitive conduct (Case T-309/94 *KNP BT* v *Commission* [1998]

ECR II-1007, paragraphs 47 and 48); that evidence can therefore be used, *a fortiori*, as support for the contention that it exercised decisive influence over the subsidiary (see, to that effect, *Lafarge* v *Commission*, paragraph 117 above, paragraph 546).

119 In this respect, the applicant does not contest the accuracy of the facts set out in recital 391 of the contested decision, but submits (i) that the persons in question, in particular Mr A.B., had purely administrative functions and were not associated with the day-to-day operations of the undertaking and (ii) that the position held by Messrs W.B. and G.W. within the holding company, through which the applicant owned FMC Foret, was not relevant, since the only purpose of that holding company was to hold shares.

120 However, those arguments are not capable of casting doubt on the relevance of the evidence in question with respect to the assessment of the subsidiary's independence.

121 First, the applicant's argument based on the purely administrative functions of the persons concerned is founded on the incorrect premiss that the influence of the parent company must be examined by reference to the 'day-to-day operations' of the subsidiary and that simply 'over[seeing] the business strategy' of that subsidiary is not relevant in this respect.

122 Given that the influence in question is to be assessed by reference to the commercial policy of the undertaking in the broad sense, and not by reference merely to the specific aspects of its day-to-day operations (see paragraphs 104 and 105 above), the overlap between the members of staff in question is a relevant factor, even if their role was limited to that of coordinating and controlling the business strategy of the undertaking.

123 Second, as regards the fact that Messrs W.B. and G.W. also carried out functions within FMC Chemical Holding, the Court observes that, although that circumstance cannot be regarded as a strong indication of the exercise of influence, it is not irrelevant, since it was the holding company through which the applicant owned FMC Foret. It is moreover undisputed that Mr W.B. carried out functions within each of the three companies concerned.

124 Accordingly, the applicant is not justified in claiming that the Commission ought not to have used, for the purposes of corroborating the presumption in question, the additional indicia referred to in recital 391 of the contested decision. The Commission was therefore also right, in recitals 392 to 394 of the contested decision, to dismiss the similar arguments of the applicant relied on during the administrative procedure, alleging that the evidence in question was not relevant.

125 In the second place, the applicant states that, in its reply to the statement of objections, it presented a body of evidence that was sufficient to show that its subsidiary was independent and submits that the Commission committed an error of law and of assessment in concluding to the contrary.

126 It is apparent from the documents before the Court that, in its reply to the statement of objections, the applicant claimed in essence that its shareholding in the subsidiary, acquired progressively between 1966 and 1992, was a mere financial investment and had no effect on the subsidiary's independence. The applicant submitted inter alia that it did not exercise any influence over FMC Foret, the affairs of FMC Foret having been run by its own management team in an independent manner.

127 According to the applicant, that view was demonstrated by the following material annexed both to its reply to the statement of objections and to the application: (i) the corporate directories of the companies concerned during the period of the infringement, demonstrating, in the applicant's submission, that there was no overlap between those companies in terms of personnel, (ii) the statements by four employees of the companies concerned, namely Messrs T.B., A.B., G.W. and S.S., demonstrating,

in the applicant's submission, the absence of any coordination between the two companies, in particular as regards the marketing of the products in question, (iii) internal literature (corporate brochure) of FMC Foret, from which it is allegedly apparent that FMC Foret had historically developed its products before it was taken over by the applicant and then carried out its operations independently and (iv) extracts from the subsidiary's board minutes, demonstrating, in the applicant's submission, that its meetings were held in Spanish and that operational management was never discussed. The documents before the Court moreover show that the applicant also submitted to the Commission its 1995 annual report, an item on which it does not rely before the Court.

128 It is therefore appropriate to examine, in the light of the criteria set out in paragraphs 96 to 109 above, the applicant's arguments relying on the material in question.

129 First, the Court would point out that the applicant's view that its subsidiary, owned through an intermediate holding company, was treated as a simple investment is a mere assertion and does not therefore constitute in itself adequate proof of independence.

130 The fact that the parent company's corporate objects enable the conclusion that it constituted a holding company whose role under its statutes was to manage its shareholdings in the capital of other companies is not sufficient, in itself, to rebut the presumption in question (see, to that effect, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 109 above, paragraph 70). In the present case, it is all the more insufficient given that the applicant does not claim that its company was a holding company, but that its subsidiary was owned through a holding company, and does not put forward any evidence demonstrating the role of that holding company.

131 Second, as regards the applicant's contention, supported by the statements of Messrs T.B., A.B., G.W. and S.S., alleging that, within the group, there were 'two entirely separate organisational structures for producing and selling HP', the Court would point out that the fact that a parent company is not active on the same market as its subsidiary does not demonstrate that the subsidiary is independent.

132 The decisive influence in question is to be assessed by reference to all the economic, organisational and legal links between the parent company and its subsidiary, and the claim that the subsidiary was responsible for the day-to-day management of the activity relating to the infringement, even if it were established, is not sufficient evidence of its independence (see paragraph 105 above). In particular, since the division of tasks is a normal phenomenon in a group, such as the group in question in the present case, no conclusion can be drawn from the fact that the parent company and its subsidiary operate on separate markets and have no links in terms of customer-supplier relationships.

133 Those considerations apply, *a fortiori*, to the circumstances of the present case, given that the applicant marketed, admittedly on a separate geographic market, one of the products in question, HP, which indicates, at the very least, that it was in a position to influence the commercial policy of its subsidiary in the same area.

134 The Court must therefore reject the applicant's arguments seeking to establish that FMC Foret organised its HP sales and production business independently of the similar business carried out by the applicant in the United States, a separate market in view of transport constraints, that the companies in question had separate product ranges, and that there was no overlap in terms of their customers.

135 Since those circumstances, even if they were established, are not capable of showing that the subsidiary was independent, the Commission was therefore also right, in recital 394 of the contested decision, to reject the arguments based on the evidence in question as not constituting adequate proof that FMC Foret was independent.

136 The applicant is also wrong to submit that the Commission distorted its argument (i) by presenting it as a claim that there was a 'separate department for the manufacturing of HP to be shipped to the American market' and (ii) by stating that the applicant was 'equally involved in producing … PBS' (recital 394 of the contested decision).

137 Although the Commission did not present the applicant's argument that there were two separate organisational structures in the exact terms in which it was couched, that manner in which it was presented was not able to affect the Commission's assessment since, in any event, it is not a factor which is capable of establishing that FMC Foret was independent.

138 Moreover, with respect to the Commission's statement that the applicant marketed PBS, the Court observes that the Commission concedes that that was an error but makes it clear that that error stems from a statement by Mr T.B., provided by the applicant, something which the applicant does not contest.

139 The Court observes that, in view of the wording of the statement in question, set out in paragraph 77 above, the applicant cannot claim that it is an obvious 'typographical error'.

140 Thus, the Commission cannot be criticised for having referred to a statement which, although incorrect, came from information supplied by the applicant in the context of evidence to the contrary which the applicant was required to adduce. In any event, since no conclusion can be drawn from the fact that the two companies operated on different markets, the legality of the contested decision cannot be affected by the Commission's reference to that erroneous statement.

141 Third, the applicant's argument that there was no overlap in personnel between the companies in question, which is based on the names appearing in the companies' directories and on Mr T.B.'s statement that those companies had maintained 'their own dedicated, separate business managers, controllers, human resource managers, sales and market managers, production managers, technology managers and operational work force' is not significant evidence of the subsidiary's independence.

142 The argument in question is invalidated by the links, outlined in recital 391 of the contested decision, between the companies concerned resulting from the overlap between some of their board members.

143 Moreover, the alleged absence of overlap between the personnel involved in the operational management of the undertaking on which the applicant relies is not capable of demonstrating that its subsidiary was independent, since the assessment of independence does not relate solely to the commercial policy *stricto sensu* of the undertaking (see paragraph 105 above).

144 Fourth, the applicant relies on the absence of any information and reporting system between itself and FMC Foret, with the exception of the financial reports and of other information comparable to that given to a mere investor, and refers to (i) the statements to that effect by Messrs A.B. and G.W. and (ii) the fact that, unlike in the case

of the applicant's other subsidiaries, FMC Foret's board minutes were only drawn up in Spanish, and their content confirms moreover that the 'operational' issues of the undertaking were not discussed.

145 The Court observes in this respect that, given that the independence of the subsidiary is not to be assessed solely by reference to the operational management aspects of the undertaking, the fact that the subsidiary never implemented for the benefit of its parent company a specific information policy on the market concerned is not sufficient to show that it was independent.

146 Moreover, the applicant's argument seeking to show that there was no specific information policy is irrelevant in the light of the fact, stated in recital 391 of the contested decision, that Mr A.B., chairman and managing director of FMC Foret, was also vice-president of the applicant and was therefore in a position to inform the latter about the commercial policy of the subsidiary.

147 It follows from all those considerations that the Commission was right to find that the evidence put forward by the applicant, considered as a whole, did not contain adequate proof that FMC Foret was independent and that the body of evidence at the Commission's disposal, in particular the items of evidence described in recital 391 of the contested decision, attested to the contrary (recital 394 of the contested decision).

148 Nor is that finding invalidated by the applicant's arguments directed more generally against the Commission's assessments of the arguments and evidence in question.

149 In this respect, first, given that the independence of a subsidiary is to be assessed in the light of all the relevant factors relating to the economic, organisational and legal links between the companies concerned, the Commission was justified in referring in that assessment to the additional indicia described in recital 391 of the contested decision.

150 In particular, contrary to the applicant's submission, the Commission was not required to rebut in detail the applicant's arguments alleging that there was no overlap of personnel and no information and reporting system, since the Commission correctly found, in recital 394 of the contested decision, that those arguments were invalidated by the indicia referred to in recital 391 of that decision relating to the links in terms of personnel between the companies concerned and the role of Mr A.B. in the collusive contacts.

151 Second, the applicant is not justified in claiming that the Commission erred in the assessment of the employees' statements submitted by the applicant during the administrative procedure.

152 Contrary to the applicant's claim, recital 394 of the contested decision does not contain any admission that the statements in question constituted adequate proof that FMC Foret was independent. In that recital, the Commission stated that '[t]he "independent status" of FMC Foret is otherwise only demonstrated through statements by … employees'. It is apparent both from the context of that sentence, which falls within the assessment of the applicant's arguments, and the use of quotation marks that the Commission was merely referring to the argument in the words used by the applicant, but did not find that the applicant had, in fact, established the 'independent status' of FMC Foret.

153 Next, the applicant is also wrong to allege that the Commission rejected the statements in question on the sole ground that they came from employees of the companies concerned and that it did not ascribe to that evidence probative value comparable to that of the statements by the employees of the undertakings which made leniency applications.

154 It is apparent from recital 394 of the contested decision, read as a whole, that the Commission rightly found that the statements in question contained evidence, but concluded, following assessment of all the relevant information, that that evidence was not sufficient to demonstrate that FMC Foret was independent.

155 Accordingly, the applicant cannot reasonably claim that the Commission refused to ascribe probative value to the statements in question.

156 Moreover, by the same argument, the applicant maintains — wrongly — that the statements in question have particularly great probative value, comparable to that ascribed to certain statements made by the undertakings which made leniency applications.

157 The ascribing, on a case-by-case basis, of significant probative value to statements made in the context of a leniency application is explained by the consideration that they are an admission of infringement and therefore, as a rule, statements which run counter to the interests of the declarant (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 211). The employees' statements submitted by the applicant in the present case were made exclusively in the applicant's interest and the context of those statements is therefore not the same as that of a leniency application.

158 Third, the applicant submits that the Commission failed to take into account certain material, namely the corporate directories, the internal literature (corporate brochure) of FMC Foret and the FMC Foret board minutes.

159 The Court would point out that it is apparent from recitals 392 to 394 of the contested decision that the Commission assessed the applicant's arguments that its subsidiary was independent in the light of all the evidence submitted to it.

160 In that regard, given that the assessment in recitals 392 to 394 of the contested decision responds, to the requisite legal standard, to the applicant's arguments as a whole, the mere fact that the Commission did not refer to certain material submitted by the applicant cannot invalidate that assessment.

161 Fourth, the applicant criticises the use of the material referred to by the Commission in recital 394 of the contested decision, in the words preceding footnote 379, according to which, in its annual report of 2004 and its press release of 6 February 2006, the applicant 'itself present[ed] FMC Foret as an integrated part of its business', and from which it followed, according to the Commission, that 'FMC Foret operate[d] as its European subsidiary in this regard'.

162 The Court observes that, when questioned on this point at the hearing, the Commission admitted that the applicant had not been afforded an opportunity during the administrative procedure to submit its observations on the material set out in footnote 379 of the contested decision.

163 That material must therefore be disallowed as evidence.

164 None the less, with respect to the infringement of the rights of the defence, the undertaking concerned must still show that the result at which the Commission arrived in its decision would have been different if that undisclosed material had to be disallowed as evidence (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 73).

165 In this respect, the applicant submits that the defects vitiating the assessments in question necessarily affected the content of the contested decision, in view of the weakness of the other evidence relied on by the Commission in support of its finding of the applicant's joint and several liability.

166 However, the Court would point out that since this material was relied on by the Commission only by way of confirmation, as is apparent from the last sentence of recital 394 of the contested decision, the fact that it must be disallowed as evidence cannot affect the legality of the finding of the applicant's liability, which is demonstrated to the requisite legal standard by other considerations set out in the contested decision.

167 The factor taken into account by the Commission, namely the presumption of the exercise of the applicant's decisive influence over its wholly-owned subsidiary, was sufficient to justify the finding of the applicant's liability, since that presumption was not rebutted by the applicant and was indeed reinforced by the factual elements described in recital 391 of the contested decision.

168 Lastly, since it is apparent from recitals 391 to 394 as a whole that the Commission rightly relied on the exercise of decisive influence by the applicant over its subsidiary, the applicant cannot reasonably claim that the Commission relied on an incorrect criterion merely because, in the fourth sentence of recital 394 of that decision, reference is made to the fact that a specific argument of the applicant's did not suffice to establish that it did not exercise 'any control' over its subsidiary.

169 In the light of all those considerations, it must be concluded that the Commission was right to find that the evidence submitted by the applicant, considered as a whole, was not capable of establishing that FMC Foret was independent and, therefore, of rebutting the finding, arising from the presumption, that it exercised its decisive influence over the conduct of its subsidiary.

170 In addition, that finding is supported by the additional indicia, based on the links in terms of personnel between the companies concerned and the role of Mr A.B. in the infringement (recital 391 of the contested decision), which were also not called in question by the applicant.

171 Furthermore, the applicant has failed to establish that the Commission erred in the assessment of the probative value or the content of the evidence adduced to rebut the presumption, or that the Commission failed to assess the evidence as a whole (see paragraphs 153 to 155 and 158 to 160 above).

172 Nor has the applicant demonstrated that the alleged infringement of the rights of the defence stemming from the use of undisclosed material was capable of having any effect on the conclusions reached in the contested decision (see paragraphs 166 and 167 above).

173 In view of the foregoing, the Court holds that this plea is not well founded and therefore rejects the claim that the contested decision should be annulled.

The claim that the fine should be reduced

Arguments of the parties

174 The applicant disputes the determination of the amount of its fine, and claims that, when assessing the nature of the infringement and therefore its gravity, the Commission reduced the addressees of the contested decision to a single category, stating that they had colluded to set up a secret and institutional system designed to restrict competition, and did so with full knowledge of the illegality of their actions (recital 454 of the contested decision).

175 There is no evidence to support the finding that FMC Foret colluded with the others to set up an institutionally collusive system. The evidence set out in the contested decision does not demonstrate that FMC Foret was involved in setting up a collusive scheme, but shows, at the most, that it was drawn into an institutionally collusive framework by the larger undertakings, and to a great extent against its own interests. Its role was essentially passive and its participation in the meetings was sporadic in nature.

176 The applicant maintains that, according to the Commission itself, FMC Foret simply joined the cartel some three years after it started. The other parties to the cartel were already involved previously in an identical cartel on the same market.

177 As a new entrant, FMC Foret had nothing to gain from the cartel but everything to gain from competing. The Commission itself acknowledged that there was a difference between the other parties to the cartel and FMC Foret, and stated that its participation '[had] often differed in manner from that of other undertakings' (recital 323 of the contested decision).

178 FMC Foret's passive role is also demonstrated by its much more sporadic participation in the collusive meetings, as its representatives participated physically in 14 of the 30 meetings held between May 1997 and December 1999, out of the 73 meetings that allegedly took place while the cartel was in existence. In the context of some other meetings, FMC Foret was alleged to have been connected or kept informed by telephone, and could not therefore have influenced the discussions.

179 The applicant disputes the Commission's argument that, in so far as the duration of FMC Foret's participation in the infringement was taken into account in recital 467 of the contested decision, there was no need to take it into account again when assessing the gravity of the infringement. The fact that an undertaking entered the market at a late stage can demonstrate that it played a less active role in the infringement, and the same principle ought to apply to situations in which an undertaking enters a cartel long after it has been set up. The duration of an undertaking's participation in the infringement is a question distinct from that of its active or passive role (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraphs 171 to 174).

180 The Commission contests the applicant's arguments.

Findings of the Court

181 In support of its application for a reduction in its fine, the applicant relies on the circumstances of its subsidiary's participation in the infringement, claiming, first, that the gravity of its subsidiary's participation in the infringement was less pronounced than that of other undertakings and, second, that the Commission ought to have granted it the benefit of an attenuating circumstance on the basis of its passive role in the infringement.

182 As regards the Commission's alleged failure to take account of the circumstances in question when assessing the gravity of the infringement and determining the starting amount of the fine, it should be recalled that that assessment is to be carried out by reference to the entire infringement in which all the undertakings participated.

183 Accordingly, the applicant's arguments based on the circumstances of FMC Foret's participation in the infringement in question can be examined only in the context of the complaints relating to the assessment of the attenuating circumstances (see, to that effect, Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraphs 102 and 104).

184 As regards, next, the complaint alleging refusal to grant FMC Foret the benefit of the attenuating circumstance associated with its alleged passive role in the infringement, it should be pointed out that the Court held, in its judgment of even date in Case T-191/06 *FMC Foret* v *Commission* [2011] ECR II-2959, paragraphs 334 to 341), that a body of evidence comparable to that relied on by the applicant in the present case did not demonstrate that FMC Foret had an exclusively passive or follow-my-leader role in the cartel, as regards in particular the alleged sporadic nature of its participation in the collusive meetings, the specific manner in which that participation manifested itself, and the evidence relating to its alleged competitive strategy on the market.

185 In particular, it should be recalled that FMC Foret was represented or kept informed, as regards the majority of the collusive meetings referred to in the contested decision, during the period from 29 May 1997 until 13 December 1999. The applicant cannot therefore reasonably claim, in this respect, that the participation of FMC Foret was significantly more sporadic than that of the other parties to the cartel. In so far as the applicant relies on the specific manner in which FMC Foret participated in certain collusive meetings, namely that it did not physically participate in them but was informed of them by telephone, the Court observes that that manner of participation is consistent with the clandestine nature of the cartel and does not demonstrate an exclusively passive or follow-my-leader role.

186 Furthermore, as regards the applicant's argument based on the duration of FMC Foret's participation in the cartel, the Court would point out that that factor was taken into account in the context of the determination of the amount of the fine (recital 467 of the contested decision).

187 In addition, the applicant cannot reasonably rely on the approach adopted in *Cheil Jedang* v *Commission*, paragraph 179 above (paragraph 171), in which the Court took account, in the assessment of the passive role, of the fact that the undertaking concerned entered the market at a late stage. In contrast to the circumstances of the case in that judgment, in the present case FMC Foret was present on the markets concerned right from the beginning of the cartel and the fact that its participation in it was established only from 29 May 1997 does not demonstrate, in the light in particular of the other circumstances of the case, its passive role.

188 In the light of the foregoing, the complaint based on an alleged attenuating circumstance associated with the exclusively passive or follow-my-leader role of FMC Foret in the cartel cannot be upheld.

189 Consequently, the Court rejects the claim that the fine should be reduced and therefore dismisses this action in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders FMC Corp. to pay the costs.

Vadapalas Dittrich Truchot

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]