Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

18 June 2013*

(Competition — Agreements, decisions and concerted practices — World market in aluminium fluoride — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Action for annulment — Period allowed for commencing proceedings — Out of time — Inadmissibility — Price-fixing and market-sharing — Evidence of the infringement — Rights of defence — Definition of the relevant market — Fines — Gravity of the infringement — 2006 Guidelines on fines)

In Case T-404/08,

Fluorsid SpA, established in Assemini (Italy),

Minmet financing Co., established in Lausanne (Switzerland),

represented by L. Vasques and F. Perego, lawyers,

applicants,

v

European Commission, represented by V. Di Bucci, C. Cattabriga and K. Mojzesowicz, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2008) 3043 of 25 June 2008 relating to a proceeding under Article 81[EC] and Article 53 of the EEA Agreement (COMP/39.180 – Aluminium fluoride), concerning a worldwide price-fixing and market-sharing cartel on the world aluminium fluoride market and, in the alternative, reduction of the fine imposed on the applicants,

THE GENERAL COURT (First Chamber),

composed of J. Azizi (Rapporteur), President, I. Labucka and S Frimodt Nielsen, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 June 2012,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

I – *Facts*

1 Commission Decision C(2008) 3043 of 25 June 2008 relating to a proceeding under Article 81[EC] and Article 53 of the EEA Agreement (COMP/39.180 – Aluminium fluoride) ('the contested decision'), concerns a worldwide price-fixing and market-sharing cartel on the world aluminium fluoride market, in which the applicants, Fluorsid SpA ('Fluorsid') and Minmet financing Co. ('Minmet'), were found to have participated actively.

2 Fluorsid is a company incorporated under Italian law which manufactures and sells derivatives of fluorine, including aluminium fluoride. Minmet, a company established in Switzerland, is Fluorsid's main shareholder, with 54.844% of the shares, and acts as its exclusive sales agent for aluminium fluoride throughout the world with the exception of Italy.

3 Boliden Odda A/S ('Boliden') is a Norwegian company active in the production and sales of zinc and aluminium fluoride (recital 6 in the preamble to the contested decision). On 23 March 2005, Boliden submitted to the Commission of the European Communities an application for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the Leniency Notice'). In April 2005, Boliden submitted further clarifications, additional information as to its participation in a cartel on the aluminium fluoride market and oral statements. On 28 April 2005, the Commission granted Boliden conditional immunity pursuant to point 8(a) of the Leniency Notice (recital 56 of the contested decision).

4 On 25 and 26 May 2005, the Commission carried out inspections, pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), at the premises of European producers of aluminium fluoride (recital 57 of the contested decision), in particular of Fluorsid, Alufluor AB, Derivados del Fluor SA and C.E. Giulini & C. Srl.

5 On 23 and 31 August 2006, the Commission interviewed Mr O., the former commercial manager of 'Noralf', Boliden's aluminium fluoride division, pursuant to Article 19 of Regulation No 1/2003 (recital 58 of the contested decision).

6 Between September 2006 and February 2007, the Commission sent a number of requests for information to the undertakings the subject of the administrative procedure at that stage, inter alia, to Industries chimiques du fluor (ICF), a company incorporated under Tunisian law, Boliden, Alufluor, Derivados del Fluor, Fluorsid, C.E. Giulini & C., Minmet and Industrial Quimica de Mexico (IQM), a company incorporated under Mexican law, pursuant to Article 18(2) of Regulation No 1/2003, to which those undertakings replied (recital 59 of the contested decision).

7 On 29 March 2007, during a meeting with the Commission, Fluorsid submitted certain written materials. On 22 April 2007, Fluorsid submitted 'an application for immunity or a reduction of its fine' under the Leniency Notice, which the Commission interpreted as an application for a reduction of the fine. On 27 May 2007, Fluorsid submitted an addendum to that application. On 13 July 2007, the Commission informed Fluorsid that it did not intend to grant it any reduction of fines under the Leniency Notice (recitals 60 and 248 to 249 of the contested decision).

8 On 24 April 2007, the Commission formally initiated proceedings against, inter alia, ICF, Boliden, Fluorsid, Minmet and IQM and adopted a statement of objections, which was sent to them on 25 April 2007 and notified to them between 26 and 30 April 2007. At the same time, they were granted access to the file by the Commission by means of a CD-ROM (recital 61 of the contested decision).

9 With the exception of Boliden, the addressees of the statement of objections submitted their observations on the objections raised against them (recital 62 of the contested decision).

10 On 13 September 2007, an oral hearing was held, in which all the addressees of the statement of objections took part (recital 63 of the contested decision).

11 On 11 and 14 April 2008, the Commission sent requests for information to all the addressees of the statement of objections, asking them to provide information about their overall turnover for the years 1999, 2000, 2001 and 2007 and their sales of aluminium fluoride as well as details about any forthcoming significant change to their businesses or owners (recital 64 of the contested decision).

II – *Contested decision*

A – *Operative part of the contested decision*

12 The operative part of the contested decision is worded as follows:

‘*Article 1*

The following undertakings have infringed Article 81 [EC] and Article 53 of the EEA Agreement by participating, from 12 July 2000 until 31 December 2000, in an agreement and/or concerted practice in the aluminium fluoride sector:

(a) Boliden …

(b) Fluorsid … and Minmet …

(c) [ICF]

(d) [IQM] and QB Industrias SAB …

Article 2

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

(a) Boliden …: 0 EUR;

(b) Fluorsid … and Minmet …, jointly and severally: EUR 1 600 000;

(c) [ICF]: EUR 1 700 000 EUR;

(d) [IQM] and QB Industrias SAB …, jointly and severally: EUR 1 670 000

…’.

B – *Grounds of the contested decision*

13 In the grounds of the contested decision, the Commission found, essentially, as follows:

1. The aluminium fluoride industry

14 The Commission states that aluminium fluoride is a chemical compound used for the production of aluminium, enabling the consumption of electricity required in the smelting process to be lowered during the production process of primary aluminium and thereby considerably contributing to the reduction of the production costs of aluminium. Aluminium producers are the main users of aluminium fluoride. Every year more than 20 million tons of aluminium is produced world-wide, some 30% of which in Europe (recitals 2 and 3 of the contested decision).

15 In 2000, Fluorsid's sales of aluminium fluoride in the European Economic Area (EEA) amounted to EUR 2 717 735 and its total sales worldwide amounted to EUR 31 997 725. In 2007, its worldwide total turnover amounted to EUR 83 136 704 (recital 15 of the contested decision).

16 In 2000, the estimated total market value of aluminium fluoride sold on the open market in the EEA was approximately EUR 71 600 000. The market value of aluminium fluoride sold on the open worldwide market concerned by the cartel, in 2000, was approximately EUR 340 000 000. The estimated joint market share of the undertakings the subject of the contested decision is 33% on the EEA market and 35% on a world-wide basis (recital 33 of the contested decision).

17 Aluminium fluoride is traded on a world-wide basis. Sales have been made from the United States into the EEA and from the EEA to the United States, Africa, South America and Australia (recital 35 of the contested decision). ICF sells considerable quantities of the product in the EEA (recital 36 of the contested decision). Since 1997, the aluminium fluoride industry association, the Inorganic Fluorine Producers Association (IFPA), has brought together producers from all around the world (recital 38 of the contested decision).

2. The Milan meeting and the implementation of the cartel

18 The Commission states that to some extent collusive activities already took place in the aluminium fluoride industry in the period between the creation of the IFPA in 1997 and the Milan (Italy) meeting of 12 July 2000, but that there is no convincing evidence in that regard (recital 73 of the contested decision). The Commission pointed out that, at the Milan meeting, representatives of Fluorsid, ICF and IQM were present, whereas a representative of Boliden's 'Noralf' division took part in the meeting over the telephone. During that meeting, the participants agreed on an objective of increasing prices by 20% for the sale of aluminium fluoride. They examined various regions worldwide, including Europe, to establish a general price level and in some cases a market division. According to their agreement, the overall aim was to obtain a higher price level and to discourage deep price discounting. The participants also exchanged commercially sensitive information. In that connection, the Commission relied on the report of the Milan meeting by Mr R., representing Fluorsid, the notes taken by Mr O., representing Boliden's 'Noralf' division and Mr O.'s statement (recitals 77 to 91 of the contested decision).

19 Following the Milan meeting, the undertakings concerned remained in contact with each other (recital 93 of the contested decision).

20 On 25 October 2000, Mr T. of Boliden's 'Noralf' division and Mr A. of IQM exchanged over the telephone information on their respective offers to an aluminium fluoride customer in Australia, including information about the price level, contract period and volume offered. The content of that telephone call was recorded in a contemporaneous handwritten note from Mr T. to Mr O., also of Boliden's 'Noralf' division (recital 94 of the contested decision).

21 On 8 November 2000, Mr C., managing director of Minmet, sent a note to Fluorsid concerning a telephone conversation which he had with Mr G. of ICF on the same day concerning the sales prices of aluminium fluoride (recital 95 of the contested decision).

22 On 9 November 2000, Minmet sent another report to Fluorsid, this time of a meeting with ICF in Lausanne, Switzerland, concerning the customers and prices on certain markets, in particular Brazil and Venezuela (recital 96 of the contested decision).

3. The application of Article 81(1) EC and Article 53(1) of the EEA Agreement

23 The Commission concluded that the Milan meeting and the resulting conduct aimed at giving effect to it presented all the characteristics of agreements and/or concerted practices within the meaning of Article 81 EC and Article 53 of the EEA Agreement (recitals 115 to 122 of the contested decision) and that that cartel constituted a single and continuous infringement (recitals 123 to 129 of the contested decision).

24 That infringement had the object of restricting competition in the European Community and the EEA (recitals 130 to 135 of the contested decision), but its geographic scope was worldwide, covering the regions mentioned in the report of the Milan meeting, namely, in particular, Europe, Turkey, Australia, South America, South Africa and North America (recital 136 of the contested decision).

25 In the Commission's view, the cartel was capable of having an appreciable effect upon trade between the Member States or the Contracting Parties of the EEA Agreement (recitals 137 to 142 of the contested decision).

4. Duration of the infringement

26 Whilst there are indications that collusion may already have occurred between the aluminium fluoride producers in the second half of the 1990s, and notably following a meeting in Greece in 1999, the Commission took the view that it had convincing evidence that there was a cartel from 'at least' 12 July 2000, the date of the Milan meeting (recital 144 of the contested decision).

27 The Aluminium fluoride industry supply contracts are negotiated in advance during a period starting some time in the second half of each calendar year and ending at the end of that calendar year or in the very first months of the next calendar year. That applies also to multi-year contracts. Some of the multi-year contracts still provided either for an annual price negotiation by the end of each calendar year or for half-yearly revision of prices at the end of each semester. The report of the Milan meeting confirms that the practice of the industry was to determine prices in advance for the following business year. The Commission inferred from this that the result of the collusive contacts in July 2000 applied to the negotiations carried out in the second half of the year 2000 (recital 146 of the contested decision).

28 The Commission thereby concluded that the cartel was in force and continued to produce its anti-competitive effects, from the cartel members' conduct, until 'at least' 31 December 2000 (recital 147 of the contested decision).

5. Determination of the basic amount of the fine

29 The Commission set the basic amount of the fine to be imposed on the applicants – on the basis of the data supplied by them concerning the value of their sales of the product in question calculated in the EEA (EUR 6 279 960), at EUR 1 600 000 (recital 243 of the contested decision) stating that, in accordance with the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, 'the 2006 Guidelines'), 'the basic amount of the fine to be imposed should be related to a proportion of the value of sales, depending on the degree of gravity of the infringement multiplied by the number of years of infringement' (recital 234 of the contested decision).

30 In the present case, the infringement consisted of, inter alia, a horizontal price-fixing agreement, which, by its very nature, was among the most harmful restrictions of competition. That aspect had to be reflected in the proportion of the value of sales taken into account (recital 236 of the contested decision). In 2000, the estimated combined market share of the undertakings participating in that infringement was not more than 35% in the EEA (recital 237 of the contested decision). The geographic scope of the infringement was worldwide (recital 238 of the contested decision). The Commission '[also took into account t]he degree to which the agreement was implemented (recitals (134) to (135), (154) to (156), (172) and (185) of the contested decision)… in setting the proportion of the value of sales to take into account' (recital 239 of the contested decision).

31 The Commission concluded that, taking into account the factors referred to above concerning the nature of the infringement and its geographic scope, the proportion of the value of sales of each undertaking to be used to establish the basic amount of the fines to be imposed was 17% (recital 240 of the contested decision).

32 Since the duration of the infringement corresponded 'at least' to the period from 12 July 2000 to 31 December 2000, the multiplying factor to be applied to the basic amount was 0.5 (recital 241 of the contested decision). The additional amount in order to deter undertakings from entering into horizontal price-fixing agreements such as the one currently at issue was 17% of the value of sales (recital 242 of the contested decision).

33 The Commission determined the basic amounts of fines to be imposed on the participants in the cartel as follows:

— Boliden: EUR 1 000 000;

— Fluorsid and Minmet: EUR 1 600 000;

— ICF: EUR 1 700 000;

— IQM, QB Industrias SAB: EUR 1 670 000.

34 In accordance with the Leniency Notice, the Commission ultimately granted Boliden immunity from any fines.

6. Mitigating circumstances

35 The Commission lastly considered that the mere fact that Fluorsid and Minmet cooperated in the investigation did not in itself constitute a mitigating circumstance and that there were no exceptional circumstances present in this case that could justify a reduction in the amount of their fine (recitals 248 to 249 of the contested decision). The Commission noted that Fluorsid had submitted its application for immunity from fines or a reduction in the fine some two years after the beginning of

the investigation, being the second undertaking to approach it. The Commission found that the information supplied by Fluorsid before the statement of objections was adopted did not represent significant added value and that the information supplied by it after 22 April 2007 had not been used to prove the infringement (recitals 260 to 263 of the contested decision). Consequently, the Commission did not grant a reduction of the applicants' fine. It set the final amount of the fine imposed on them jointly and severally at EUR 1 600 000 (recital 276 and Article 2 of the contested decision).

Procedure and forms of order sought by the parties

36 By application lodged at the Court Registry on 20 September 2008, signed by the same legal representatives, the applicants jointly brought the present action.

37 The applicants claim that the Court should:

— annul the contested decision;

— in the alternative, reduce the amount of the fine imposed on them jointly and severally;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss Minmet's action as manifestly inadmissible or, in the alternative, as unfounded;

— dismiss Fluorsid's action as unfounded;

— order the applicants to pay the costs.

39 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure.

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

41 In the context of a measure of organisation of procedure under Article 64 of the Rules of Procedure, the Court called upon the Commission to answer a question in writing. The Commission complied with that measure of organisation of procedure within the prescribed period.

42 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 14 June 2012. At the hearing, the Commission produced a document explaining how it had calculated the value of sales and the market shares for the purposes of determining the fine imposed on the applicants. The views of the parties having been heard, that document was placed on the file, and that fact was noted in the record of the hearing.

Law

I – *Admissibility*

A – *Preliminary observation*

43 Since the Commission has argued that the action is inadmissible in so far as it has been brought by Minmet, it must be stated that the contested decision consists of a bundle of decisions comprising several similar individual decisions imposing fines, adopted pursuant to a common procedure (see, to that effect, Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraphs 49 et seq.). In the present case, it is therefore necessary to distinguish, inter alia, the decision addressed to Fluorsid from that addressed to Minmet and to assess the admissibility of the actions of Minmet and Fluorsid separately, since those actions are directed at legally distinct decisions adopted in respect of them (see, to that effect, *Commission* v *AssiDomän Kraft Products and Others*, paragraphs 53 to 56).

B – *The scope of the action*

44 It must be pointed out that the Commission communicated to Minmet an English-language version of the contested decision on 9 July 2008. By contrast, an Italian-language version of the contested decision was communicated to Fluorsid on 11 July 2008.

45 One of the heads of claim of the application seeks to 'annul the contested decision in its entirety', without further clarification as to the subject matter of the proceedings. Nevertheless, in paragraph 1 of the application, it is stated that the applicants seek 'the annulment of Commission Decision C (2008) 3043 … notified to Fluorsid and Minmet, on 11 … and 9 July 2008 respectively'. Similarly, paragraph 3 of the application states that, 'by the present action, … Fluorsid and Minmet seek to contest the decision … by which the Commission … concluded that there had been an infringement of Article 81 [EC] and by which it therefore penalised Fluorsid and Minmet on a joint and several basis'. Lastly, in annex to the application, the applicants produced only the decision addressed to Fluorsid in Italian and not that addressed to Minmet in English. It was not until after a measure of organisation of procedure of the Court, pursuant to Article 64 of the Rules of Procedure, that Minmet produced the English-language version of the decision.

46 It follows from all of those points that, even though the applicants did not state expressly that their actions were in actual fact directed at two legally distinct decisions, addressed to two different legal persons respectively, the fact remains that it is sufficiently clear and precise from the application that the applicants sought to contest, and seek the annulment of, those two decisions in so far as they adversely affected them. The applicants' view, reiterated at the hearing, and recorded in the minutes thereof, is that the 'contested decision' is 'one and the same decision' notified to them, since it finds them jointly and severally liable for the same infringement and imposes on them, for that reason, a fine on a joint and several basis.

C – *Admissibility of Minmet's action*

47 As regards the admissibility of Minmet's action in so far as it is directed at the decision addressed to it, it must be noted that the Commission has argued that that action was brought out of time on 20 September 2008 and must therefore be declared inadmissible. In that connection, Minmet submits that that delay was caused by the malfunctioning of electronic communications. This involved objective facts concerning technical matters, which could not be foreseen and were therefore excusable.

48 Regardless of whether Minmet is entitled to bring proceedings against the decision addressed to it, which the Commission disputes, it must be found that Minmet does have an interest in bringing proceedings against the decision addressed to, and the fine imposed on, Fluorsid, for which Minmet has been found jointly and severally liable both in that decision and the decision addressed to it individually. That applies *a fortiori* since the decision addressed to Fluorsid is the primary legal basis for Minmet's joint liability, which is inextricably linked to Fluorsid's liability and the fine imposed on it. Minmet's interest in that fine being annulled or reduced is therefore not in doubt.

49 In any event, as has been acknowledged in the case-law, since one and the same action is involved, the Courts of the European Union ('EU') may forego considering whether the other applicants are entitled to bring proceedings (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31 and Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraph 57).

50 In the light of the foregoing, the Court concludes that Minmet's action is admissible is so far as it is directed against the decision addressed to Fluorsid for which the action was brought within the prescribed period.

51 By contrast, as regards Minmet's action against the decision addressed to itself, the Court notes, first of all, that the form of order sought by the Commission implies that that action must be dismissed as inadmissible, since the time-limit for bringing that action had expired. In that connection, it must be noted that the time-limit for instituting proceedings within two months of the notification of the measure concerned, within the meaning of the fifth paragraph of Article 230 EC, is a matter of public policy, established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice. It is therefore for the Courts of the European Union to ascertain, of their own motion, whether it has been complied with (see, to that effect, Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraph 38). That time-limit is fixed, absolute and may not be extended (Case T-291/04 *Enviro Tech Europe and Enviro Tech International* v *Commission* [2011] ECR II-8281 paragraph 95).

52 In the present case, Minmet received notification of the contested decision on 9 July 2008. Under Article 101(a) of the Rules of Procedure, '[w]here a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question'. Article 102(2) of those rules provides that the prescribed time-limits are to be extended on account of distance by a single period of ten days. Consequently, in the present case, the time-limit for bringing an action against the decision addressed to Minmet had expired on 19 September 2008, which Minmet acknowledged at the hearing, a note of which was made in the record thereof. However, it was not until the application was lodged at the Court Registry, on 20 September 2008, that Minmet brought its action against the decision addressed to it.

53 Minmet argues that the Court's request that the application be rectified extended the time-limit for bringing proceedings. However, given that that time-limit is fixed, absolute and may not be extended (*Enviro Tech Europe and Enviro Tech International* v *Commission*, paragraph 51 above, paragraph 95), neither such a request for, nor acceptance by the Court of, such rectification could affect the expiry of the period for bringing an action. It has been held that the question of the admissibility of an action had to be assessed on the basis of the situation existing at the date on which the application was lodged. If at that time the conditions which must be satisfied to enable an action to be brought are not fulfilled, the action is therefore inadmissible. A defect can be rectified only before the expiry of the period for bringing proceedings (see orders in Case T-532/08 *Norilsk Nickel Harjavalta and Umicore* v *Commission* [2010] ECR II-3959, paragraph 70, and in Case T-539/08 *Etimine and Etiproducts* v

Commission [2010] ECR II-4017, paragraph 76 and the case-law cited). It must be found, in the present case, that rectification occurred after the period for bringing proceedings had expired, so that it could no longer render the action admissible.

54 Consequently, in so far as Minmet's action is directed at the decision addressed to it, it is out of time and must be declared inadmissible.

55 That assessment is not called in question by the other arguments put forward by the applicants.

56 First, the fact that the present action was brought jointly by Fluorsid and Minmet, as an economic unit, against the 'contested decision', without any distinction between the individual decisions addressed to them respectively, cannot have the consequence that Minmet benefits from the same time-limit for bringing proceedings as Fluorsid.

57 Admittedly, the concept of an undertaking within the meaning of Article 81(1) EC must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal. When such an economic entity infringes the competition rules, that infringement must, according to the principle of personal responsibility, be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections – and *a fortiori* the final decision – must be addressed to that person, indicating in which capacity that legal person is called on to answer the allegations (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraphs 54 to 57 and the case-law cited; the Opinion of Advocate General Kokott in Case C-97/08 *P Akzo Nobel and Others* v *Commission* [2009] ECR I-8241, point 37).

58 Moreover, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the European Union judicature relates only to those aspects of the decision which concern that addressee. By contrast, unchallenged aspects concerning other addressees, or aspects challenged out of time, do not form part of the matter to be tried by it (*Commission* v *AssiDomän Kraft Products and Others*, paragraph 43 above, paragraph 53, and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* [2011] ECR I-2239, paragraph 142).

59 It must be stated that Minmet is a separate legal person from Fluorsid, and that, consequently, as regards the decision addressed to it, it cannot benefit from the same time-limit for bringing proceedings applicable to the decision addressed to Fluorsid. These are two separate decisions, addressed to two distinct legal persons, notified on different dates and in respect of which the time-limits for bringing proceedings must be calculated separately.

60 Secondly, as regards Minmet's reliance on a case of *force majeure* and excusable error, reference must be made to the case-law which has held that the concepts of *force majeure* and unforeseeable circumstances contain an objective element relating to abnormal circumstances unconnected with the trader in question and a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the trader must demonstrate diligence in order to comply with the prescribed time-limits. There must be abnormal difficulties, independent of the will of the person concerned and apparently inevitable, even if all due care is taken (Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraphs 31 and 32). In addition, no derogation from the application of the rules on procedural time-limits may be made save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to *force majeure*, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice of the European Union, since the strict application of those rules serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see the order in Case C-242/07 P *Belgium* v *Commission* [2007] ECR I-9757, paragraph 16 and the case-law cited).

61 As regards, in particular, the concept of excusable error, it has been held that that concept can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and displaying all the diligence required of a normally well-informed person (order in Case C-112/09 P *SGAE* v *Commission* [2010] ECR I-351, paragraph 20). That is the case, for example, when an applicant is faced with a particular difficulty of interpretation in identifying the competent authority or the time-limit (orders in Case C-406/01 *Germany* v *Parliament and Council* [2002] ECR I-4561, paragraph 21, and in *SGAE* v *Commission*, cited above, paragraph 24; judgment in Case T-382/94 *Confindustria and Romoli* v *Council* [1996] ECR II-519, paragraph 21).

62 However, in the present case, first, the provisions applicable to time-limits for bringing proceedings did not present any difficulty of interpretation for Minmet. In addition, the conduct of the Commission has not been such as to give rise to any confusion concerning the assessment of the time-limit. On the contrary, the Commission satisfied the requirements of clarity and legal certainty by notifying, on different dates, two separate decisions – in different language versions moreover, that is, in English to Minmet and in Italian to Fluorsid – to two separate legal persons. It follows that Minmet was perfectly able to recognise and take cognisance of the fact that two separate legal decisions were involved, both of which produced separate legal effects with regard to each of the applicants.

63 Secondly, Minmet does not argue in any detail or with supporting evidence that the application's submission out of time was caused by the malfunctioning of the electronic communications, the unforeseeable delay in the e-mail system's communication of transmission failure and problems with the fax machine. It is not even apparent from Minmet's submissions on what date it attempted to send the application. Such vague and unsubstantiated allegations are not sufficient to prove that there is a case of *force majeure* or excusable error. Consequently, that argument must be rejected as manifestly unfounded.

64 In the light of the foregoing considerations, it must be concluded that Minmet failed to contest the decision addressed to it within the time-limit for bringing proceedings laid down in the fifth subparagraph of Article 230 EC, so that that decision became final in relation to it and it was time-barred from challenging its lawfulness.

II – *Substance*

A – *Summary of the grounds for annulment*

65 In support of their actions, the applicants rely essentially on three pleas in law.

66 The first plea in law alleges, principally, an infringement of Article 81 EC. First, the cartel alleged by the Commission in the contested decision is 'impossible'. Secondly, even if such a cartel had existed, it would not have had any effects on the market, because a price agreement adopted in July 2000 would not have been capable of producing effects during the second half of the year 2000 as alleged by the Commission in the contested decision. Prices for the second half of the year 2000 were set in 1999 or 'at the very least' during the first months of 2000. Thirdly, the applicants deny that an agreement seeking to restrict competition was concluded at the Milan meeting. There was merely an exchange of information between competitors. In that context, the applicants submit that there was a breach of the obligation to state reasons under Article 253 EC concerning proof of the infringement, and also of Article 2 of Regulation No 1/2003.

67 The second plea in law alleges infringement of (i) the rights of the defence, (ii) Article 27 of Regulation No 1/2003, (iii) Article 81 EC and (iv) 'Article 253 [EC] or Article 173 EC'. First, in the contested decision a different infringement was found from that alleged in the statement of objections. The Commission based its decision on facts not referred to in the statement of objections and on which

the parties had no opportunity to defend themselves. Secondly, the Commission placed the documents relating to Fluorsid's application for leniency on the file in the administrative proceedings, after having 'overlooked' that application for leniency in the statement of objections.

68 The third plea in law, advanced in the alternative, alleges an infringement of Article 23 of Regulation No 1/2003 concerning the fine imposed on the applicants. The applicants dispute the definition and quantification of the value of the relevant market in the contested decision. The gravity of the infringement found by the Commission is disproportionate. The applicants also submit that point 18 of the 2006 Guidelines has been misapplied.

B – *The first plea in law, alleging infringement of Article 81 EC*

1. Preliminary observations

69 The applicants submit, essentially, first, that the cartel found by the Commission in the contested decision is impossible. The undertakings concerned were not in a position to impose an aluminium fluoride price, in the market, on aluminium producers, since that price is not determined by supply, but by demand. Secondly, the purpose of the Milan meeting was not to establish 'cartel prices', but 'to understand, given certain cost functions, what price would enable the addresses of the contested decision at issue to "remain in the market", notwithstanding the exponential increase in production costs'. In addition, aluminium fluoride prices are negotiated each year for the following year's supplies. Consequently, it is also impossible that a price agreement adopted in July 2000 could have produced effects during the second half of the year 2000. The applicants thereby concluded that, even if the infringement alleged by the Commission had existed, it could not have produced effects on the market concerned. Lastly, as regards 'what took place in Milan', the applicants submit that the Commission obtained proof of an exchange of information between competitors, but not of an agreement 'whose object was a restriction of competition'. The Commission therefore infringed Article 81 EC, the obligation to state reasons under Article 253 EC with regard to detailing the evidence of the infringement and Article 2 of Regulation No 1/2003.

70 The Commission contends that the present plea should be rejected.

71 As a preliminary point, the settled case-law should be borne in mind according to which, first, it is for the party or the authority alleging an infringement of the competition rules to prove its existence by establishing to the requisite legal standard the facts constituting an infringement, and, secondly, it is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58; 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 78; and Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 50).

72 The Court observes, as regards proof of an infringement of Article 81(1) EC, that the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 215).

73 It has also consistently been held that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 180 and the case-law cited).

74 In addition, it is normal for the activities which anti-competitive practices and agreements entail to take place clandestinely, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 71 above, paragraphs 55 to 57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 51).

75 The concepts of agreement and concerted practice within the meaning of Article 81(1) EC are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 131 and 132, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 190). In addition, in the context of a complex infringement the Commission cannot be expected to classify the infringement precisely as an agreement or a concerted practice, as both those forms of infringement are covered by Article 81 EC (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraphs 111 to 114, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 696). Therefore, as in the present case, the dual characterisation of the infringement as an agreement 'and/or' a concerted practice must be understood as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 81(1) EC, which lays down no specific category for a complex infringement of this type (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 264, and *HFB and Others* v *Commission*, cited above, paragraph 187).

2. Outline of the contested decision

76 It must be noted that, in the contested decision, the Commission relied essentially on the following documents in order to find that there had been an infringement of Article 81 EC: the report of the Milan meeting (recitals 77 and 81 to 88 of the contested decision), the notes taken by Mr O., from Boliden's 'Noralf' division, at that meeting (recital 89 of the contested decision), Mr O.'s statement concerning that report (recital 90 of the contested decision), Mr O.'s notes of 25 October 2000 concerning the telephone interview between Boliden's Noralf' division and IQM (recital 94 of the contested decision), and the notes of Mr C. of Minmet of 8 and 9 November 2000 (recitals 95 and 96 of the contested decision). The Commission deduced from those documents that a meeting had taken place between representatives of Fluorsid, ICF and IQM, that is between Mr R., Mr G. and Mr A., respectively, on 12 July 2000 in Milan, in which the representative of Boliden's 'Noralf' division, Mr O., took part by telephone. The report of the Milan meeting was drawn up by Mr R. of Fluorsid. According to the Commission, the content and object of that meeting were anti-competitive (recitals 115 to 122 of the contested decision).

77 The technical terms and abbreviations used in the abovementioned documents correspond to the following definitions:

— 'US$/T or US$/MT', which means that the prices are stated in US dollars (USD) per ton or per metric ton;

— 'INCOTERMS', which means 'International Commercial Terms';

— 'FCA', which means Free Carrier;

— 'FOB', which means Free On Board;

— 'CFR', which means Cost and Freight;

— 'C&F Filo' which means Cost and Freight and Free in/Liner out;

— 'LME', which means the London Metal Exchange, which is a trading exchange for listed metals. The LME price determines the price of aluminium. In the documents referred to, the abbreviation 'LME' indicates the price of aluminium;

— 'AlF_3' is the abbreviation for aluminium fluoride. It must also be pointed out that the price of aluminium fluoride may be calculated as a percentage of LME. According to the parties, the AlF_3 price is normally between 45% and 55% of LME, that is between USD 650 and USD 900.

78 It must also be noted that the documents relied on by the Commission in the contested decision were produced either by Boliden or by the other cartel members, in particular Fluorsid. The applicants have not challenged the authenticity, credibility or the probative value of those documents, and there is nothing in the file which gives grounds to assume that their evidential value must be called in question. The applicants do not challenge the content of that evidence as such, but simply dispute the conclusions drawn from it by the Commission in order to prove the existence of a cartel.

3. Proof of the infringement

79 In the contested decision, the Commission found that the participants in the Milan meeting concluded an agreement on a 20% price increase for the sale of aluminium fluoride. They also established a general price level in various regions worldwide, including Europe, and, in some cases, divided markets and exchanged commercially sensitive information. It is therefore necessary to assess the evidence on which the Commission relied in the contested decision in support of its conclusions.

80 First of all, the report of the Milan meeting refers to an increase in total costs of 20% between June 1999 and June 2000, which made necessary a 20% increase in aluminium fluoride costs in 2001. In that connection, it is then stated as follows:

'[A]s our price of [aluminium fluoride] for sale in 2000 was determined in mid year 1999 and our costs at mid year 2000 are 20% higher than 1999, our prices of [aluminium fluoride] in 2001 should be 20% higher than those of 2000. All three parties [Fluorsid, ICF, IQM] agreed this was reasonable from the producer standpoint. However will the market supply/demand permit such an increase [?]' (recital 81 of the contested decision).

81 It is therefore clear from the report of the Milan meeting that the representatives of those taking part in that meeting, including Fluorsid's representative, agreed on a 20% increase in their prices for the sale of aluminium fluoride in 2001.

82 In addition, as regards the European market, the report of the Milan meeting refers to an agreement between those representatives for 2001 on a price of USD 775 FCA, that is, USD 800 FOB, per ton of aluminium fluoride:

‘For year 2001 [ICF] wants to raise price to 800 US$/T Fca Mordijk [*sic*] And 775 US$/T FOB Gabes. European producer price therefore 775/800 US$/T FCA/FOB european producer’ (recital 85 of the contested decision).

83 It is apparent from all those documents that that price constituted a minimum price below which the cartel members had not to make offers on the markets affected.

84 Those conclusions are confirmed by the notes of Mr O., of Boliden’s ‘Noralf’ division, taken at the Milan meeting, in which he participated by telephone, and by the oral statements he made before the Commission (recitals 77, 89 and 90 of the contested decision). Consequently, it is apparent from those notes and statements that the participants at that meeting stated that they needed a 20% price increase and, after taking stock of costs, concluded that the prices for 2001 had to be increased by 20% and set at USD 800 per ton, that is 50% ‘LME’.

85 In addition, several documents subsequent to the Milan meeting show that the participants thereto observed the terms of that agreement, maintained bilateral contacts in that regard and exchanged sensitive commercial data, in particular for the purposes of monitoring each other’s respective price policies. Thus, the note of Mr T. of Boliden’s ‘Noralf’ division to Mr O., also of that division, concerning a telephone conversation of 25 October 2000 between Mr T. and IQM’s Mr A., indicates that Mr T. and Mr A. exchanged information on their price offers to a customer in Australia. Those price offers corresponded to a minimum price of USD 800 per ton agreed at the Milan meeting. It is apparent from the note that IQM offered that Australian customer a price level of USD ‘850 – 875 – 900’, whereas Boliden’s ‘Noralf’ division stated that it had offered a price of approximately USD 800, but had not yet concluded any agreement with the Australian customer (recital 94 of the contested decision).

86 In addition, it is apparent from the note of Mr C. of Minmet, concerning his telephone conversation of 8 November 2000 with Mr G. of ICF, that ICF had complained about the ‘low’ prices offered by Minmet in an Egyptian public tender – ‘$725 FOB/$745 CFR’ – and asked how Minmet could expect to raise the price to USD 875 in Venezuela as the Venezuelans would have access to the tender in Egypt. The same note states that ICF reconfirmed that the prices offered to a Brazilian customer exceeded USD 800 per ton (recital 95 of the contested decision).

87 In addition, according to another report of 9 November 2000, drawn up by Minmet and sent to Fluorsid, concerning a meeting between Mr C. and Mr K. of Minmet and Mr G. and Mr T. of ICF, ICF informed Minmet that it had secured a contract for a price of USD 845 with a Brazilian customer and confirmed that it would not offer more than 6 000 metric tonnes on the Venezuelan market. Minmet insisted that prices in Venezuela should be above USD 800 CFR (recital 96 of the contested decision).

88 It is apparent from the documents relating to the contacts of 25 October and 8 and 9 November 2000 that the undertakings concerned monitored each other’s price levels. In addition, as the Commission correctly stated in the contested decision, the prices corresponded to the results of the negotiations at the Milan meeting. In that connection, it must also be noted that the documents of 25 October and of 8 and 9 November 2000 describe contacts after the Milan meeting between participants in it, in particular between the applicants and ICF, which were clearly linked to the agreement on prices agreed upon at that meeting, since they refer to key aspects of that agreement.

89 That price agreement related, first, to the European markets. In that connection, the report of the Milan meeting states, in particular, the forecasts for production and sales volumes of aluminium fluoride for 2001 for Italy, Romania, Spain, Scandinavia, Germany, the Benelux, and the United Kingdom (recital 85 of the contested decision). In that context, ICF stated that it wanted to raise the price to USD 800 per ton in 2001 'Fca Mordijk' and to USD 775 per ton 'FOB Gabes', with the result that the European producer price would be USD 775/800 per ton 'FCA/FOB' (see paragraph 82 above).

90 Secondly, the Commission established that that agreement also applied to various regions in the world. Thus, according to the report of the Milan meeting, concerning Australia, the 'price idea' for 2001 was USD 800 per ton 'FOB Europe', that is '50% LME FOB', whereas the European price could be higher than the Chinese price and should be USD 875 per ton (recital 86 of the contested decision). As regards South America, the report contains prices for the year 2000 and minimum prices for 2001. For Venezuela, it contains the price of USD 850 per metric ton 'C&F Filo' and the absolute minimum price of USD 890 per metric tonne. For Brazil, all producers agree that the price has to be about 50% 'LME FOB' and USD 875 per ton CFR (recital 87 of the contested decision).

91 In its oral statements to the Commission, Mr O. of Boliden's 'Noralf' division stated, in addition, that the participants in the Milan meeting had agreed on each other's customers and the price level which should be maintained inside and outside Europe. The aim of the Milan meeting was thus to achieve a common explanation as to how the new price levels should be introduced. The participants in the Milan meeting agreed on the quantities for the different customers. There was an implicit agreement to respect their respective customers and supplies to those customers (see recital 90 of the contested decision).

92 Similarly, it is apparent from the note of the telephone call of 25 October 2000 that Mr A of IQM wanted to 'keep in touch' with Mr T. of Noralf's Boliden division, concerning, in particular, the aluminium fluoride price levels in Australia, noting the price of USD 800 which had been agreed on at the Milan meeting (recital 94 of the contested decision).

93 Lastly, it is also apparent from the report of the Milan meeting that, subsequently, the participants in that meeting, namely Fluorsid, ICF and IQM, exchanged information on production and sales volumes in 2000 and on forecasts for 2001 concerning various countries in the world with references to precise quantities and information according to producers and customers. As regards 'the individual markets', the report states as follows (recital 84 of the contested decision):

'We examined each market to establish a general price level and in some cases a market division. However we all agreed regardless of who obtains business we must obtain a higher price level. Therefore we should discourage deep price discounting'.

94 It follows that the participants in the Milan meeting exchanged sensitive commercial information, such as that concerning production volumes, the amounts which they sold or intended to sell, their customers both in Europe and worldwide, the determination of their prices and the sharing of the markets between themselves, in order to agree upon those competition parameters.

95 It is therefore apparent from all that evidence, whose content is not disputed by the applicants as such, that the Commission has proved to the requisite legal standard the existence of a price-fixing agreement for the purposes of Article 81 EC and Article 53 of the EEA Agreement, concluded at the Milan meeting in which the applicants participated.

96 Consequently, in the contested decision, the Commission established that the Milan meeting had an anti-competitive object and that there was an agreement which infringed Article 81(1) EC, and there was no need to prove that that agreement produced effects (*Commission* v *Anic Partecipazioni*, paragraph 75 above, paragraph 123, and *JFE Engineering and Others* v *Commission*, paragraph 73 above, paragraph 181). In that connection, it must be borne in mind that the anti-competitive object

and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article 81(1) EC. According to settled case-law, the alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise object of the agreement, in the economic context in which it is to be applied. However, it is not necessary to examine the effects of an agreement once its anti-competitive object has been established (see, to that effect, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 55, and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 135). It follows from this that the applicants' argument that the implementation of such an agreement is 'impossible' must be rejected.

97 In those circumstances, there is no need to consider whether the criteria laid down in the case-law governing the concept of a concerted practice are also met in the present case (see the case-law cited in paragraph 75 above). Since the criterion for constituting an 'agreement', necessary for the prohibition in Article 81 EC to apply, has been met in the present case, the Court would merely be classifying an alternative characterisation of the same cartel, which does not affect the remainder of its analysis.

98 It follows from all the foregoing considerations that the complaint alleging infringement of Article 81 EC must be rejected as unfounded.

99 As regards the complaint alleging 'breach of the obligation to state reasons concerning proof of the infringement', it must be observed that the applicants have referred to an inadequate statement of reasons only in the heading of the present plea, without, however, developing supporting arguments. Since that complaint has not been detailed or substantiated, it must be regarded as indissociable from the substantive plea and as going to the issue of whether the grounds of the contested decision are well founded (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 65 to 68). That plea is therefore indissociable from the plea alleging infringement of Article 81 EC and is not required to be examined separately.

100 Even if the applicants have effectively raised a plea that there is an inadequate statement of reasons, or if the Court should raise such a plea of its own motion, it must be noted that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to defend their rights and to enable the European Union judicature to exercise its power of review (Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 124, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraphs 166 and 178). Although the Commission is required under Article 253 EC to set out all the circumstances of fact and law justifying the adoption of a decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative procedure (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22; Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 55, and *Volkswagen* v *Commission*, cited above, paragraph 127; Case T-11/06 *Romana Tabacchi* v *Commission* [2011] ECR II-6681, paragraph 233). The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 77 and the case-law cited).

101 In the present case, the Commission set out in detail in the contested decision the matters of fact and law and the considerations as a whole which led it to adopt that decision. Moreover, the reasoning was sufficient to enable the applicants to become aware of the grounds for the decision in order to defend

their rights, and to enable the Court to exercise its power of review. Consequently, the contested decision is not inadequately reasoned concerning the establishment of an infringement of Article 81 EC and that complaint must, on any view, be rejected.

102 Consequently, the present plea in law must be rejected in its entirety.

C – *The second plea in law, alleging breach of the rights of the defence*

1. Preliminary observations

103 The applicants submit that the Commission breached their rights of defence and Articles 2 and 27 of Regulation No 1/2003. In the contested decision a different infringement was found from that referred to in the statement of objections during the administrative procedure. The Commission pursued its investigation and gathered additional documents after the statement of objections. The applicants were not able to exercise their rights of defence in that connection. First, in the contested decision infringements were found and factual evidence admitted which were not referred to in the statement of objections, in particular, the documents relating to the bilateral contacts of 8 and 9 November 2000. Secondly, in the statement of objections a ‘continuous infringement’ was found, and in the contested decision a ‘six-month infringement’. Fluorsid also calls in question the failure of the statement of objections to refer to its application to the Commission for a reduction in the fine and submits that no reasons were given in the statement of objections for the dismissal of that application.

104 The Commission disputes the applicant’s arguments. The documents relating to contacts after the Milan meeting are included in the Commission’s administrative file. There was no extension of the objections raised by the Commission against the cartel members. The facts found by the Commission and of which the cartel members are accused were known to the latter. The Commission’s final decision, that is the contested decision, does not have to be identical to the statement of objections. The Commission states that it did not find it necessary to adopt a supplementary statement of objections concerning evidence not referred to in the statement of objections. That documentation does not call in question the evidence already admitted and did not result in different conclusions being reached.

105 In addition, as regards the alleged infringement of Fluorsid’s rights of defence, concerning its application for a reduction in the fine, the Commission states that it found that the application for a reduction in Fluorsid’s fine was not substantiated, since the evidence submitted by it did not provide significant added value. The Commission informed Fluorsid of this on 13 July 2007. The Commission was required to adopt a position only in the contested decision, which it did. Fluorsid was therefore able to exercise the rights of defence during the administrative procedure, in the knowledge that its application for a reduction in the fine had been refused.

106 It should be recalled that observance of the rights of the defence in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the European Courts ensure (see Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 26 and the case-law cited).

107 According to settled case-law, observance of the rights of the defence thus requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10; Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21; and Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraph 88 and the case-law cited).

108 Article 27(1) of Regulation No 1/2003 reflects that principle in so far as it provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the procedure (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 71 above, paragraph 67), in order to enable the parties concerned properly to identify the conduct complained of by the Commission and the evidence which it has at its disposal (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 315 and 316, and *Aalborg Portland and Others* v *Commission*, paragraph 71 above, paragraphs 66 and 67) and to defend themselves properly before the Commission adopts a final decision (see, to that effect, *Archer Daniels Midland* v *Commission*, paragraph 107 above, paragraphs 85 and 86). That obligation is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views (see, to that effect, Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 109 and the case-law cited).

109 However, the essential facts on which the Commission is relying in the statement of objections may be set out summarily and the final decision is not necessarily required to replicate the statement of objections (*Musique Diffusion française and Others* v *Commission*, paragraph 107 above, paragraph 14), since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, to that effect, Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 70). Thus, the statement of objections may be supplemented in the light of the parties' response and their arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or law in support of its objections (see, to that effect, Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 448, and Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, paragraph 438). Consequently, until a final decision has been adopted, the Commission may, in view, in particular, of the written or oral observations of the parties, abandon some or even all of the objections initially made against them and thus alter its position in their favour or decide to add new complaints, provided that it affords the undertakings concerned the opportunity of making known their views in that respect (see Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 115 and the case-law cited).

110 In addition, as recognised by the case-law, the rights of the defence are breached where it is possible that the outcome of the administrative procedure conducted by the Commission may have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such a breach where it adequately demonstrates not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no procedural error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see, to that effect, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31 and the case-law cited, and Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 28; see also, by analogy, Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-9147, paragraph 94).

111 As regards specifically the right of access to the file, it is settled case-law that, where access has been refused to a document, it is sufficient for the undertaking to show that it would have been able to use the document in its defence (see Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10329, paragraph 57 and the case-law cited, and the Opinion of Advocate General Kokott in that case, paragraph 171 and the case-law cited; *Aalborg Portland and Others* v *Commission*, paragraph 71 above, paragraphs 74 and 75; *Knauf Gips* v *Commission*, paragraph 110 above, paragraph 23, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P

and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 108 above, paragraphs 318 and 324). That undertaking does not have to show that that error did influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision, but only that it was able to influence the course of the proceedings and the content of the Commission's decision (see, to that effect, the Opinion of Advocate General Kokott in *Solvay* v *Commission*, cited above, paragraphs 179 and 181, and the judgments in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 81; Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 128; 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*, paragraph 108 above, paragraph 318; and *Aalborg Portland and Others* v *Commission*, paragraph 71 above, paragraph 74). Where documents are not disclosed, the undertaking concerned does not therefore have to show that disclosure of the documents would have altered the outcome of the administrative procedure, but only that there was even a small chance that the documents which were not disclosed in the administrative procedure could have been useful for its defence (see the Opinion of Advocate General Kokott in *Solvay* v *Commission*, cited above, paragraph 181 and the case-law cited, and *Aalborg Portland and Others v Commission*, paragraph 71 above, paragraph 131).

2. The alleged breach of the rights of the defence linked to the documents concerning the contacts after the Milan meeting

112 In the present case, the applicants submit, in essence, that the Commission based the contested decision on documents not referred to in the statement of objections, in particular the documents relating to the contacts of 8 and 9 November 2000, which constitutes a breach of the rights of defence.

113 In that regard, it is apparent from paragraphs 20 to 22, 76, and 86 to 88 above (see also recital 239 of the contested decision) that the Commission relied on those documents, in the contested decision, in order to prove the existence of the cartel and also its implementation, and draw conclusions therefrom in assessing the gravity of the infringement and determining the amount of the fine to be imposed on the applicants.

114 First of all, the contents of the statement of objections and the contested decision must therefore be compared.

115 In the statement of objections, the Commission took the view that there had been contacts between the cartel members from 1997 onwards (paragraphs 76 et seq.), and referred to a meeting in Greece on 29 July 1999 (paragraphs 85 et seq.), 'further contacts' (paragraphs 92 et seq.) and the Milan meeting (paragraphs 103 et seq.). In setting out the details of the cartel's implementation, the statement of objections refers to contacts between the cartel members, including contacts subsequent to the Milan meeting. The Commission took the view that '[following] the Milan meeting, the companies involved in the agreement reached there continued to exchange information concerning the aluminium fluoride market in bi-lateral contacts' (paragraph 117). In that connection, the statement of objections refers expressly to contact on 25 October 2000, contact in the course of 2001, a conference of 17 to 21 February 2002, another conference in San Diego, California (United States) on 6 March 2003 and contact in January 2004 and on 21 January 2005 (paragraphs 118 to 123). In addition, the Commission stated that the cartel had been put into effect, which it would take into account in its assessment of gravity (paragraph 227).

116 As regards the duration of the infringement, the Commission found, in the statement of objections, that the infringement had started as early as 30 June 1997, the date of the meeting in Sousse (Tunisia), that it was intensified as from the date of the meeting in Greece on 29 July 1999, 'when the outright agreement to increase prices for sales in the year 2000 was concluded and entered into force', and that a similar agreement was concluded on 12 July 2000 in Milan for sales prices for the year 2001.

The Commission concluded from this that the infringement had continued, in the cases of Fluorsid, ICF and IQM, 'at least until 31 December 2001', the end of the period of operation of the agreement, corresponding to the end of the period in which the sales to which the agreement applied were made (paragraph 216).

117 In recitals 155 and 156 of the contested decision, the Commission refers to 'bilateral contacts … in autumn 2000', in particular those of 25 October 2000 and of 8 and 9 November 2000. Those contacts show that the agreement reached at the Milan meeting was monitored for the purposes of its implementation. In recital 239 of the contested decision, the Commission again refers to the documents relating to the contacts of 8 and 9 November 2000 concerning the implementation of the cartel, in the context of setting the basic amount of the fine. The Commission states in that recital that, in setting the proportion of the value of sales to take into account, it took into account the degree to which the cartel was implemented, and refers, inter alia, to recitals 154 to 156 of the contested decision.

118 As regards the duration of the infringement, the Commission takes the view, in the contested decision, that the cartel existed at least from 12 July 2000 to 31 December 2000 (recitals 241 and 147 of the contested decision). Recital 146 of the contested decision states, 'supply contracts are negotiated in advance during a period starting some time in the second half of each calendar year and ending at the end of that calendar year or in the very first months of the next calendar year'. The Commission therefore took the view that, in accordance with the practice of the aluminium fluoride industry, prices are determined in advance for the following business year.

119 Lastly, it must be stated that the documents relating to contacts after the Milan meeting, including those of 8 and 9 November 2000, are not referred to in that part of the contested decision concerning the duration of the infringement.

120 Consequently, even though the statement of objections had recourse to documents concerning contacts after the Milan meeting, such as those referred to in paragraph 115 above, it does not refer expressly to the documents relating to the bilateral contacts of 8 and 9 November 2000 on which the Commission relied in the contested decision.

121 However, those documents relating to the contacts of 8 and 9 November 2000 were included in the administrative file of the Commission, which communicated them to the parties to the administrative procedure, and thus to the applicants, when the statement of objections was sent, so that the rights of defence and the right of access to the file could be exercised. In addition, it is not disputed that, first, the applicants enjoyed full access to the file, including the documents relating to the contacts of 8 and 9 November 2000, and that, secondly, the contacts after the Milan meeting were expressly mentioned, admittedly in general terms, in the statement of objections.

122 Both the bilateral contacts of 8 and 9 November 2001 not referred to in the statement of objections and the bilateral contacts expressly referred to therein show that the applicants were involved in the cartel and its implementation after the Milan meeting. In that connection, it sufficed that, in the statement of objections, the Commission based its assessment regarding a single and continuous infringement and the implementation thereof on various factors, including the Milan meeting and bilateral and multilateral contacts after that meeting, in particular a contact of 25 October 2000, thus in the autumn of 2000. The evidence set out in the statement of objections alone was already sufficient to alert the applicants to the fact that the Commission could use it against them as incriminating evidence. In the light of the documents relating to contacts after the Milan meeting referred to in the statement of objections, the documents relating to the contacts of 8 and 9 November 2000 were not therefore essential to proving a continuous infringement and the implementation thereof. Thus, in recital 156 of the contested decision, in particular footnote No 128, the Commission also refers to the contact of 25 October 2000, which had already been referred to in paragraph 118 of the statement of objections. Therefore, as such, the documents relating to the

contacts of 8 and 9 November 2000 were not decisive for the conclusion reached by the Commission in the contested decision, given that a continuous infringement and its implementation beyond 31 December 2000 had already been found in the statement of objections on the basis of other evidence.

123 In addition, the Court's case-law should be borne in mind, cited in paragraph 110 above, according to which the rights of the defence are breached only where it is possible that, in the absence of the procedural error committed – in this case the failure to refer expressly, in the statement of objections, to the documents relating to the contacts of 8 and 9 November 2000 – the outcome of the administrative procedure may have been different.

124 It is clear that that is not the case here.

125 As has been noted in paragraph 121 above, the applicants had access to documents relating to the contacts of 8 and 9 November 2000 in conjunction with the statement of objections, without deducing any exculpatory evidence from them, either in the administrative procedure or in the present proceedings. In addition, at the stage of the administrative procedure, the applicants even declined to take a position on the contacts after the Milan meeting which were expressly referred to in the statement of objections (paragraphs 117 to 123 of the statement of objections). Similarly, during the present proceedings, the applicants have neither explained nor substantiated how the failure to refer expressly to those documents, in the statement of objections, compromised the effectiveness of their defence during the administrative procedure, and how they could have defended themselves more effectively if they had been expressly informed, on that occasion, that the Commission intended to use the documents of 8 and 9 November 2000 as incriminating evidence, in the contested decision, of their participation in the infringement and its implementation. On the contrary, having regard to the content of those documents and the fact that the applicants were fully aware of it, being indeed the authors of those documents, which came from inside their own organisations, it must be found that they have not proved that they could have derived exculpatory evidence from them as regards the existence of an anti-competitive agreement and its subsequent implementation. In that connection, it must be pointed out that the Commission did not take into account – in assessing the gravity of the infringement for the purposes of calculating the fine – the effects of the infringement on the market. Therefore, the applicants have not been able to establish that the fact that they were not informed, in the statement of objections, of the Commission's intention to use the documents in question as incriminating evidence was capable of compromising the effectiveness of their defence and, thus, the conclusion reached by the Commission in the contested decision (see, to that effect and by analogy, Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 75 above, paragraph 56 and the case-law cited, confirmed by Case C-51/92 P *Hercules Chemicals* v *Commission*, paragraph 111 above, paragraph 80).

126 In any event, the applicants cannot successfully claim that that omission was likely to prevent them from defending themselves effectively against the objection that the infringement continued until 31 December 2001. Neither in the statement of objections nor the contested decision did the Commission base the duration of the infringement on the contacts of 8 and 9 November 2000. In that regard, the contested decision does not differ from the statement of objections, which had established that the duration of the infringement extended beyond the Milan meeting, until 31 December 2001, with regard to the applicants. Consequently, the applicants were perfectly able to recognise the relevance of the evidence concerning contacts after the Milan meeting, as contained in the statement of objections and the contested decision, for determining the duration of the infringement, which the Commission essentially deduced from the practice in the aluminium fluoride industry according to which prices are determined in advance for the following business year. Having regard to that practice, the Commission was justified, already on the basis of the evidence expressly referred to in the statement of objections, in finding that the whole of the sixth-month period concerned until

31 December 2001 was included in the duration of the infringement. In that connection, the additional reference, in the contested decision, to the documents relating to the contacts of 8 and 9 November 2000 is of no account.

127 It must be stated, in addition, that the duration determined by the Commission in the contested decision is the minimum duration of an infringement, since periods of less than six months are to be counted as half a year and the multiplying factor to be applied to the basic amount of the fine is only 0.5 in both cases. Thus, even if the duration of the infringement were limited to the Milan meeting alone, without taking into account the effects of the agreement decided there and the contacts after that agreement, the duration factor in assessing the fine would have been the same.

128 The Court concludes from this that there was no breach of the applicants' rights of defence linked to the documents of 8 and 9 November 2000 and that that complaint must be rejected.

(a) The alleged breach of the rights of the defence in relation to the 'timeframe' of the infringement

129 As regards the alleged breach of the rights of the defence linked to the duration of the infringement, the Court notes that the duration in the contested decision, concerning the period of 12 July to 31 December 2000, is shorter than that specified in the statement of objections, concerning the period from 30 June 1997 to 31 December 2001. Admittedly, in the contested decision, the Commission referred to certain indications that to some extent collusive activities had already taken place in the aluminium fluoride industry before the Milan meeting of 12 July 2000, but it took the view that there was no conclusive evidence for that earlier period (recital 73 of the contested decision). Therefore, in the light of the probative value of the evidence available, the Commission ultimately reduced the duration of the infringement, stating that it had conclusive evidence of a cartel only as from 12 July 2000 (recitals 73 to 76 and 144 of the contested decision).

130 Accordingly, the mere fact that, in the statement of objections, the Commission still took the provisional view that the cartel had started as early as 30 June 1997, the date of the meeting in Sousse, and was then intensified as from the meeting in Greece on 29 July 1999 (paragraph 216 of the statement of objections) is irrelevant and cannot have affected either the interests or the rights of defence of the applicants, which, as regards the duration of the infringement complained of, were ultimately subject, in the contested decision, to a lesser charge (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 73 above, paragraph 435). In addition, contrary to what the applicants claim, that difference in the 'timeframe' of the infringement found by the Commission was not likely to change the nature of the continuous infringement, as found in the statement of objections and in the contested decision. Lastly, it is clear that the applicants had the opportunity to submit their observations effectively on the statement of objections, including as regards the contentions concerning the longer duration of the infringement than that ultimately found in the contested decision, whereby the Commission abandoned in part, as it was entitled to do, a complaint to the applicants' benefit (see, to that effect and by analogy, *Atlantic Container Line and Others* v *Commission*, paragraph 109 above, paragraph 115).

131 The complaint alleging breach of the rights of defence linked to the duration of the infringement found by the Commission must therefore be rejected.

(b) The alleged breach of the rights of the defence linked to the application for a reduction in the amount of Fluorsid's fine, and the alleged failure to state reasons

132 As regards the alleged breach of Fluorsid's rights of defence linked to its application for a reduction in the fine, it must be noted, first of all, that Fluorsid does not dispute the contested decision as such as regards the application of the Leniency Notice in its regard, but criticises the failure to refer to its application for a reduction in the fine in the statement of objections, which constitutes a preparatory

measure not open to challenge. The Court notes in that regard, as it has been held in settled case-law, that measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts which may be the subject of an action for annulment within the meaning of Article 230 EC (Case C-516/06 P *Commission* v *Ferriere Nord* [2007] I-10685, paragraph 27). In addition, in the case of acts or decisions adopted by a procedure involving several stages, in principle an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraphs 9 and 10, and *Commission* v *Ferriere Nord*, paragraphs 27 to 33).

133 In so far as the present complaint must be interpreted as seeking to rely on a legal defect in the contested decision as such, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for annulment, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step (*IBM* v *Commission*, paragraph 132 above, paragraph 12), that is the contested decision in the present case. Therefore, the Court must decide whether anything unlawful has been done in the course of the administrative procedure and if so whether it is such as to affect the legality of the decision taken by the Commission on the conclusion of the administrative procedure (*IBM* v *Commission*, paragraph 132 above, paragraph 24).

134 It follows from the 2002 Leniency Notice that, in the context of the leniency programme provided for by that notice, the procedure for granting an undertaking immunity from fines or a reduction in fine has several distinct stages. It is only in the last stage, at the end of the administrative procedure, when the Commission adopts the final decision, that it does or does not grant, in that decision, immunity from fines or a reduction in fine. It thus follows from the system as provided for in the 2002 Leniency Notice that before the final decision is taken the undertaking seeking immunity or a reduction in the fine does not obtain immunity from fines or a reduction in the fine in the strict sense but benefits only from a procedural status that may be transformed into immunity from fines or reduction in the fine at the end of the administrative procedure if the requisite conditions are met (see, to that effect and by analogy, Case T-12/06 *Deltafina* v *Commission* [2011] ECR II-5639, paragraph 118).

135 Point 26 of the 2002 Leniency Notice provides that, if the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes added value, it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of the fine. That means also that, when the Commission has no intention of granting an application for leniency, it has no obligation to notify this to the undertaking concerned at the stage of the statement of objections. Point 27 of the 2002 Leniency Notice provides that the final position of each undertaking which filed an application for a reduction of a fine will be evaluated at the end of the administrative procedure in any decision adopted. Therefore, it is only in the final decision of the administrative procedure before the Commission that the latter must determine the applications for leniency submitted to it, as it did in the present case.

136 It follows that the Commission was not required to adopt a position on Fluorsid's application for leniency at the stage of the statement of objections. Thus, the Commission neither breached Fluorsid's rights of defence nor failed to comply with its duty to state reasons in that regard, since, at that stage, it was not required to adopt a position on Fluorsid's application for leniency. The same also applies *a fortiori* to the Commission's failure to adopt a position, in the statement of objections, concerning Fluorsid's application for a reduction in the fine.

137 Consequently, the Court rejects the complaint alleging breach of Fluorsid's rights of defence linked to its application for leniency or its application for a reduction in fine.

D – *The third plea in law, alleging infringement of Article 23 of Regulation No 1/2003 on calculation of the fine and of point 18 of the 2006 Guidelines*

1. Preliminary observations

138 First of all, it must be pointed out that the present case involves the application of the 2006 Guidelines.

139 In essence, while stating that 'the Commission's assessment of the definition of the market cannot be disputed … as to the substance', the applicants submit that the contested decision is vitiated by inadequate reasoning and contradictions regarding the quantification and geographic scope of that market, in particular in so far as the Commission excluded from its assessment China and Russia, whereas those countries were concerned by the infringement. In addition, the applicants complain that the Commission took into account the figures provided by Fluorsid in April 2008, instead of those provided by it in May 2008, for the purposes of assessing the value of the sales on the aluminium fluoride market in the EEA. Therefore, the basis of the calculation of the fine, determined pursuant to point 18 of the 2006 Guidelines, is incorrect.

140 The Commission contends that the present plea in law should be rejected.

141 The plea in law is divided, essentially, into three parts, namely, first, incorrect assessment of the geographic scope of the market, secondly, incorrect determination of the values of the market and of the sales and, thirdly, incorrect determination of the level of the fine.

142 In that regard, the Court considers it appropriate to recall the general principles governing the determination of the amount of fines.

143 Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine for infringements of Article 81(1) EC, regard is to be had both to the gravity and to the duration of the infringement.

144 It has consistently been held that the gravity of infringements of competition law must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (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 241; *Prym and Prym Consumer* v *Commission*, paragraph 106 above, paragraph 54; and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 91).

145 It has been acknowledged in case-law that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as 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 European Union (see Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 56 and the case-law cited).

146 It has also been held that objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements (see *Chalkor* v *Commission*, paragraph 145 above, paragraph 57 and the case-law cited).

147 This large number of factors requires that the Commission carry out a thorough examination of the circumstances of the infringement (*Chalkor* v *Commission*, paragraph 145 above, paragraph 58).

148 In order to ensure the transparency and impartiality of its decisions setting fines for the infringement of the competition rules, the Commission adopted guidelines on the method of setting fines (point 3 of the 2006 Guidelines). In those guidelines, the Commission indicates the basis on which it will take account of a particular aspect of the infringement and what this will imply as regards the amount of the fine (*Chalkor* v *Commission*, paragraph 145 above, paragraph 59).

149 The Guidelines form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment, and merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine (see *Chalkor* v *Commission*, paragraph 145 above, paragraph 60 and the case-law cited).

150 The Guidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria that the Commission intends applying when exercising the discretion conferred on it by Article 23(2) of Regulation No 1/2003 for the purpose of setting fines. The Guidelines do not therefore constitute the legal basis of a decision imposing fines - which is based on Regulation No 1/2003 - but determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 144 above, paragraphs 209 to 213, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 219 and 223).

151 Thus, although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons, at the risk of infringing the principles of legal certainty and equal treatment (*Dansk Rørindustri and Others* v *Commission*, paragraph 144 above, paragraphs 209 and 210, and Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91).

152 Under point 5 of the 2006 Guidelines, as applicable to the present case, the Commission must refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also be taken into account as being an important factor. The combination of the value of sales to which the infringement relates and of the duration of the infringement reflects the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Point 6 of the 2006 Guidelines states that reference to those factors therefore provides a good indication of the order of magnitude of the fine, but should not be regarded as the basis for an 'automatic and arithmetical calculation method'.

153 Under points 10 and 11 of the 2006 Guidelines, the Commission must determine, for the purposes of setting the fine, a basic amount for each undertaking, which it may adjust.

154 Pursuant to points 12 and 13 of the 2006 Guidelines, the basic amount must be set by reference to the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA, normally during the last full business year of its participation in the infringement. Point 15 of the 2006 Guidelines states that the Commission must use the 'best available figures'.

155 Point 18 of the 2006 Guidelines provides as follows:

‘Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.’

156 Pursuant to point 19 of the 2006 Guidelines, the basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. Point 20 of the 2006 Guidelines states that the assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case. In accordance with point 21 of the 2006 Guidelines, as a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.

157 The various complaints raised by the applicants must be assessed in the light of the foregoing considerations.

2. The geographic scope of the infringement and the alleged error in the definition of the market

158 In accordance with point 18 of the 2006 Guidelines and the principles set out in paragraphs 142 to 151 above, the Commission is not required to determine the market of the goods in question as such, but only the geographic scope of the infringement. In that regard, the Commission found in the contested decision that, during the Milan meeting, the cartel members had agreed upon prices, sales volumes and market sharing in Europe, North America, South America, Australia and other markets, such as Turkey. Thus, in accordance with the method which it has bound itself to use, the Commission found that the scope of the infringement extended beyond the territory of the EEA and was worldwide.

159 The applicants submit, in essence, that, pursuant to point 18 of the 2006 Guidelines, when the Commission assessed the total value of the sales of goods or services to which the infringement related in the relevant geographic area, it was mistaken, and relied on insufficient and contradictory reasoning, in omitting to take into account the figures concerning Russia and China.

160 It is apparent from recitals 33, 51 and 136 of the contested decision that, even though the Commission took the view that the cartel was worldwide in scope, it excluded from its geographic scope, first, China on the ground that it was not concerned by the cartel arrangements and, secondly, Russia because ‘the reference to Russia d[id] not bear out the existence of arrangements concerning this country’.

161 As regards Russia, the Commission stated in footnote No 69 of recital 84 of the contested decision, without being contradicted by the applicants, that it was apparent from the Milan meeting that Russia had been referred to only once in the terms ‘Russia – no interest for ICF or IQM’. That single reference to Russia is not sufficient to show that the geographic scope of the infringement committed by the parties identified in the contested decision extended to Russia. Therefore, the Commission did not err in excluding Russia from the geographic scope of the infringement. That conclusion is not called in question by the fact that, for the purposes of assessing the value of the worldwide market in

aluminium fluoride in 2000 concerned by the cartel, Boliden assessed that amount at EUR 329 000 000, including the value of the Russian market. The Commission's assessment of that value at EUR 340 000 000 also takes into account the figures of ICF, which assessed the same value at EUR 400 852.695 (footnote No 37 in recital 33 of the contested decision). Similarly, in the extract of the minutes of the IFPA meeting in Montreal (Canada) of 13 September 1999 it is simply stated that the uncertainties in the figures from Russia are of a magnitude to invalidate any reasoning based on the overall figures.

162 As regards China, the applicants are correct to state that, in the report of the Milan meeting, reference is made to a 'Chinese price'. In recital 86 of the contested decision that report is cited, in the context of setting out the supply distribution and the prices envisaged by the aluminium fluoride suppliers on the Australian market, as stating that 'Chinese price in 2001 should be about 750-760 US$/T FOB with imputed freight of 10 US$/T. But European level can be higher. Delivered price from Europe/IQM should be 875 US$/T'. However, the Commission stated in its pleadings, in a plausible manner and without being contradicted convincingly by the applicants in their reply, that that reference to the Chinese price ought to have been understood as relating to the prices offered by the Chinese exporters to their Australian customers and not as sales made on the Chinese market as such.

163 In those circumstances, the Commission was entitled to take the view that China and Russia did not form part of the geographic regions covered by the cartel. The Commission did not therefore err in its determination of the geographic scope of the market in the contested decision pursuant to point 18 of the 2006 Guidelines.

164 Consequently, the first part of the third plea in law must be rejected.

3. The value of the market and of the sales of aluminium fluoride in the EEA

165 Recital 33 of the contested decision states that the value of the aluminium fluoride market in the EEA is based on the estimates provided by the cartel members in response to the Commission's requests for information of 11 and 14 April 2008.

166 In response to those requests, Fluorsid stated, first of all, in April 2008, that that market value was EUR 73 195 200 and, next, on 16 May 2008, that it was EUR 46 920 000.

167 First, as regards the applicants' argument that the figures provided in May 2008 were more relevant and ought to have led the Commission to substitute them for those provided by Fluorsid in April 2008, it must be stated that the applicants have not been able to develop a sufficiently detailed and plausible explanation in support of their argument. That argument is even less convincing since the data initially provided by Fluorsid as to the value of the aluminium fluoride market in the EEA, namely EUR 73 195 200, was very close to that provided by IQM – EUR 75 000 000 – and by ICF – EUR 82 057 530 – and only Boliden had stated a much lower figure of EUR 53 000 000. The applicants have not managed to provide a plausible explanation for that alignment *in tempore suspecto* of the data provided by Fluorsid with the data from Boliden, nor sufficiently substantiated the contention that the May 2008 figures were more reliable those from April 2008. In that regard, they simply stated that the difference between those figures was due to a different evaluation of the consumption of aluminium fluoride in the EEA, which was not 25 kg per tonne, as they had estimated in order to calculate the April 2008 figures, but 16 kg per tonne, which reduces the value of the aluminium fluoride market in the EEA. However, the applicants' vague assertion is not supported by evidence. Therefore, the applicants have not proved to the requisite legal standard that the May 2008 figures were more relevant than those from April 2008. In those circumstances, the Commission was entitled to base its assessment on the arithmetic average of the figures supplied by the cartel members in April 2008, which it rounded.

168 Consequently, in the absence of a valid reason to trust the figures supplied by Fluorsid in May 2008, the Commission could reasonably rely on the figures provided by Fluorsid in April 2008 as being the best available figures within the meaning of point 15 of the 2006 Guidelines in order to assess the value of the aluminium fluoride market in the EEA.

169 Furthermore, and for the sake of completeness, as regards the applicants' interest in challenging the failure to take into account the value of the aluminium fluoride market in the EEA, as communicated by them in May 2008, it must be noted that, pursuant to point 22 of the 2006 Guidelines, in order to decide whether the proportion of the value of sales to be considered in a given case in order to set the basic amount of the fine should be at the lower end or at the higher end of the scale of 0 to 30% of that value, the Commission is to have regard to a number of factors. These include the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

170 As regards the combined market share of all the undertakings concerned, the Commission found first of all, in the contested decision, on the basis of the figures provided by the addressees of that decision, that the value of the sales of Boliden's 'Noralf' division in the EEA in 2000 amounted to EUR 12 731 118 (recital 9 of the contested decision), those of Fluorsid to EUR 2 717 735 (recital 15 of the contested decision), and those of ICF to EUR 8 146 129 (recital 25 of the contested decision). IQM had no sales of aluminium fluoride in the EEA in 2000 (recital 29 of the contested decision). Therefore, the total value of the combined sales of the addressees of the contested decision having made sales in the EEA in 2000 amounted to EUR 23 594 982.

171 Next, the Commission evaluated the total value of sales of aluminium fluoride in the EEA in 2000 at EUR 71 600 000, an average of the figures stated by the cartel members, and inferred from this a combined market share of the addressees of the contested decision of 33% on the EEA market (recital 33 of the contested decision).

172 Lastly, when setting the basic amount of the fine on the basis of the proportion of the value of sales, the Commission stated that it took into account the fact that the combined market share of the addressees of the contested decision in the EEA in 2000 was not more than 35% (recital 237 of the contested decision).

173 In the light of the foregoing, it must be observed that the fact that the Commission took into account the April 2008 figures, not those from May 2008, was beneficial for the applicants. Indeed, the larger the total value of the market the smaller the market share of the addressees of the contested decision in the EEA and conversely. Therefore, the combined value of the sales of the cartel members of EUR 23 594 982 represents approximately 33% of the total value of the sales of aluminium fluoride in the EEA in 2000, which was EUR 71 600 000 in accordance with Fluorsid's figures in April 2008. However, relying on the total value of sales of aluminium fluoride in the EEA in 2000 of EUR 46 920 000 as indicated by Fluorsid in May 2008, the average value of the market would be EUR 64 244 250 and the proportion of the value of sales of the addressees would be higher, namely 37%, which would have been less favourable to the applicants.

174 Consequently, the applicants' complaint based on the failure to take into account the value of the aluminium fluoride market in the EEA, as communicated by them in May 2008, for the purposes of calculating the basic amount of the fine, must be rejected.

175 Secondly, as regards an alleged defect in reasoning, the principles governing the Commission's obligation to state reasons, as set out in paragraph 100 above, must be borne in mind.

176 In that regard, it is sufficient to note that, in relying, in recital 33 of the contested decision, on the figures representing the value of the aluminium fluoride market in the EEA, as provided, in particular, by Fluorsid in April 2008, the Commission considered implicitly that the figures supplied belatedly by

Fluorsid in May 2008 were not relevant. Since, for the purposes of assessing the value of the aluminium fluoride market in the EEA, IQM, ICF and, initially, the applicants had provided figures of the same order of magnitude, the applicants were able to understand the approach adopted by the Commission in that regard in the contested decision, which enabled them to challenge it before the courts and the General Court to review the lawfulness of the substance of that decision. In that connection, the Court recalls that, although the Commission is required under Article 253 EC to set out all the circumstances of fact and law justifying the adoption of a decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative procedure (*VBVB and VBBB* v *Commission*, paragraph 100 above, paragraph 22; *Belasco and Others* v *Commission*, paragraph 100 above, paragraph 55; *Volkswagen* v *Commission*, paragraph 100 above, paragraph 127, and *Romana Tabacchi* v *Commission*, paragraph 100 above, paragraph 233). That is all more so when, as in the present case, the party concerned produces such evidence belatedly, or even *in tempore suspecto*, and when that evidence contradicts the evidence supplied by it initially.

177 Consequently, the complaint alleging a failure to state the grounds must be rejected.

4. The determination of the fine

178 In so far as the applicants challenge in general terms the lawfulness of the Commission's determination of the level of the fine, the Court notes, first of all, that the Commission was fully entitled to find, in the contested decision, that there was a cartel, in which the applicants participated. In addition, the Commission has proved to the requisite legal standard that the agreement decided on at the Milan meeting had been monitored during the second half of 2000 and that, therefore, the cartel had indeed been implemented by the addressees of the contested decision, including the applicants (see paragraphs 79 to 101 above and recital 239 of the contested decision).

179 The Court notes, next, that, in accordance with point 23 of the 2006 Guidelines, the Commission was entitled to find that the infringement in the present case consisted of, inter alia, a horizontal price-fixing agreement, which, by its very nature, is among the most harmful restrictions of competition (recital 236 of the contested decision).

180 The Commission did not therefore err in applying point 25 of the 2006 Guidelines, which states that, 'irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales … in order to deter undertakings from even entering into [,inter alia,] horizontal price-fixing [and] market-sharing … agreements', having regard in particular to factors such as the nature of the infringement, the combined market share of all participants, the geographic scope of the infringement and whether or not the infringement has been implemented, as provided for in point 22 of the 2006 Guidelines.

181 In the contested decision, the Commission found that the combined market share of the cartel members in the EEA was not more than 35% in 2000 (recital 237 of the contested decision, with a reference to recital 33 of that decision) and that the geographic scope of the infringement was worldwide (recital 238 of the contested decision, with a reference to recital 136 of that decision). The Commission also stated that it had taken into account a market share of less than 35%, thereby setting at 17% the proportion of the applicants' value of sales to be used to establish the basic amount of the fines to be imposed (recital 240 of the contested decision). In the absence of a sufficiently clear and precise challenge by the applicants to the approach adopted in the contested decision in that regard, it must be held that the Commission did not err in taking into account those matters when determining the level of the fine.

182 Accordingly, the complaint alleging miscalculation of the level of the fine must be rejected.

183 Consequently, the third plea in law must also be rejected.

184 In the light of the foregoing, the claims for annulment must be rejected in their entirety. In addition, as regards the application, submitted in the alternative, for alteration of the amount of the fine imposed on the applicants, in the light of the foregoing considerations in particular, there is no cause for the Court, in the exercise of its unlimited jurisdiction, to uphold that application.

185 Accordingly, the action must be dismissed in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Fluorsid SpA and Minmet financing Co. to bear their own costs and to pay those incurred by the European Commission.**

Azizi　　Labucka　　Frimodt Nielsen

Delivered in open court in Luxembourg on 18 June 2013.

[Signatures]

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