

OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 30 April 2009¹

I — Background, procedure and forms of order sought

1. By Decision C(2004) 4221 final of 26 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/F-1/38.338 — PO/Needles) ('the decision at issue'), the Commission of the European Communities established, in Article 1 of that decision, that William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG had infringed Article 81(1) EC by entering into a series of agreements engaging in or contributing to the sharing of product markets by segmenting the European market for hard haberdashery products, and geographic markets by segmenting the European market for needles, in conjunction with two British undertakings and their respective subsidiaries, namely Coats Holdings Ltd and J&P Coats Ltd (together, 'the Coats group'), and Entaco Group Ltd and Entaco Ltd (together, 'the Entaco group').

2. In Article 2 of the decision at issue, the Commission imposed a fine of EUR 30 million on the appellants.

3. In the decision at issue, the Commission set that fine on the basis of the gravity and duration of the infringement, which are the two criteria referred to both in Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty,² as amended ('Regulation No 17'), and in Article 23(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.³ To calculate the amount of the fine imposed on the appellants in the decision at issue, the Commission also followed, without expressly referring to it, the method set out in the 1998 Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty⁴ ('the Guidelines').

4. Thus, in the context of the gravity of the infringement, examined in points 317 to 321 of the grounds of the decision at issue, the Commission took into account the nature of the infringement, its 'actual impact on the market' and the size of the geographic market at issue. On the basis of those factors, the Commission concluded that the undertakings which were party to the agreement at issue

1 — Original language: French.

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

3 — OJ 2003 L 1, p. 1.

4 — OJ 1998 C 9, p. 3.

had committed a ‘very serious’ infringement, and the Commission accordingly set the starting amount for the fine to be imposed on the appellants at EUR 20 million.

cases (‘the Cooperation Notice’).⁵ The total amount of the fine imposed on the appellants by the decision at issue was therefore EUR 30 million.

5. As regards the duration of the infringement, the Commission noted that the infringement had extended over a period of at least five years and three months, that is to say from 10 September 1994 to 31 December 1999. It therefore increased the starting amount by 50% to take into account the duration of the infringement. The Commission thus set the basic amount of the fine to be imposed on the appellants at EUR 30 million.

8. By application lodged at the Registry of the Court of First Instance of the European Communities on 28 January 2005, the appellants sought the annulment of the decision at issue in so far as it affected them and, in the alternative, the cancellation or reduction of the fine which they had been jointly and severally ordered to pay.

6. Furthermore, in point 331 of the grounds of the decision at issue, the Commission refused to grant the appellants the benefit of mitigating circumstances, pointing out, in particular, that the early termination of the infringing agreement was not due to an intervention of the Commission and that it had already taken that early termination into account when establishing the duration of the infringement.

9. In its judgment of 12 September 2007 (‘the judgment under appeal’),⁶ the Court of First Instance granted the application in part in so far as it sought to reduce the fine, on the ground that the appellants had wrongly been refused the benefit of Section D, point 2, of the Cooperation Notice for having failed to contest the facts set out in the Statement of Objections sent by the Commission on 15 March 2004. Consequently, exercising its unlimited jurisdiction under Article 229 EC, the Court reduced the amount of the fine imposed on the appellants to EUR 27 million. It dismissed the remainder of the application.

7. Moreover, the Commission took the view that only the Entaco group had satisfied the conditions set out in Section B of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel

⁵ — OJ 1996 C 207, p. 4.

⁶ — Case T-30/05 *Prym and Prym Consumer v Commission* [2007] ECR II-107.

In the context of the settlement of costs, the Court ordered the appellants to bear 90% of their own costs as well as 90% of the Commission's costs, the Commission bearing the remainder.

II — Legal analysis

A — Preliminary remarks

10. By document lodged at the Registry of the Court of Justice on 30 November 2007, the appellants brought an appeal against the judgment under appeal, claiming that the Court should set aside that judgment in so far as it adversely affects them and annul the decision at issue in so far as it relates to them. In the alternative, the appellants claim that the fine imposed on them in Article 2 of the decision at issue should be cancelled or reduced, and that the case be referred back to the Court of First Instance for judgment. They also claim that the Commission be ordered to pay the costs of the whole proceedings.

11. In its response, the Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

12. The parties presented oral argument at the hearing held on 5 March 2009.

13. The appellants put forward five pleas in support of their appeal. The first two pleas, alleging infringement of the rights of the defence and a denial of access to justice respectively, are made in support of the claim that the judgment appealed against should be set aside (in its entirety). The other three pleas, as I shall explain below, all relate exclusively to the fixing of the amount of the fine which has been jointly and severally imposed on the appellants and could therefore, if at least one of them were to be upheld, result only in the partial setting aside of the judgment under appeal, and, if appropriate, the amendment of the decision at issue if the Court were to find, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, that the state of the proceedings permits it to give final judgment in the matter.

14. However, I would state at the outset that, in my view, none of the pleas relied on by the appellants in support of their appeal should result in the setting aside, even on a partial basis, of the judgment under appeal, even though the reasoning on which the latter is based is not beyond criticism in some respects, as I shall demonstrate below.

B — The first plea on appeal, alleging infringement of the rights of the defence, in particular the right to be heard

1. Considerations of the Court of First Instance

15. The appellants submitted before the Court of First Instance that the Commission had infringed their right to be heard by separating the originally unified ‘hard haberdashery’ procedure into two separate procedures, namely the ‘hard haberdashery: needles’ procedure (‘the “needles” case’), which led to the decision at issue, on the one hand, and the ‘hard haberdashery: fasteners’ procedure (‘the “fasteners” case’), on the other hand. They asserted that, if the Commission had respected their right to be heard, they would have pointed out to it that the amount of the fine imposed in the decision at issue should be determined in the context of an overall assessment because of the links between the ‘needles’ case and the ‘fasteners’ case. However, the appellants claimed that the Commission had failed to take the ‘fasteners’ case into account in the decision at issue, and, as a result, the fine imposed on the appellants in that decision was much higher (some 8.9% of the appellants’ overall global turnover) than it would have been if the two cases had been examined jointly.

16. The Court of First Instance dismissed that argument. It pointed out first of all, in paragraph 61 of the judgment under appeal, that the Statement of Objections sent to the appellants on 15 March 2004 was unambigu-

ously entitled ‘Statement of Objections in the PO/hard haberdashery: needles procedure’ and that the appellants were therefore aware, by that date at the latest, that the Commission had opened a separate procedure relating to the needles market. In the view of the Court of First Instance, the appellants were thus in a position to raise a defence against the separation of the procedures in their reply to the Statement of Objections.

17. In paragraphs 63 to 66 of the judgment under appeal, the Court of First Instance went on to say:

‘63. With regard to the arguments relating to the 10% ceiling and the Commission’s alleged obligation to carry out an “overall assessment” of the needles and fasteners cases, it should be pointed out that Article 23(2) of Regulation No 1/2003 provides only that, for each participant in the infringement, the fine may not exceed 10% of the total turnover in the preceding business year. That provision does not refer to the sum of various fines imposed on a company. If the appellants have indeed committed separate infringements, the question whether the infringements were established in a number of decisions or in only one is irrelevant. The only question is therefore whether or not the infringements are in fact separate.

64. In that context, the Commission's right to separate and to join procedures for objective reasons was recognised, implicitly, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* ("*Tokai II*"). In paragraph 118 of that judgment, the Court held that the Commission was entitled to impose on SGL Carbon, one of the appellants in those cases, three separate fines (in two decisions), each within the limits imposed by Article 15(2) of Regulation No 17, provided that SGL Carbon had committed three separate infringements of Article 81(1) EC.

as to its possible outcome and the alleged lack of objective reasons for separating the procedures (see, on that requirement, paragraphs 119 to 124 of the judgment in *Tokai II*, cited in paragraph 64 above) are speculative and cannot call into question the lawfulness of the [contested] decision.'

2. Arguments of the parties

65. The situation in this case is not entirely comparable to that in *Tokai II*, cited in paragraph 64 above, because, according to the applicants, the needles and fasteners cases overlap in relation to the background to the cases, the markets at issue, the period covered by the infringements and the undertakings concerned. The applicants point out that the market definition contained in the Statement of Objections in the fasteners case corresponds "almost word for word" to that in recital 46 in the preamble to the [contested] decision.

66. However, those claims cannot be verified until after the decision in the fasteners case has been adopted. During the oral procedure, the Commission confirmed that the administrative procedure in the fasteners case had not been completed, and that no decision had yet been adopted. Consequently, all assumptions

18. In this plea on appeal, the appellants submit that the Court of First Instance committed an error of law by finding, in paragraph 61 of the judgment under appeal, that they were aware, from the Statement of Objections of 15 March 1994 at the latest, that the Commission would be initiating a separate procedure with regard to the needles market and that they were therefore in a position to raise a defence against the separation of the procedure. The appellants take the view that the mere fact of being aware of the separation of the procedure is not sufficient to enable them effectively to exercise their rights of defence. In their view, the Commission should have set out the facts and the reasons on the basis of which it had separated the procedure, as the Statement of Objections of 15 March 1994 showed only that the Commission considered that the appellants' conduct in the 'haberdashery: needles' sector constituted a separate infringement in relation to the conduct in the 'haberdashery: fasteners' sector. According to the appellants, the consequence of the error of law committed by the Court of First Instance was to deprive them of the opportunity to argue that there were a significant number of factors, set out in their appeal, which demonstrated that the acts committed in the 'needles' and 'fasteners'

cases should have been regarded, at least in part, as a single and continuous infringement for the purposes of Article 23(2) of Regulation No 1/2003. At the hearing, the appellants pointed out that they had brought before the Court of First Instance an application for annulment of Commission Decision C(2007) 4257 final of 19 September 2007 in Case COMP/E-1/39.168 — Hard Haberdashery — Fasteners⁷ (‘the “fasteners” decision’).

19. In its response, the Commission takes the view, on the one hand, that this plea on appeal must be rejected as inadmissible in so far as the appellants are arguing for the first time that the fourth infringement identified in the ‘fasteners’ decision constitutes a single and continuous infringement with the infringement established in the decision at issue. In its submission, the appellants never made such a claim, not even in more general terms, before the Court of First Instance. In that regard, the Commission refers in particular to paragraphs 12 to 23 of the application initiating proceedings before the Court of First Instance, which show that the appellants alleged that, if they had been aware of the separation of the two procedures, they would have pointed out that the fine could not exceed the ceiling of 10% of the turnover in both procedures. On the other hand, the Commission also regards as inadmissible and, in the alternative, as unfounded, the appellants’ claim that the Commission infringed the obligation to state reasons in separating the procedure.

3. Assessment

(a) The scope of the plea on appeal and its admissibility

20. First of all, it is important to point out that in an appeal, the jurisdiction of the Court of Justice is, as a rule, confined to review of the findings of law on the pleas argued before the court called upon to adjudicate on the substance.⁸ A party may not therefore, as a rule, put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance in so far as that would have the effect of authorising the Court of Justice to review the legality of the findings of the Court of First Instance by reference to pleas which the latter did not have occasion to hear and determine.⁹

21. In this case, it is common ground that, in the context of the plea on appeal alleging infringement of essential procedural requirements, the appellants claimed, before the Court of First Instance, that their right to be heard had been infringed inasmuch as they

⁷ — This action, currently pending before the Court of First Instance, is registered under reference T-454/07.

⁸ — See, to that effect, in particular, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 95 and case-law cited.

⁹ — See, in that regard, *Sison v Council*, cited above.

had not been able to put forward their observations on the separation of the 'needles' procedure and the 'fasteners' procedure before the decision at issue was adopted.

argued before the court adjudicating on the substance of the case and which, in accordance with case-law, may not, as a rule, be heard and determined by the Court of Justice in the context of an appeal.¹⁰

22. The appellants reiterate that argument in their appeal, focusing their criticism more specifically on paragraph 61 of the judgment under appeal, but appear to extend their plea to 'infringement of the rights of the defence, in particular the right to be heard', without for that matter claiming that the Court of First Instance itself infringed that right in the proceedings which led to the judgment under appeal. The right to be heard is simply one of the forms in which the rights of the defence are exercised. It therefore seems to me that the examination of the first plea on appeal must be confined to ascertaining whether the Court of First Instance was entitled to reject the complaint raised by the appellants to the effect that their right to be heard had been infringed.

23. Before undertaking that examination, it is necessary to address the two grounds of inadmissibility relied on by the Commission. I should say here and now that, in my view, they should be rejected.

24. As regards the first plea of inadmissibility, it is important first of all to note that the plea on appeal, as I have just defined it, alleging infringement of the right to be heard in no way constitutes a new plea which has not been

25. Next, in its response, the Commission exhibits some hesitation when it comes to classifying the allegedly new complaint raised by the appellants in relation to the existence of a single and continuous infringement in the 'needles' and 'fasteners' procedures, by referring to both a new 'argument' and a new 'plea'.¹¹

26. It is true that, while that classification would appear to be essential for the purposes of deciding whether or not to uphold a ground of inadmissibility based on the production of a new plea before the Court of Justice in the context of an appeal, the Court does not very often examine that question, but confines itself sometimes to classifying a particular complaint as an 'argument' and declaring it admissible without first seeking to ascertain whether it is in fact a plea¹² or, more questionably and, in my view, erroneously,

10 — See the case-law cited in footnote 8.

11 — See, in that regard, paragraph 3 of the response.

12 — See, in that regard, concerning the admissibility of arguments based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Case C-229/05 P *PKK and KNK v Council* ECR I-439, paragraph 66, in which the Court stated that, '... on appeal, an appellant may put forward any relevant argument, provided only that the subject-matter of the proceedings before the Court of First Instance is not changed in the appeal. Contrary to the Council's assertions, there is no requirement that each argument put forward on appeal must previously have been discussed at first instance. A restriction to this effect cannot be accepted because an appeal would thereby be deprived of a significant part of its purpose'.

applying the rule as to the inadmissibility of new pleas to any new argument put forward by the appellants in support of a plea and declaring that argument to be inadmissible.¹³

27. Personally, I take the view that it is important in this case to ascertain whether the complaint alleging the existence of a single infringement is raised on a legal basis other than the plea on appeal alleging infringement of the right to be heard, in which case that complaint must be regarded as a separate and new plea in law which must be declared inadmissible because it was raised for the first time before the Court of Justice, or whether that complaint is put forward only in support of the plea on appeal alleging infringement of the right to be heard, in which case it is therefore merely an argument which should be declared admissible.¹⁴

28. In this case, it is clear from the appeal and from the Commission's response that the complaint alleging the existence of a single and continuous infringement, which, it is not disputed, was not raised in those terms before the Court of First Instance, appears to have been formulated only as a consequence of the alleged failure by the Commission to observe the right to be heard. Indeed, the appellants refer expressly, in particular in paragraphs 12

and 13 of their appeal, to the impact they claim that alleged procedural defect has had, which they address in the section of their appeal entitled '[e]ffects of the procedural error on the appellants' material position', with reference to the case-law to the effect that infringement of the right to be heard may result in the annulment of a measure only where the outcome of the procedure might have been different had it not been for such an irregularity.¹⁵ It is therefore only for the purposes of demonstrating the impact which the alleged infringement of the right to be heard has had on their situation and on the decision at issue that the appellants advance the argument, in their appeal, that there were many factors which showed that the acts committed in the 'needles' and 'fasteners' cases should have been regarded as a single and continuous infringement. It is therefore a complaint raised merely to support the plea in law alleging infringement of the right to be heard. That complaint must therefore be regarded as an argument which must be declared admissible.

29. Lastly, it is clear from paragraphs 63 to 66 of the judgment under appeal that the Court of First Instance did indeed take a view, in the context of the plea alleging failure to observe the right to be heard, on the question whether the Commission split a single and continuous infringement. It is true, with regard to the argument put forward by the appellants, as set out in paragraphs 15 and 28 above, in relation to the impact which the Commission's failure to observe the right to be heard has had on the operative part of the decision at issue, that such findings by the Court of First Instance,

13 — See, in particular, Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 114: '[i]n an appeal the jurisdiction of the Court of Justice is ... confined to review of the findings of law on the pleas argued before the Court of First Instance', and Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraphs 59 and 60.

14 — On the basis of the distinction between legal argument and plea drawn by the Court in judgment of 25 October 2007 in Case C-167/06 P *Kominou and Others v Commission*, paragraph 24.

15 — See, in that regard, in particular, Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 31. See also, to that effect, Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, paragraph 98 and case-law cited.

despite their somewhat confused wording, can unquestionably have been included only for the sake of completeness, as the Court dismissed the appellants' claim alleging infringement of the right to be heard.

that it was not raised before the Court of First Instance.

30. None the less, where a plea is admissible, it is in principle for the appellant to set out arguments in support of it as he sees fit, whether by relying on arguments already used before the Court of First Instance or by developing new arguments, in particular in relation to the positions adopted by that Court. If it were otherwise, an appeal would be deprived of part of its purpose.¹⁶

32. Secondly, with regard to the objection of inadmissibility raised by the Commission in relation to the appellants' claim that the separation of the procedure was vitiated by a failure to state reasons, it is my view that that objection likewise cannot be upheld.

33. I accept that that claim should be classified as a plea which is separate from that alleging infringement of the right to be heard and it is common ground that it was not raised before the Court of First Instance.

31. In any event, in the light of the foregoing considerations, it is clear that the claims made by the appellants in paragraphs 13 to 29 of their appeal with respect to the existence of a single and continuous infringement common to the procedures in the 'needles' and the 'fasteners' cases cannot be interpreted as seeking to raise, before the Court of Justice, a plea alleging an error of law or an error of assessment in the findings in points 250 to 260 of the grounds of the decision at issue to the effect that there was a single and continuous infringement in the markets identified in that decision. In accordance with case-law, if that were the case, such a plea, relating to the validity of the decision at issue, would be inadmissible in so far as it is common ground

34. That twofold finding could support the rejection of that plea on the ground that it is new. Indeed, I note that the Court, in Case C-121/01 P *O'Hannrachain v Parliament*, has already held to be inadmissible a complaint seeking a declaration establishing an infringement of the obligation to state reasons allegedly committed by a Community institution which had not been raised before the court adjudicating on the substance of the case, on the ground that the dispute of which the Court of Justice is seised on appeal cannot have a wider ambit than that which came before the Court of First Instance.¹⁷

16 — See *PKK and KNK v Council*, cited above (paragraph 64 and case-law cited).

17 — Case C-121/01 P *O'Hannrachain v Parliament* [2003] ECR I-5539, paragraph 39.

35. However, the approach adopted in the judgment cited above strikes me as being excessively rigid in that it fails to take into account the case-law of the Court to the effect that infringement of the obligation to state reasons is a matter of public policy which must be raised by the Community judicature of its own motion.¹⁸ As the Court recently held in paragraphs 49 and 50 of the judgment in *Chronopost and La Poste v UFEX and Others*, consideration of a plea involving a question of public policy may take place at any stage in the proceedings even if the party relying on that plea did not do so before the Court of First Instance.¹⁹ It is important to point out in this regard that, in paragraph 49 of the judgment in *Chronopost and La Poste v UFEX and Others*, the Court of Justice referred to paragraph 25 of its judgment in *Commission v Daffix*,²⁰ in which infringement of the obligation to state reasons was pleaded. That reference leads me to think that the Court, implicitly but necessarily, accepted that it should be possible, in the context of an appeal, to rely on a plea alleging failure to

fulfil the obligation to state reasons, in particular failure to state reasons, despite the fact that that plea was not raised before the court adjudicating on the substance of the case.

36. In any event, the appellants appear to criticise the Court of First Instance for not having raised of its own motion the alleged failure to state the reasons for the division of the investigation procedure into two separate procedures.

37. I therefore take the view that the Court should dismiss both grounds put forward by the Commission with a view to obtaining a declaration as to the inadmissibility of the first plea on appeal.

18 — See, in particular, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case C-265/97 P *VBA v Florimex and Others* [2000] ECR I-2061, paragraph 114. See also, on the definition of a plea involving a matter of public policy, paragraphs 102 to 104 of my Opinion in Case C-443/05 P *Common Market Fertilizers v Commission* [2007] ECR I-7209. As regards the obligation to state reasons for a measure as a matter of public policy which must be examined by the court of its own motion, the case-law does not appear to make a distinction according to the dual function of the rules relating to the provision of reasons, that is to say, on the one hand, to allow the court to review the lawfulness of the measure (objective purpose) and, on the other hand, to ensure that the person concerned is aware of the reasons for the measure taken so that he is able to defend his rights and verify the validity of the measure (subjective purpose) (see on that dual function, in particular, Case 43/82 *VBVB and VBBB v Commission* [1984] ECR 19, paragraph 22; Case C-360/92 P *Publishers Association v Commission* [1995] ECR I-23, paragraph 39; and Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, paragraph 124). The finding of inadmissibility in *O'Hannra-chain v Commission*, cited above, does not seem to be based on a distinction of that type. In any event, in the light of the exclusively subjective purpose served by observance of the rights of the defence, a plea alleging infringement of those rights (or the right to be heard) cannot, in my view, be classified as a plea involving a matter of public policy. The Community judicature should not therefore be able to examine such a plea of its own motion.

19 — Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste v UFEX and Others* [2008] ECR I-4777.

20 — Case C-166/95 P *Commission v Frédéric Daffix* [1997] ECR I-983, paragraph 25.

(b) Substance

38. As regards the substance, I take the view that this plea on appeal should be rejected.

39. First, the appellants cannot, in my view, criticise the Court of First Instance for having held, in paragraph 61 of the judgment under appeal, that they were afforded the oppor-

tunity to submit their observations on the separation of the procedure in their reply to the Statement of Objections, which was sent to them on 15 March 2004 and was unambiguously entitled 'Statement of Objections in the PO/hard haberdashery: needles procedure'.

40. In that regard, it should be pointed out that the Statement of Objections provided for in Regulation No 17 (and in Regulation 1/2003) is a procedural document of a preparatory nature in relation to the decision which brings the procedure to a close. That document delimits the scope of the administrative procedure initiated and thereby prevents the Commission from relying in its decision on other objections. That document must set forth the essential facts upon which the Commission is relying at that stage of the procedure. The assessments of fact or of law set out by the Commission in the Statement of Objections are therefore purely provisional in character.²¹

41. Moreover, respect for the rights of the defence requires that, during the administrative procedure, the undertakings concerned must have been afforded the opportunity to make known their 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 of the EC Treaty.²² The Commission must take into account the factors emerging from the administrative procedure, either to abandon such objections as have been shown to be unfounded, or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains.²³

42. In other words, it is by the Statement of Objections that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage of the procedure and it is only after notification of that statement that the undertaking is able to rely in full on the rights of the defence.²⁴

43. In this case, the Statement of Objections of 15 March 2004 unambiguously restricted the subject-matter of the administrative procedure which led to the adoption of the decision at issue to 'hard haberdashery: needles'.

44. That information was sufficient to enable the appellants to give their views on the separation of the procedure and, in so far as they considered that that separation adversely affected them, to dispute it.

21 — See, to that effect, the Order in Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries v Commission* [1986] ECR 1899, paragraph 13, and the judgments in Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries v Commission* [1987] ECR 4487, paragraph 70, and 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 67 and case-law cited.

22 — *Aalborg Portland and Others v Commission*, cited above (paragraph 66 and case-law cited).

23 — See Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 92, and *Aalborg Portland and Others v Commission*, cited above (paragraph 67), as well as the Order in *British American Tobacco and Reynolds Industries v Commission*, cited above (paragraph 13).

24 — See Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 59 and case-law cited.

45. I would point out, moreover, notwithstanding that there is no need for any comment on the validity of that allegation, that the appellants expressly accept, in paragraph 10 of their appeal, that the Statement of Objections of 15 March 2004 made it clear that the Commission considered that their conduct in the ‘needles’ case constituted an infringement which was separate from their conduct in the fasteners sector.

appellants to admit the existence of an infringement in the ‘fasteners’ case;²⁵ nor, for that matter, do they so claim.

48. Secondly, the claim that the separation of the procedure at the stage of the Statement of Objections is vitiated by a failure to state reasons likewise cannot succeed.

46. That admission shows that the appellants could indeed have reasonably made known their views on the separation of the procedure at the stage of the Statement of Objections. However, the appellants have clearly still not explained why, although informed and aware of the Commission’s (at least provisional) view, it was impossible for them to submit — even summary — observations on that position in their reply to that Statement of Objections, which they had over two months from the time of its notification to provide.

49. It is important to point out that the administrative procedure leading to the adoption of a decision establishing an infringement of Article 81(1) EC is generally divided into two stages, each having *its own internal logic*. The first of those stages, namely the preparatory stage before the Statement of Objections, must enable the Commission to adopt a position on the course which the procedure is to follow. The second of those stages, covering the period from notification of the Statement of Objections to adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned.²⁶

47. I would add that the submission of such observations at that stage of the procedure would not have made it necessary for the

25 — According to case-law, the Commission may, if necessary by adopting a decision, compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (see *Dalmine v Commission*, cited above (paragraph 34 and case-law cited)).

26 — See, in that regard, 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 182 to 184, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraph 38.

50. As the appellants have acknowledged in their appeal, it was clear from the Statement of Objections of 15 March 2004 that the Commission took the view that the infringement referred to in that document, namely that relating to 'hard haberdashery: needles', constituted a single and continuous infringement. By the time the Statement of Objections was notified on 15 March 2004 at the latest, therefore, the appellants understood the reason for the separation of the procedure, as from the notification of that statement, into two separate procedures, one of which led to the adoption of the decision at issue.

51. In that regard, contrary to what the appellants suggest, I do not think it possible to impose on the Commission the obligation to explain in greater detail the rationale behind its definition of the subject-matter of a document, such as a Statement of Objections, the very purpose of which is to circumscribe the subject-matter of that stage of the administrative procedure at the end of which the Commission will reach a final decision on the alleged infringement.²⁷ The approach proposed by the appellants would have the effect of requiring the Commission to explain its provisional position, as defined in the Statement of Objections, in relation to factors arising from the preliminary investigative measures which that institution considers do not need to be included at that stage of the administrative procedure. The Commission would then not only be required, in accordance with case-law, to set forth in the Statement of Objections the essential facts upon which, at that stage of the procedure, it bases its claim as to the existence of an infringement, but also to include a detailed statement of reasons relating to the (by

definition non-essential) facts on which, in the context of that administrative procedure, it does not intend to base its claim.

52. Imposing such a requirement to state reasons at that stage of the administrative procedure would in my view be excessive.

53. In this case, it is also important to emphasise, as the appellants stated in their pleadings, that, at the time when the Statement of Objections was adopted on 15 March 2004, the Commission had not completed the investigation procedure relating to the fasteners sector and that it had therefore not sent the appellants the Statement of Objections in that case, which was not adopted until 16 September 2004. In those circumstances, it is all the more difficult to see how the Commission could have been required to give specific reasons for the separation of the procedure at the time when its first Statement of Objections in the 'haberdashery: needles' sector was adopted, given that, at that stage, there was no other document which sought to establish the existence of a further infringement of Article 81(1) EC.

54. Moreover, I would point out that, in *Van Landewyck and Others v Commission*, the Court rejected a plea based on the unlawful and unreasoned joinder, at the stage of the decision establishing an infringement of Article 81 EC, of three originally separate procedures on the ground that the undertakings and associations concerned had been

²⁷ — See, in that regard, *Limburgse Vinyl Maatschappij and Others v Commission*, cited above (paragraph 183).

given an opportunity to make known their views on the objections raised in the administrative procedure which had originated in a number of complaints lodged in succession in the course of the procedure.²⁸ Despite the failure to state the reasons for the decision forming the subject of the action in that case in relation to the ‘joinder’ of the three procedures, the Court stated that there is nothing to prevent the Commission from ruling in a single decision on one and the same infringement which is the subject of several successive complaints lodged during one and the same proceeding.²⁹

55. I do not see why the Commission should be subject to a more onerous requirement to state reasons where it separates the procedure, given that the Statement of Objections enabled the appellants to express their views on that separation in the administrative procedure which led to the adoption of the decision at issue. In that regard, I would point out that at no point did the appellants claim before the Court of First Instance that the Commission had committed an error of law or an error of assessment in the decision at issue with respect to the findings, in points 250 to 260 of that decision, to the effect that there was a ‘single and continuous infringement’ of Article 81(1) EC in the markets covered by that decision.

56. I am therefore of the view that the Court of First Instance was not required to raise of its

own motion the alleged failure to state the reasons for the separation of the administrative procedure.

57. The first plea on appeal should therefore be rejected as unfounded.

C — The second plea on appeal, alleging a denial of access to justice and infringement of the right to effective judicial protection

1. Arguments of the parties

58. The appellants allege that the Court of First Instance refused to review the lawfulness of the separation of the procedure, even though, on the one hand, it acknowledged that this case was different from the *Tokai II* case, cited above, and, on the other hand, it had evidence, namely the Statements of Objections of 16 September 2004 and 8 March 2006 concerning the ‘fasteners’ case, that the Commission had arbitrarily separated a single and continuous infringement. Contrary to the finding of the Court of First Instance in paragraph 66 of the judgment under appeal, the outcome of that procedure was no longer speculative in nature. The Court of First Instance also failed to take into account the fact that the lawfulness of the decision at issue depended on whether the infringement established and penalised in it was a separate infringement from the fourth

28 — See Joined Cases 209/78 to 215/78 and 218/78 *Van Landuyck and Others v Commission* [1980] ECR 3125, paragraphs 29 to 32.

29 — *Ibid* (paragraph 32).

infringement penalised in the ‘fasteners’ decision.

59. The Commission submits, in essence, that the ‘fasteners’ decision had not been adopted when the Court of First Instance deliberated on the case which gave rise to the judgment under appeal and that the Statements of Objections are preparatory documents. It proposes that this plea should be rejected.

2. Assessment

60. As I said when examining the first plea on appeal, the findings of the Court of First Instance contained in paragraphs 63 to 66 of the judgment under appeal and reproduced in paragraph 17 of this Opinion were, implicitly but necessarily, set out in the context of the examination of the alleged impact which the failure to observe the right to be heard had on the lawfulness of the decision at issue.

61. However, in so far as the Court of First Instance held, rightly in my view, that the appellants had been afforded the opportunity to raise a defence against the separation of the procedure, the findings in paragraphs 63 to 66 of the judgment under appeal were therefore included merely for the sake of completeness.

62. In accordance with case-law, complaints directed against such grounds of a judgment of the Court of First Instance included merely for the sake of completeness cannot be successful.³⁰

63. The second plea on appeal must therefore, in my view, be declared irrelevant.

64. In any event, this plea is, in my view, unfounded.

65. First of all, contrary to the appellants’ claims, the Court of First Instance did not consider, in paragraph 65 of the judgment under appeal, that this case was different from that in *Tokai II*, but merely summarised the appellants’ arguments in support of their view that the ‘needles’ and ‘fasteners’ cases overlapped, with the result that the situation at issue was not entirely comparable to that in *Tokai II*. In paragraph 66 of the judgment under appeal, the Court of First Instance notes that the ‘[“applicants”] claims cannot be verified until after the decision in the fasteners case has been adopted’.

³⁰ — See, in particular, Case C-164/01 P *van den Berg v Council and Commission* [2004] ECR I-10225, paragraph 60, and 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 148.

66. Secondly, with regard to the aforementioned finding contained in paragraph 66 of the judgment under appeal, it is established that, at the time when the application was lodged before the Court of First Instance and when the case was deliberated on following the oral procedure, no decision terminating the administrative procedure in the ‘fasteners’ case had yet been adopted. The fact, as stated by the appellants, that, at the time of the hearing in the case which gave rise to the judgment under appeal, the Court of First Instance was in possession of the two Statements of Objections addressed, in particular, to the appellants in the ‘fasteners’ case, did not enable it, because of the necessarily provisional nature of the findings contained in those documents,³¹ to regard those documents as constituting evidence of an alleged lack of objective reasons justifying the separation of the procedure. If the Court of First Instance had followed the approach suggested by the appellants in support of this plea and taken into consideration the factors set out in the Statements of Objections, it would, in my view, have caused the grounds of the judgment under appeal to be vitiated by an error of law inasmuch as it would have taken into account provisional findings without regard to any observations that might be submitted by the undertakings to which those statements are addressed, thus improperly pre-empting the ‘fasteners’ decision.³²

67. Moreover, it is important to point out that at no point did the appellants claim before the Court of First Instance that the Commission had committed an error of law or assessment by finding, in the decision at issue, that there

was a single and continuous infringement of Article 81(1) EC.

68. The Court of First Instance could not therefore do otherwise than to confine itself to finding that the claims made by the appellants on the basis of acts preparatory to the ‘fasteners’ decision, which had not been adopted either at the time when the case was being deliberated on or even when the judgment under appeal was delivered, were purely speculative and could not call into question the lawfulness of the decision at issue.

69. By stating, in the first sentence of paragraph 66 of the judgment under appeal, that those claims could not be verified until after the decision in the ‘fasteners’ case had been adopted, the Court of First Instance did not therefore commit an error of law. On the contrary, it responded to the appellants’ arguments by, rightly, restricting its review to that of the lawfulness of the decision at issue in the light of the pleas relied on by the appellants. It cannot therefore be claimed, in my view, that the Court of First Instance denied access to justice or breached the right to effective judicial protection.

70. Moreover, the finding in the first sentence of paragraph 66 of the judgment under appeal as well as the clarification contained at the end of paragraph 232 of that judgment, concerning the proportionality of the fine imposed in the decision at issue in relation to

31 — See, in that regard, the case-law referred to in footnote 21 of this Opinion.

32 — See, with regard to the level of the fines, *Dansk Rørindustri and Others v Commission*, cited above (paragraph 434).

that liable to be imposed on the appellants in the ‘fasteners’ decision, to the effect that the argument put forward by the appellants could be relied on in the context of any subsequent procedure directed against the decision in the ‘fasteners’ case, demonstrates, in my view, the concern of the Court of First Instance to show the appellants that those complaints should, more relevantly, be directed against any future decision that might be adopted in the ‘fasteners’ case.³³

71. For all of those reasons, I take the view that the second plea, alleging a denial of access to justice and infringement of the right to effective judicial protection, should be dismissed as irrelevant or, in the alternative, as unfounded.

D — The third plea on appeal, alleging failure by the Court of First Instance to take adequate account of the finding that the Commission infringed the obligation to state reasons in determining the gravity of the infringement

72. The third plea has two limbs, based, respectively, on a failure by the Court of First Instance to take adequate account of the finding that the Commission infringed the obligation to state reasons with respect to the size of the markets at issue and a failure by the Court of First Instance to take adequate account of the finding that the Commission infringed the obligation to state reasons with respect to the actual impact of the infringement on the market.

1. The first limb of the third plea, based on a failure by the Court of First Instance to take adequate account of the finding that the Commission infringed the obligation to state reasons with respect to the size of the markets at issue

(a) Considerations of the Court of First Instance

73. In their action before the Court of First Instance, the appellants alleged, in particular, that the Commission had failed to state adequate reasons for its findings relating to the size of the markets at issue in the decision at issue.

74. The Court of First Instance first pointed out, in paragraph 87 of the judgment under appeal, that the Commission was under no obligation in this case to define the market for the purposes of applying Article 81(1) EC, because of the anti-competitive object of the agreements.

75. However, in paragraph 88 of the judgment under appeal, the Court stated that, since the operative part of the decision at issue imposed a fine under Regulation No 1/2003, the findings of fact relating to the market concerned were relevant, even though their inadequacy was not such as to give rise to the total annulment of that decision.

³³ — As the appellants stated at the hearing in this case, they have brought an action against the ‘fasteners’ decision (see paragraph 18 of this Opinion).

76. In paragraph 89 of the judgment under appeal, the Court of First Instance held:

‘89. According to the Guidelines, in assessing the gravity of the infringement “account must be taken” not only of its nature, but also of “its actual impact on the market, where this can be measured” (first paragraph of Section 1.A). In order to assess the actual impact of the infringement on the market, it is necessary to define that market. The Guidelines also provide that it is “necessary”, in order to determine the gravity of an infringement, to “take account of the effective economic capacity of offenders to cause significant damage to other operators” (fourth paragraph of Section 1.A), which entails the need to determine the size of the markets and the market shares of the undertakings concerned.’

77. Having taken the view that there was no failure to state reasons with respect to the definition of the markets (paragraph 95 of the judgment under appeal), the Court of First Instance examined the Commission’s findings relating to the size of the market in points 45 and 46 of the grounds of the decision at issue.

78. In paragraph 98 of the judgment under appeal, the Court of First Instance pointed out that the Commission’s findings on the dimensions of the three product markets which it had identified were incomplete and did not make it possible to ascertain the sizes of all the

markets concerned. In paragraph 99 of the judgment under appeal, the Court of First Instance held that the decision at issue ‘was vitiated by an inadequate statement of reasons, which could result in the partial annulment of [that] decision ..., unless the Commission’s findings with regard to the effective economic capacity of the undertakings concerned to cause significant damage are based on grounds other than the [contested] decision’.

79. In paragraphs 100 to 101 of the judgment under appeal, the Court of First Instance made the following findings:

‘100. In the circumstances of this case, the appellants have never disputed the Commission’s findings in [the grounds] of the contested decision which support the conclusion as to the existence of such capacity, even in the absence of the aforementioned information. In [point] 325 of the [grounds of the] contested [d]ecision, the Commission found that, during the period of infringement, Prym and Entaco were the European market leaders in manufacturing needles and that competition was very limited [coming essentially from Needle Industries (India) Ltd]; that Prym was the European number one in the other hard haberdashery sectors, such as fastening systems and pins, and one of the main competitors on the zip market; and that Coats and Prym were the main retail competitors with their respective brands of hand

sewing needles, namely Milward and Newey.

101. Those observations, although entitled “Differential treatment”, are set out in the “Gravity of the infringement” section of the contested decision and contain references to the relevant criteria for assessing the effective economic capacity of offenders to cause significant damage. Furthermore, the appellants have never disputed that they were among the most powerful operators in the sector concerned.’

(b) Arguments of the parties

80. According to the appellants, the Court of First Instance failed to take into account the fact that the infringement of the obligation to state reasons with respect to the size of the product markets had an impact on the determination of the actual gravity of the infringement, as the latter must be ascertained by cumulative reference to a number of criteria. In that regard, the appellants point out that, in point 333 of the grounds of the decision at issue, the Commission itself stated that it determined the actual gravity of the infringement on the basis of the size of the markets at issue and the economic capacity of the offenders to cause significant damage.

81. The Court of First Instance also committed an error of law by finding that the Commission had adequately described the actual impact of the infringement on the

market, inasmuch as it referred in paragraph 101 of the judgment under appeal, to the leading position of the undertakings concerned. The Court thus failed to take into account the difference between determination of the effective economic capacity of an undertaking to cause significant damage and determination of the actual impact on the market in cases where this can be measured. While the appellants accept that the reference to its leading position may just about be sufficient to establish the economic capacity of an undertaking to cause significant damage, it is not sufficient for the purposes of measuring the actual impact on the market, for which the size of the markets must be ascertained. Furthermore, the appellants consider that there is a contradiction between paragraph 89 and paragraphs 99 and 100 of the judgment under appeal. They therefore consider that the errors vitiating the judgment under appeal should result in the annulment of the decision at issue.

82. The Commission counters these submissions by stating that, on a correct reading of the judgment under appeal, the Court of First Instance endorses the obligation to determine the size of the product markets only in the context of the capacity of the undertakings concerned to cause significant damage. However, if, as is the case here, that capacity can be established by other means, the Commission is relieved of the obligation to determine the size of the markets (paragraphs 89, 90, 99 and 101 of the judgment under appeal). Furthermore, it is clear from the case-law of the Court of First Instance that the method for setting fines described in the Guidelines does not in any way require account to be taken of the size of the product markets for the purposes of determining the starting amount of the fine.

83. According to the Commission, the Court of First Instance did not confuse the question of determining the effective capacity of the undertaking to cause significant damage and that of determining the actual impact of the infringement since, in paragraph 115 of the judgment under appeal, it found the reasons given with respect to actual impact to be inadequate.

84. It adds that, by stating, in paragraph 89 of the judgment under appeal, that the Commission was required to define the market at issue and, therefore, to determine its size, the Court of First Instance could certainly not have taken the view that such a definition amounted to the definition required under Article 82 EC; the case-law to the effect that the Commission is not required, under Article 81(1) EC, to define the market would otherwise be rendered completely meaningless. In any event, any errors in the findings relating to the size of the markets cannot result in the complete annulment of the decision at issue.

(c) Assessment

85. First of all, it is important to state that, by this limb of the third plea, the criticisms which the appellants direct against the judgment under appeal relate solely to the assessment by the Court of First Instance of the reasons given in the decision at issue with respect to the size of the markets at issue, for the purposes of determining the gravity of the infringement. Since, as I have already said, the

gravity of the infringement is one of the two criteria which Article 23(3) of Regulation No 1/2003 requires to be taken into account for the purposes of setting the fine, this limb, assuming it is to be upheld, cannot but lead, if not to the setting aside of the judgment under appeal, to the partial annulment of the decision at issue, as the Court of First Instance held in paragraphs 88 and 99 of the judgment under appeal, and, if appropriate, to its amendment.

86. In my view, however, that limb cannot be successful.

87. First, as the Commission rightly noted in its response, the appellants have misread, in several respects, the grounds of the judgment under appeal which have been challenged, inasmuch as they confuse the findings made by the Court of First Instance with respect to the size of the markets and those — which, moreover, form the subject-matter of the second limb of this plea and appear in other paragraphs of the grounds of the judgment under appeal — relating to the actual impact of the infringement on the market. Contrary to the appellants' submissions, at no point did the Court of First Instance state that the Commission had adequately described the actual impact of the infringement on the market by referring, in paragraph 101 of the judgment under appeal, to the leading position of the undertakings concerned. The findings in paragraph 101 of the judgment under appeal refer solely to the effective economic capacity of the undertakings concerned to cause significant damage to other operators, within the meaning of the

fourth paragraph of Section 1.A of the Guidelines, and not to the specific impact of the infringement on the market, referred to in the first subparagraph of paragraph 1.A of the Guidelines.

88. Secondly, the appellants appear to take the view, though their argument is not particularly clear in this regard, that the criteria relating to the assessment of the gravity of an infringement for the purposes of setting the fine are cumulative and that, where the Commission includes the size of the markets among those criteria, as in the decision at issue, the Court of First Instance cannot hold that the inadequate statement of reasons with respect to that criterion may be supplemented by reference to the findings in the decision at issue concerning the effective economic capacity of the undertakings concerned to cause significant damage.

89. In that regard, it is important to point out that, according to case-law, the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up.³⁴

90. The Court of Justice has held that the factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Community.³⁵

91. The Commission is therefore, in principle, under no obligation to take account of the size of the product markets as a criterion for assessing the gravity of an infringement, as that is just one among a number of other factors to be taken into account.³⁶

92. Contrary to the appellants' submissions with reference to paragraph 91 of the judgment in *Aalborg and Others v Commission*, cited above, no other conclusion can be drawn from that paragraph. That paragraph simply states that account must be taken of 'the extent of the market affected', which unquestionably refers to the geographic extent of the market concerned, as Section 1.A of the Guidelines confirms, and not to the economic size (or volume of turnover) of the affected markets.

34 — See Case C-219/95 *P Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 33; *Limburgse Vinyl Maatschappij and Others v Commission*, cited above (paragraph 465); *Dansk Rørindustri and Others v Commission*, cited above (paragraph 241); and *Dalmine v Commission*, cited above (paragraph 129).

35 — See, in particular, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 129; *Dansk Rørindustri and Others v Commission*, cited above (paragraph 242); and *Dalmine v Commission*, cited above (paragraph 130).

36 — See, in that regard, *Dalmine v Commission*, cited above (paragraph 132).

93. It is important to point out that the Commission stated, in the decision at issue, that it had relied on various factors in order to determine the gravity of the infringement, including the size of the markets and the effective economic capacity of the undertakings to cause significant damage to other operators, the latter being expressly referred to in the fourth paragraph of Section 1.A of the Guidelines.

94. In that regard, it should be pointed out that the appellants do not criticise the finding of the Court of First Instance, in paragraph 89 of the judgment under appeal, to the effect that, for the purposes of assessing the gravity of the infringement, determination of the size of the markets is necessary (and therefore useful) for the purposes of ascertaining the effective economic capacity of the undertakings to cause significant damage to other operators, within the meaning of the Guidelines.

95. They take the view, however, that the Court of First Instance contradicts itself by first imposing such a requirement but subsequently accepting, in paragraphs 99 and 100 of the judgment under appeal, that the inadequate statement of reasons which it found to exist with respect to determination of the size of the markets may be supplemented by the Commission's reference in point 325 of the grounds of the decision at issue to the position of market leader, which reference is not challenged by the appellants.

96. While I feel it is wholly relevant that the appellants highlight the contradiction which becomes evident on reading the grounds set out in paragraphs 89, 99 and 100 of the judgment under appeal,³⁷ that complaint cannot be successful in my view, for the following reasons.

97. As the Court of Justice has held, and as the Court of First Instance reiterated in paragraph 90 of the judgment under appeal, in order to determine the influence which an undertaking may exert on the market, the market shares held by the undertaking are relevant.³⁸

98. However, it cannot be inferred from that case-law that, in order to assess the undertaking's influence on the market, or, to use the terms found in the Guidelines, the effective economic capacity to cause significant damage to other operators, that capacity must be measured by requiring the Commission first to define the market and to assess its size, in terms of volume of turnover.³⁹

37 — It is settled case-law that the question whether the grounds of a judgment of the Court of First Instance are contradictory is a question of law which is amenable, as such, to judicial review on appeal. See, in particular, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited above (paragraph 71 and case-law cited).

38 — Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 139.

39 — In paragraph 95 of the judgment under appeal, the Court of First Instance held that the Commission had satisfied its obligation to state reasons as regards the definition of the markets at issue, which finding the appellants have not disputed.

99. As the Commission rightly considers, interpreting paragraph 89 of the judgment under appeal as imposing such a requirement would have the effect of imposing on the Commission an obligation to demonstrate something which it is not even required to demonstrate for the purposes of establishing an infringement of Article 81(1) EC where that infringement is, by its very nature, contrary to that article, as the Court of First Instance held in paragraphs 86 and 87 of the judgment under appeal with reference to settled case-law (which grounds, moreover, are not disputed by the appellants).⁴⁰

100. Such an approach would also represent a particularly restrictive interpretation of the Guidelines.

101. Consequently, while I take the view that the Court of First Instance was right to hold that, for the purposes of establishing the gravity of the infringement and setting the fine, it is necessary for the Commission to take

into consideration the effective economic capacity of the offenders to cause significant damage to other operators, in accordance with the fourth paragraph of Section 1.A of the Guidelines, such consideration does not, in my view, necessarily entail the need to determine the size of the markets, contrary to the finding of the Court of First Instance in paragraph 89 of the judgment under appeal.

102. Rather, it would, in my opinion, be more accurate to say that the capacity of the offenders to cause significant damage may be demonstrated by all appropriate means, including determination of the size of the markets in terms of volume of turnover.

103. In fact, that was the very test which the Court of First Instance applied in paragraphs 99 to 101 of the judgment under appeal. Having found that the decision at issue contained an inadequate statement of reasons with respect to the determination of the size of the markets in terms of volume of turnover, the Court took the view that that deficiency in the statement of reasons could be supplemented by other grounds set out in the decision at issue, in this instance the findings in point 325 of the grounds of that decision, which relate in essence to what the parties in this case have described as the appellants' leading market position.

104. In that regard, it should be pointed out that, in paragraphs 63 and 66 of their appeal, the appellants expressly accept the relevance

⁴⁰ — The Court has held that 'the sole purpose of defining the relevant market for the purposes of applying Article 85(1) of the Treaty (now Article 81(1) EC) is to determine whether the agreement at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market' (Order of 16 February 2006 in Case C-111/04 P *Adriatica di Navigazione v Commission*, paragraph 31). The Court of First Instance quite logically infers from this, as in paragraph 86 of the judgment under appeal, that the obligation on the Commission to define the relevant market in a decision applying Article 81 EC is not absolute, but is incumbent on the Commission only where it is impossible, without such a definition, to determine whether the agreement at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. See also, in particular, Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913, paragraph 206; Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 230; and Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paragraph 132.

of such a criterion for assessing the effective economic capacity of an undertaking to cause significant damage. They complain only, in this respect, that the Commission did not adequately demonstrate the existence of such a leading market position, taking into account the circumstances of the case. However, such a criticism, which goes to the findings of fact and the assessment of those facts, is not amenable to examination by the Court of Justice in the context of an appeal, save where those facts have been distorted by the Court of First Instance,⁴¹ which the appellants do not claim to be the case here.

2. The second limb of the third plea, based on a failure by the Court of First Instance to take adequate account of the finding that the Commission infringed the obligation to state reasons with respect to the actual impact of the infringement on the market

(a) Considerations of the Court of First Instance

105. Therefore, despite the error of law and the contradictory grounds adversely affecting the reasoning of the Court of First Instance in paragraphs 89, 99 and 100 of the judgment under appeal, those defects did not have any bearing on the operative part of that judgment such as would make it necessary to set it aside.

107. In paragraph 108 of the judgment under appeal, the Court of First Instance pointed out that, under the first paragraph of Section 1.A of the Guidelines, the Commission is required to examine the actual impact of an infringement on the market only where that impact can be measured.

108. The Court of First Instance then noted, in paragraph 109 of the judgment under appeal, that the Commission had never submitted that the impact could not be measured in this case and that it had even stated, during the contentious procedure, that the infringement had been implemented; this implied that it had necessarily had actual effects on the conditions of competition in the markets concerned.

106. I therefore suggest that the first limb of the third plea should be rejected as unfounded.

109. The Court of First Instance dismissed that argument as not being 'convincing', on the ground that the implementation of an agreement does not necessarily mean that it has actual effects, and relied in that regard on

⁴¹ — See, in that regard, in particular, Case C-510/06 P *Archer Daniels Midland v Commission* [2009] ECR I-1843, paragraph 105 and case-law cited.

the Commission's practice in previous decisions and on one of its own judgments. It also criticised the Commission for having failed to respond to the appellants' argument that the agreements at issue had not led to an increase in the sale price of suture needles (paragraph 110 of the judgment under appeal). The Court of First Instance found, lastly, that the Commission had relied exclusively on a cause-and-effect relationship between the implementation of the cartel and its actual impact, which was not sufficient for setting the fine (paragraph 111 of the judgment under appeal). It therefore concluded, in paragraph 112 of the judgment under appeal, that the Commission had not adequately fulfilled its obligation to state reasons.

110. In paragraph 190 of the judgment under appeal, the Court of First Instance examined the legal consequences of such a failure to fulfil the obligation to state reasons. In that paragraph, the Court pointed out, in particular, that the Commission's statement concerning the determination of the amount of the fine did not contain any explanation as to why the reduced impact of the infringement after 13 March 1997, which, moreover, it expressly recognised in point 320 of the grounds of the decision at issue, was not factored into the setting of the fine. The Court none the less concluded that '[t]his failure to state reasons cannot, however, in this case, lead to the cancellation or reduction of the amount of the fine imposed, given that the classification of the infringement as "very serious" was well founded [for the reasons it gave in paragraphs 188 and 189 of the judgment under appeal] and that the Commission chose the minimum starting amount provided for by the Guidelines for such an infringement (or, more specifically, the maximum amount for a "serious" infringement), namely EUR 20 million. The

Commission rightly points out that the fact that the minimum amount was chosen is sufficient, in this case, to take account of the reduced impact of the infringement during the infringement period'.

(b) Arguments of the parties

111. The appellants take the view that the Court of First Instance committed an error of law by finding, in paragraph 190 of the judgment under appeal, that the failure to state reasons with respect to the assessment of the actual impact of the infringement should not, in the circumstances of this case, lead to the cancellation or reduction of the fine, given that the classification of the infringement as 'very serious' was well founded. The Court thus confuses questions concerning the substantive legality of the decision with questions concerning the legal consequences of an infringement of the formal obligation to state reasons. Since the Commission has a broad margin of discretion in matters relating to cartels, compliance with procedural provisions and with the obligation to state reasons is of paramount importance for the rights of the defence.

112. The Commission rejects the view put forward by the appellants. It considers, however, that the Court of First Instance committed errors of law in paragraphs 109 to 112 of the judgment under appeal. First, the Court required the Commission to demonstrate that there was no actual impact that

could be measured, but it did not itself establish that that impact could be measured. Secondly, the Court contradicted settled case-law to the effect that the implementation of an agreement having an anti-competitive object is sufficient to preclude the possibility that the agreement had no effect on the market. The Commission therefore requests the Court of Justice to amend the grounds of the judgment under appeal by setting aside the findings contained in paragraphs 109 to 112 of the judgment under appeal with respect to the evidence and measurability of the impact on the market.

(c) Assessment

113. Before examining the second limb in support of the plea relied on by the appellants in relation to paragraph 190 of the judgment under appeal, I must first comment on the Commission's request for amendment of the grounds of the judgment under appeal, as such a request may enable the Court of Justice to identify an error of law committed by the Court of First Instance and to correct it, without however affecting the operative part of the judgment under appeal, which is well founded for other reasons.⁴²

(i) The Commission's request for amendment of the grounds of the judgment under appeal

114. Two points of law lie at the centre of the criticisms made by the Commission in relation to the grounds set out by the Court of First Instance in paragraphs 109 to 112 of the judgment under appeal.

115. First, the Commission takes the view that the Court of First Instance was wrong to find that it was required to produce evidence to show that the infringement had no actual impact on the market, even though, on the one hand, it has an obligation to do so only where that impact can be measured, which, in its view, was not the case here because of the nature of the agreements, the object of which was to neutralise potential competition in the markets concerned, and, on the other hand, the Court of First Instance did not ultimately find that the impact on the market could be measured in this case.

116. Secondly, the Commission submits that the Court of First Instance committed an error of law by taking the view that it had provided an inadequate statement of reasons for the decision at issue in saying only that the actual impact of the infringement on the market could be inferred from the implementation of the cartel.

117. Those criticisms cannot, in my view, be endorsed.

42 — See, in particular, Case C-30/91 P *Lestelle v Commission* [1992] ECR I-3755, paragraph 28; Case C-294/95 P *Ojha v Commission* [1996] ECR I-5863, paragraph 52; Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraph 58; and Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies v Council and Commission* [2008] ECR I-6513, paragraph 187.

118. As regards the first set of criticisms, it is true that, under the first paragraph of Section 1.A of the Guidelines, it falls solely to the Commission to demonstrate the actual impact of an infringement on the market where this can be measured. The Guidelines also show that horizontal price or market-sharing agreements may be classified as very serious infringements purely on the basis of their intrinsic nature, the Commission being under no obligation to demonstrate the actual impact of the infringement on the market. In those circumstances, the actual impact of the infringement on the market is one of a number of factors.

119. However, as the Court of First Instance noted in paragraph 111 of the judgment under appeal, the Commission devoted a section of the decision at issue to 'the actual impact of the infringement' and in it stated, in particular, that the infringement had had an impact on the market and that that impact had diminished between 13 March 1997 and 31 December 1999. The Commission cannot have it both ways: either it does not intend to rely on the criterion of the actual impact of the infringement on the market, in which case the decision by which it imposes a fine on the undertakings party to the agreement will take into account, for the purposes of determining the gravity of the infringement, only the intrinsic nature of the infringement and, where appropriate, the geographic size of the market, in accordance with Section 1.A of the Guidelines, or it does intend to base its decision on that impact, as it did in the decision at issue, in which case there is, in my view, a presumption that it considers that that impact can be measured. In so far as reliance on that criterion *may* enable the Commission to raise the amount of the fine it intends to impose above the minimum threshold of EUR 20 million provided for in the Guidelines

for very serious infringements, it is unreasonable to think, where the Commission, in a decision imposing a fine, chooses to devote three points of the grounds to 'the actual impact of the infringement', that it does not intend to base that decision on the criterion of the actual impact of the infringement. In such circumstances, it is in my view correct in law to infer, as the Court of First Instance does, in essence, in the judgment under appeal, that the Commission considers that the impact it describes in its decision can indeed, in principle, be measured, unless that decision gives specific reasons to the contrary in this regard.

120. It was therefore against that background and on the basis of such a presumption as to the measurability of the actual impact on the market that the Court of First Instance pointed out, in paragraph 109 of the judgment under appeal, that, during the contentious procedure, the Commission had not stated in this case that the actual impact of the infringement could not be measured. The Court did not therefore in any way impose on the Commission an obligation to prove a negative, but simply found that, in the light of the presumption I have just described, the Commission had not, during the contentious procedure, rebutted that presumption, which could be inferred from a reading of the decision at issue.

121. Furthermore, the explanation given by the Commission in its response before the Court of Justice, to the effect that, because of the nature of the agreements — the object of which, I would reiterate, was to share product

and geographic markets by neutralising the entry into the market of a potential competitor — their impact could not be measured, is unacceptable; that reason is not contained in the decision at issue and, in any event, was not relied on at first instance.

122. Lastly, it was not for the Court of First Instance, when examining whether the reasons on which the decision at issue was based were adequate, in response to the complaint raised by the appellants in this regard, to say that the impact could indeed be measured, as such an assessment goes to the substantive legality of the decision at issue.

123. I therefore propose that the first set of criticisms made by the Commission with regard to the grounds in paragraph 109 of the judgment under appeal should be dismissed.

124. The second set of criticisms, which relates to the findings of the Court of First Instance in paragraphs 110 to 112 of the judgment under appeal, in relation to the inadequacy of the evidence of the infringement's actual impact on the market, requires special consideration.

125. It is important to point out, first of all, that the line of reasoning followed by the Court of First Instance in those paragraphs, under the sub-heading 'The statement of reasons relating to the setting of the fine' is confused. The Court's presentation of both the procedural considerations relating to the inadequacy of the reasons on which the decision at issue is based (where, for example, in paragraph 110 of the judgment under appeal, it criticises the Commission for having failed to respond to the appellants' argument that there has been no increase in the sale price of suture needles), and of the — significantly more extensive — substantive considerations relating to the 'unconvincing' or inaccurate nature of the reasons given in points 318 to 320 of the grounds of that decision, is piecemeal.⁴³

126. In my opinion, the Commission is right to criticise the Court of First Instance for having considered that the statement of reasons given in the decision at issue in relation to the actual impact of the infringement on the market was inadequate.

127. First, according to the case-law relating to the scope of the obligation to state reasons for setting a fine imposed for infringement of Community competition rules, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and

⁴³ — See, in particular, on that distinction, *Commission v Sytraval and Brink's France*, cited above (paragraphs 67 and 72), as well as paragraph 92 of the judgment under appeal.

its duration.⁴⁴ In this case, as regards the gravity of the infringement, which alone is at issue here, those factors were unquestionably set out in points 316 to 325 of the grounds of the decision at issue, the criterion of actual impact having been assessed in points 318 to 320 of the grounds of that decision.

128. Secondly, it is incontrovertibly clear from the statements made in the first and second sentences of paragraph 110 of the judgment under appeal and those in the last sentence of paragraph 111 of that judgment, that the Court of First Instance examined the merits of the grounds of the decision at issue, inasmuch as it found the assessment carried out there to be invalid, rather than simply verifying whether the Commission had set out clearly and unequivocally the reasons on the basis of which it had concluded that the infringement had an actual impact on the market.

129. I therefore take the view that the Court of First Instance committed an error of law in paragraph 112 of the judgment under appeal by attributing the defects in the decision at issue, which it established in paragraphs 110 and 111 of that judgment, to an inadequate

statement of reasons relating to the criterion of actual impact on the market.⁴⁵

130. Nevertheless, I do not take the view that the Commission's request for an amendment of the grounds of the judgment under appeal can be granted, unless that request is intended to mean (which I strongly doubt) that the Court of First Instance should have found an error of legal assessment.

131. I consider, for the reasons set out below, that the Court of First Instance rightly held, in essence, that, for the purposes of setting the fine, the Commission could not rely exclusively on a cause-and-effect relationship between the implementation of the cartel and the actual impact of that cartel on the market.

132. Contrary to the view taken by the Commission both in its response and at the hearing, the question whether the effective implementation of a cartel is sufficient to

⁴⁴ — See Case C-248/98 P *KNP BT v Commission* [2000] ECR I-9641, paragraph 42; Case C291/98 *Sarrió v Commission* [2000] ECR I-9991, paragraph 73; and *Limburgse Vinyl Maatschappij and Others v Commission*, cited above (paragraph 463).

⁴⁵ — It is important to note in that regard that, while, in the French version of paragraph 115 of the judgment under appeal, the Court of First Instance uses the expression 'défaut de motivation' ('failure to state reasons'), it is clear from the language of the case (German), the only authentic language version, which uses the expression 'unzureichende Begründung' ('inadequate statement of reasons'), that that expression refers not to a failure to state reasons ('Begründungsmangel' in German), but to an inadequate or defective statement of reasons ('unzureichende Begründung'). That interpretation is confirmed by the fact that that expression is identical to that used in paragraph 99 of the judgment under appeal, in which the Court of First Instance found there to be an 'inadequate statement of reasons' with respect to the size of the markets.

demonstrate the actual impact of the infringement on the market is by no means one on which the Court of First Instance has established 'settled case-law'. In any event, that issue has not previously been brought before the Court of Justice, which is faced with it for the first time, not only in this case, but also in the 'Austrian banks' cases.⁴⁶

133. As Advocate General Bot emphasised in his Opinion of 26 March 2009 in the aforementioned cases, numerous uncertainties exist as to what is covered by the expression 'where this can be measured' within the meaning of the Guidelines.⁴⁷

134. Those uncertainties result in part from the contradictory case-law of the Court of First Instance on the question whether the finding that a cartel has actually been implemented is sufficient to demonstrate that the infringement has had an actual impact on the market.

135. As Advocate General Bot rightly pointed out in the aforementioned Opinion,⁴⁸ two lines of case-law have emerged in that regard.

136. In the first line of case-law, the Court of First Instance has ruled that the Commission is entitled to rely solely on the fact that the cartel has been implemented in order to conclude that there has been an actual impact on the market. That line of case-law includes the judgments of the Court of First Instance in the Austrian banks cases,⁴⁹ in *Groupe Danone v Commission*⁵⁰ and, more recently, in *Hoechst v Commission*⁵¹ and *Carbone Lorraine v Commission*.⁵²

137. In the judgment under appeal, on the other hand, as I have already said, the Court of First Instance took the view that the Commission could not rely on the mere finding that the cartel had actually been implemented in order to demonstrate that the infringement had an actual impact on the market. That approach is consistent with a second line of case-law, more recent than the first, which, in essence, requires the Commission to be able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market; under

46 — Joined Cases C-125/07 P *Erste Bank der österreichischen Sparkassen AG v Commission*, C-133/07 P *Raiffeisen Zentralbank Österreich AG v Commission*, C-135/07 P *Bank Austria Creditanstalt AG v Commission* and C-137/07 P *Österreichische Volksbanken AG v Commission*, pending before the Court of Justice.

47 — Point 275 of that Opinion.

48 — See points 279 to 300 of that Opinion.

49 — Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169, paragraph 288. That judgment was delivered by the same chamber, in the same composition, as that which delivered the judgment under appeal.

50 — Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407. Paragraph 148 of that judgment states: '[t]he fact that an agreement having an anti-competitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market.' In the appeal before the Court of Justice which gave rise to Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, the Court was not asked to deal with this issue.

51 — Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraphs 345 and 348.

52 — Case T-73/04 *Le Carbone Lorraine v Commission* [2008] ECR II-2661, paragraph 84. That judgment is the subject of an appeal before the Court of Justice, registered as Case C-554/08 P *Le Carbone Lorraine v Commission*, pending before the Court.

that approach, actual implementation of the cartel represents nothing more than a strong indication of an impact, but the Commission may not restrict its analysis to such an indication.⁵³

138. According to that approach, implementation of the infringement is merely a precondition for demonstrating that the cartel had an actual impact on the market.⁵⁴

139. In line with the position adopted by Advocate General Bot in his aforementioned Opinion,⁵⁵ I endorse the reasoning followed in the second line of case-law.

140. In my opinion, where the Commission seeks to base the decision by which it imposes a fine on an undertaking for infringement of Article 81(1) EC on the existence of an actual impact on the market as a result of the infringement, it must be able to provide

specific, credible and adequate evidence enabling it to assess what actual influence the infringement may have had on competition in the market. In particular, in so far as the existence of a specific impact resulting from an infringement enables the Commission, in the case of a very serious infringement, to increase the gravity of that infringement and to raise the starting amount beyond the minimum conceivable threshold of EUR 20 million, the Commission cannot confine itself to finding that the cartel was actually implemented and, on that basis, simply assume, without further evidence, that that cartel is likely to have had an effect on the market.

141. Such a requirement strikes me as particularly appropriate in the light of the objective, defined in case-law, to the effect that fines imposed on undertakings which have infringed Article 81(1) EC serve, in particular, to suppress illegal activities carried on by those undertakings.⁵⁶

142. In this connection, it is to my mind unacceptable that, in the case of agreements having an anti-competitive object, such as those relating to product-market sharing and/or geographic-market sharing or price fixing, the Commission should be exempt not only from the requirement to prove the effects of those agreements for the purposes of establishing the *existence* of an infringement, but also from the requirement to furnish specific

53 — See Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137, paragraphs 77 and 78; Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, paragraphs 178 to 181; Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, paragraphs 15 to 159; Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627, paragraphs 161 to 165. See also, to that effect, judgment of 8 July 2008 in Case T-52/03 *Knauf Gips v Commission*, paragraphs 392 to 395; Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraphs 301 to 304; and Case T-54/03 *Lafarge v Commission*, paragraphs 584 to 587. The judgments in Cases T-52/03 and T-54/03 were the subject of appeals registered, respectively, as C-407/08 P *Gips v Commission* and C-413/08 P *Lafarge v Commission*, pending before the Court.

54 — See *Roquette Frères v Commission* (paragraph 77) and *Archer Daniels Midland v Commission* (paragraph 180), cited above.

55 — See points 303 to 314 of that Opinion.

56 — See, in particular, *ACF Chemiefarma v Commission*, cited above, paragraph 173; *SGL Carbon v Commission*, cited above (paragraph 37); and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 22.

and credible evidence of the actual impact of the infringement on the market, given that it considers it necessary to rely on such a criterion for the purposes of determining the *gravity* of the infringement and, ultimately, for setting the fine it intends to impose on the undertakings concerned.

state reasons with respect to the criterion of the actual impact of the infringement on the market.⁵⁷ Thus, they submit, the Court of First Instance could not, without committing an error of law, take the view in paragraph 190 of the judgment under appeal, that the basic amount of the fine was appropriate.

143. It follows, in my view, that the Court of First Instance was entitled to find, in essence, in paragraphs 110 and 111 of the judgment under appeal, that the Commission could not, without further explanation, simply infer from the fact that the cartel had been implemented that it had had an actual effect on the market and base its decision exclusively on a cause-and-effect relationship between the implementation of the cartel and its actual impact on the market.

146. Even assuming that the Court of First Instance was right to find that the decision at issue was based on a gap in reasoning with respect to the actual impact of the infringement on the market rather than to find that there had been a (manifest) error in the assessment of that criterion, the arguments put forward by the appellants cannot, in my view, be successful.

144. I therefore suggest that the Commission's request for amendment of the grounds of the judgment under appeal should not be granted.

(ii) The complaints raised by the appellants in support of the second limb of the third plea on appeal

145. The appellants complain that the Court of First Instance refused to annul the decision at issue, even though it found that the Commission had infringed its obligation to

147. It should be borne in mind that the Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. First, in the context of a review of their legality under Article 230 EC, it must in particular review compliance with the duty to state reasons, infringement of which renders a decision *liable to annulment*. Second, the

⁵⁷ — The point I made in footnote 45 of this Opinion regarding the French expression 'défaut de motivation' ('failure to state reasons'), used in paragraph 115 of the judgment under appeal, also applies to the use of that expression in paragraph 190 of that judgment. That expression should therefore be read as referring to a defective statement of reasons, not a failure to state reasons, in accordance with the German-language version of the judgment under appeal.

Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 229 EC and Regulation No 1/2003, the appropriateness of the amounts of fines.⁵⁸

148. It follows from this that the finding of inadequate reasoning relating to one of the criteria for setting the amount of the fine imposed on an undertaking for infringement of Article 81(1) EC cannot, *ipso facto*, result in the annulment, even on a partial basis, of the decision by which that fine was imposed. That conclusion follows in view of the number of criteria that may be used by the Commission to determine the gravity and the duration of a specific infringement. After all, the operative part of the decision at issue (including, therefore, the amount of the fine which it imposes) may quite legitimately be based on grounds other than those which have been vitiated by the error or defect found by the court adjudicating on the substance.

149. In the decision at issue, the Commission arrived at a starting fine of EUR 20 million on the basis of the gravity of the infringement. That amount was determined by taking into account, in particular, the nature of the infringement, its actual impact on the market and the geographic size of that market.

150. In the judgment under appeal, having pointed out the defects in the Commission's assessment of the actual impact on the market as part of its examination of the gravity of the infringement, the Court of First Instance determined whether those defects were also capable of having an impact on the calculation of the fine, namely on the starting amount of EUR 20 million which had been imposed on the appellants in the decision at issue.

151. It was in the context of the review which the Court of First Instance carries out in the exercise of its unlimited jurisdiction that, having stated in paragraphs 188 and 189 of the judgment under appeal that the classification of the infringement as very serious in the decision at issue was justified because of the nature of the agreements at issue, it held, rightly, in paragraph 190 of that judgment, that the defects established could not, in the circumstances of this case, *lead to the cancellation or reduction of the amount of the fine imposed*, given that the classification of the infringement as 'very serious' was well founded and that the Commission had chosen the minimum starting amount provided for by the Guidelines for such an infringement (or, more specifically, the maximum amount for a 'serious' infringement), namely EUR 20 million.

152. In other words, the Court of First Instance took the view that, although the specific impact of the infringement on the market might have enabled the Commission to increase the starting amount of the fine which it sets, if it had in fact had such an impact in the circumstances concerned, the defects affecting that criterion had not, in any

⁵⁸ — See, in that regard, *KNP BT v Commission*, cited above (paragraphs 38 to 40), and *Sarrió v Commission* (paragraphs 69 to 71).

event, had any effect on the amount set in this case (or, therefore, on the operative part of the decision at issue), as that amount corresponded to the maximum amount for the category of serious infringements under the Guidelines, even though, on the basis of its intrinsic nature, the infringement at issue counted as a 'very serious' infringement. In those circumstances, the Court of First Instance took the view, as part of its unlimited jurisdiction, that there was no need for it to exercise its power to amend the decision at issue, as the starting amount set was already moderate given the infringement's classification as 'very serious' and was therefore appropriate.

153. That assessment and that approach seem to me to be free from any error of law.

154. I therefore propose that the complaints raised by the appellants in support of the second limb of the third plea on appeal should be rejected. That plea should in my view be rejected in its entirety.

E — The fourth plea on appeal, alleging infringement of the Guidelines and an incorrect assessment of the gravity of the infringement

155. This plea comprises two limbs. The first of those limbs is based on the failure to take into account the incorrect determination of

the actual impact of the infringement on the market. The second of those limbs relates to the failure to take into account, as a mitigating circumstance, the fact that the appellants voluntarily terminated the infringement.

1. The first limb of the fourth plea, based on the failure to take into account the incorrect determination of the actual impact of the infringement on the market

(a) Arguments of the parties

156. The appellants submit that, in paragraphs 188 to 190 of the judgment under appeal, the Court of First Instance committed an error of law in two respects. First, the Court determined the gravity of the infringement by exclusive reference to the form of that infringement in the abstract. Failure to take into account the specific circumstances of the infringement is contrary to the Guidelines, the case-law of the Court of Justice and the Commission's practice in taking decisions. Secondly, the Court of First Instance was wrong to consider that the starting amount provided for in the Guidelines for a very serious infringement constitutes a minimum amount from which it is not permitted to deviate. That approach is contrary to the Commission's practice and constitutes an infringement of the principle of proportionality.

157. The Commission refers in part to the arguments it put forward under the third plea in relation to the actual impact of the infringement on the market. It adds that the Court of First Instance did not regard the starting amount provided for in the Guidelines as being an insuperable threshold, but, on the contrary, examined its proportionality in paragraphs 206 and 223 of the judgment under appeal. As regards the appellants' arguments relating to the Commission's previous practice, the examples cited are irrelevant, new or inaccurate.

159. In this case, the Court of First Instance took the view, in paragraph 188 of the judgment under appeal, that, by virtue of its intrinsic nature, the infringement at issue, the purpose of which was to share product and geographic markets, constituted a manifest breach of competition law and was therefore particularly serious. It inferred from this, in paragraph 189 of the judgment under appeal, that, in the light of the definition set out in the Guidelines, the classification of the infringement as 'very serious' in the decision at issue was justified.

(b) Assessment

158. It must be borne in mind that, in an appeal against a judgment of the Court of First Instance setting the amount of the fine imposed on an undertaking which has infringed the Community rules on competition, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Articles 81 EC and 82 EC as well as Article 15 of Regulation No 17 (or Article 23 of Regulation No 1/2003) and, second, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced.⁵⁹

160. In my view, that assessment, in itself, is free from any error of law.

161. The Court of Justice has already had occasion, in *Thyssen Stahl v Commission*,⁶⁰ to confirm the approach adopted by the Court of First Instance to the effect that the gravity of the infringement may be established by reference to the nature and object of the unlawful conduct and that factors relating to the object of the conduct may be more important in the context of setting the amount of the fine than those relating to its effects. The Court of Justice thus held that the effect which an anti-competitive practice has is therefore not a conclusive criterion for assessing the proper amount of a fine.⁶¹

59 — See, in particular, *Baustahlgewebe v Commission* (paragraph 128); *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (paragraph 217); and *Groupe Danone v Commission* (paragraph 69), cited above.

60 — Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821.

61 — *Ibid* (paragraph 118).

162. Furthermore, as the Court of First Instance rightly pointed out in paragraph 189 of the judgment under appeal, the Commission stated in the Guidelines that very serious infringements ‘will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets’ (third indent of the second paragraph of Section 1.A).

163. It is clear from that guidance that agreements or concerted practices which seek, as in this case, first to share product markets, by dividing the European market for needles and other hard haberdashery and, secondly, to share the geographic market by dividing the European market for hand sewing needles, craft needles, knitting needles and crochet needles, may, by virtue of their intrinsic nature alone, be classified as ‘very serious’, without there being any need for such conduct to be characterised as having a specific impact.

164. I therefore take the view that the appellants cannot criticise the Court of First Instance for having found, in essence, that the criteria listed in the first paragraph of Section 1.A of the Guidelines do not have the same significance for the purposes of assessing the gravity of the infringement.

165. Furthermore, as I explained in points 151 and 152 of this Opinion, having noted the defects vitiating the Commission’s examination of the actual impact of the infringement, the Court of First Instance none the less refused to exercise its power to amend the starting amount for the fine fixed in the decision at issue, taking the view, in essence, that, in the circumstances of this case, the amount which had been set there was moderate given the infringement’s automatic classification as ‘very serious’ by virtue of its intrinsic nature. Contrary to what the appellants claim, the Court of First Instance did not therefore take the view that the starting amount of EUR 20 million, set in the decision at issue, was an insuperable threshold, but, on the contrary, examined, as part of its unlimited jurisdiction, whether or not it was necessary to amend that amount, as paragraph 190 of the judgment under appeal shows.⁶² The fact that, having regard to the circumstances of this case, the Court of First Instance considered it appropriate not to amend the starting amount for the fine set in the decision at issue, and explained the reasons supporting that assessment, cannot constitute, in itself, a breach of the principle of proportionality. Furthermore, the fact that the Commission may have assessed other unlawful conduct differently in other cases is of no relevance, as the Commission’s previous practice in its decisions does not serve as a legal framework for the determination of fines in competition matters.⁶³

62 — See, in particular, for a similar approach, Case T-223/00 *Kyowa Hakko Kogyo and Kyowa Hakko Europe v Commission* [2003] ECR II-2553, paragraphs 77 to 89.

63 — See, in particular, *Dansk Rørindustri and Others v Commission* (paragraphs 209 to 213); *JCB Service v Commission* (paragraph 205); and *Archer Daniels Midland v Commission* (paragraph 82), cited above.

166. The first limb of the fourth plea on appeal must therefore be rejected. (b) Assessment

2. The second limb of the fourth plea, based on the failure to take into account, as an attenuating circumstance, the fact that the appellants voluntarily terminated the infringement

169. It is common ground that the Court of First Instance rejected the appellants' argument requesting it to penalise the Commission for having refused to grant them the benefit of an attenuating circumstance under Section 3 of the Guidelines, on the ground, in particular, that the infringement had terminated before the date on which the Commission first intervened.

(a) Arguments of the parties

167. By this limb, the appellants claim that the Court of First Instance committed an error of law in paragraphs 211 and 213 of the judgment under appeal by finding that an attenuating circumstance may be taken into account only where the undertakings at issue were prompted by the Commission's interventions to terminate their anti-competitive conduct. The appellants take the view that the fact that the infringement was terminated voluntarily even before the first investigation by the Commission should, logically, be taken into account as an attenuating circumstance, since it is certainly not taken into account in the assessment of the duration of the infringement.

170. In paragraph 211 of the judgment under appeal, the Court of First Instance held that the early termination of the infringing agreement does not create entitlement to the benefit of an attenuating circumstance under Section 3 of the Guidelines. The application of a reduction in such circumstances would duplicate the consideration given to the duration of the infringements in the calculation of the fines. In this case, the Court of First Instance found, in paragraph 212 of the judgment under appeal, that the early termination of the infringing agreement was due neither to an intervention of the Commission nor to a decision by the appellants to put an end to the infringement, but was essentially a result of the appellants' increased manufacturing capacity in the Czech Republic, as the appellants stated in their reply to the Statement of Objections. The Court of First Instance pointed out in paragraph 213 of the judgment under appeal that the early termination of the agreement had already been taken into account when assessing the duration of the infringement and could not therefore constitute an attenuating circumstance.

168. The Commission takes the view that the analysis by the Court of First Instance is consistent with its case-law, which should not be called into question.

171. Irrespective of the question (of fact) whether the appellants brought the infringe-

ment to an end voluntarily or because of economic requirements, the interpretation of the Guidelines adopted by the Court of First Instance is not, in my view, vitiated by an error of law.

172. Section 3 of the Guidelines states, in essence, that the basic amount of the fine set by the Commission is reduced, in particular, where the offending undertaking terminates the infringement as soon as the Commission intervenes.

173. However, in *Dalmine v Commission*, cited above, the Court of Justice has already had occasion to confirm the assessment by the Court of First Instance to the effect that the benefit of an attenuating circumstance under Section 3 of the Guidelines cannot be granted where the infringement found had ceased or was in the process of coming to an end when the Commission first carried out its investigations.⁶⁴

174. That approach, though in slightly different circumstances, was recently confirmed in *Archer Daniels Midland v Commission*, cited above, in which the Court of Justice held that the undertaking Archer

Daniels Midland had rightly been denied entitlement to a reduction of the basic amount of the fine imposed on it on the ground that it had ended its unlawful conduct as soon as the United States antitrust authorities intervened, which, in that case, was before the Commission intervened.⁶⁵ The Court of Justice based that assessment on the need to maintain the deterrent effect of the fine imposed by the Commission and on the effectiveness of Article 81(1) EC.⁶⁶

175. It follows that, in this case, the Court of First Instance did not commit an error of law in so far as it upheld the Commission's refusal in the decision at issue to grant the appellants the benefit of an attenuating circumstance by virtue of their early termination of the infringement of Article 81(1) EC, the existence of which the appellants did not dispute.

176. I therefore take the view that the second limb of the fourth plea on appeal cannot be successful. That plea must also be rejected in its entirety.

64 — Paragraphs 158 and 160.

65 — Paragraph 150.

66 — *Ibid* (paragraph 149).

F — The fifth plea on appeal, alleging infringement of the principle of proportionality when setting the amount of the fine

tion of the proportionate nature of the fine and that the appellants' arguments are unfounded.

1. Arguments of the parties

2. Assessment

177. The appellants submit that, when determining the gravity of the infringement for the purposes of setting the fines, the Court of First Instance infringed the principle of proportionality in two respects. First, the Court applied the Guidelines in a formalistic manner, without taking into account the specific circumstances of the infringement. Secondly, the Court verified the proportionality of the fine only in relation to isolated criteria, without taking an overall view of the facts of the case. In that regard, the appellants criticise, more specifically, paragraphs 228 to 232 of the judgment under appeal.

179. The appellants' first complaint, alleging a formalistic application of the Guidelines, must be rejected on the same grounds as are set out in point 165 of this Opinion. In support of that complaint, the appellants simply reiterate their criticisms to the effect that the Court of First Instance regarded the starting amount of EUR 20 million as being an insuperable threshold. However, as I have already argued, such criticisms cannot be successful.

178. The Commission takes the view that that plea is inadmissible as it asks the Court of Justice to re-examine the level of the fine. In the alternative, it submits that the Court of First Instance carried out a detailed examina-

180. As regards the second complaint, it is important to bear in mind that, according to settled case-law, it is not for the Court of Justice, when deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the

Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community law.⁶⁷

181. It follows that the Court of Justice does not have jurisdiction, in the context of an appeal, to carry out a general re-examination of the fines.⁶⁸

182. In this case, the appellants are in fact asking the Court, in their appeal, to re-examine the amount of the fine imposed by the Court of First Instance. In paragraphs 103 to 108 of their appeal, they submit that the alleged lack of actual impact on the market, the duration and the variable impact of the infringement, the early termination of the infringement, the alleged disproportion between the fine and overall turnover, the allegedly reduced size of the markets at issue as well as the percentage which the fine imposed by the Commission represents in relation to the annual volume of the first level of the markets concerned, should have led the Court of First Instance to reduce the amount of the fine imposed in the decision at issue.

67 — See, in particular, Case C-320/92 P *Finsider v Commission* [1994] ECR I-5697, paragraph 46; Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, paragraph 109; *Limburgse Vinyl Maatschappij and Others v Commission*, cited above (paragraph 614); and *Dansk Rørindustri and Others v Commission*, cited above (paragraph 245).

68 — See, to that effect, *Dansk Rørindustri and Others v Commission*, cited above (paragraph 246 and case-law cited).

183. In an appeal, however, the Court of Justice is required, in particular, to consider whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced.⁶⁹

184. In that regard, as the Commission submits in its response and as the examination of the third and fourth pleas on appeal carried out in this Opinion shows, the Court of First Instance carefully examined the appellants' arguments which were repeated in paragraphs 103 to 108 of their appeal, referred to above.

185. Furthermore, with regard to the more detailed criticisms relating to the allegedly disproportionate nature of the fine in relation to the appellants' overall turnover and the volume of the first level of the markets at issue, which have not been examined in the context of the response to be given to the foregoing pleas on appeal, the Court of First Instance rightly considered, in paragraphs 228 to 232 of the judgment under appeal, whether the amount set in the decision at issue was, in the light of the appellants' arguments and its unlimited jurisdiction, proportionate to those factors. In that regard, it is important to point out that the Court of First Instance made that assessment without keeping to the ceiling of

69 — See, in particular, *Baustahlgewebe v Commission* (paragraph 128), and *Groupe Danone v Commission* (paragraph 69), cited above.

10% of the overall turnover provided for in Article 23(2) of Regulation No 1/2003, compliance with which, as the Court of First Instance correctly held in paragraph 226 of the judgment under appeal, cannot automatically guarantee that the fine is proportionate.

186. In the light of those considerations, I suggest that the fifth plea on appeal, and, therefore, the appeal in its entirety, should be dismissed.

III — Costs

187. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court of Justice is to make a decision as to costs. Under Article 69(2) of those rules, applicable to the appeal procedure under Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission contended that the appellants should be ordered to pay the costs and as the appellants should, in my view, be unsuccessful in their pleas, they should be ordered to pay the costs relating to the appeal.

IV — Conclusion

188. In the light of the foregoing considerations, I propose that the Court of Justice make the following order:

- (1) The appeal is dismissed.
- (2) William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG are ordered to pay the costs.