OPINION OF ADVOCATE GENERAL GEELHOED delivered on 12 September 2006 [1]

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I — Introduction

1. This case concerns the appeal brought by Dalmine SpA ('Dalmine') against the judgment of the Court of First Instance of 8 July 2004 in Case T-50/00 *Dalmine* v *Commission.*[2]

II — The decision

2. In the judgment under appeal, the Court of First Instance reduced the fine which had been imposed on the appellant by Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes)[3] ('the decision') and dismissed the remainder of the application for annulment of that decision.

3. For the facts on which the decision is based, I refer to points 3 to 12 of my Opinion

2 — [2004] ECR II-2395 ('the judgment under appeal').

3 — OJ 2003 L 140, p. 1.

delivered today in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission*.

4. In so far as is relevant to the present appeal, the operative part of the decision reads as follows:

'*Article 1*

1. ... Dalmine SpA ... [has] infringed the provisions of Article 81(1) of the EC Treaty by participating, in the manner and to the extent set out in the grounds to this decision, in an agreement providing, inter alia, for the observance of their respective domestic markets for seamless standard threaded OCTG pipes and tubes and project line pipe.

2. The infringement lasted from 1990 to 1995 in the case of ... Dalmine SpA ...

Article 2

1. ... Dalmine SpA infringed Article 81(1) of the EC Treaty by concluding, in the context of the infringement mentioned in Article 1, contracts which resulted in a sharing of the supplies of plain end OCTG pipes and tubes to British Steel Limited (to Vallourec SA from 1994).

2. ... In the case of Dalmine SpA, the infringement lasted from 4 December 1991 to 30 March 1999.

...

Article 4

The following fines are imposed on the firms mentioned in Article 1 on account of the infringement established therein:

4.	Dalmine SpA	EUR 10 800 000

...'

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

5. By seven applications lodged at the Registry of the Court of First Instance between 28 February and 3 April 2000, seven of the eight undertakings fined, including Dalmine, brought actions against the decision.

6. Dalmine claimed that the Court of First Instance should annul the decision in whole or in part or, in the alternative, cancel the fine imposed on it or reduce its amount and order the Commission to pay the costs.

7. In the judgment under appeal, the Court of First Instance:

— annulled Article 1(2) of the decision in so far as it found that the infringement imputed to Dalmine existed before 1 January 1991;

— set the amount of the fine imposed on Dalmine at EUR 10 080 000;

— dismissed the remainder of the application;

— ordered the parties to bear their own costs.

IV — The procedure before the Court of Justice

8. On appeal Dalmine claims that the Court of Justice should:

— set aside the judgment under appeal in whole or in part;

— annul the decision;

— in the alternative, annul or reduce the fine set in Article 4 of the decision;

— furthermore, in the alternative, refer the case back to the Court of First Instance for a fresh assessment having regard to the judgment of the Court of Justice;

— order the Commission to pay the costs incurred before the Court of First Instance and the Court of Justice.

9. The Commission contends that the Court of Justice should dismiss the appeal in its entirety as inadmissible in part and, in any event, as wholly unfounded, and also to order the appellant to pay the costs.

V — The appellant's pleas in law and arguments of the parties

10. Dalmine puts forward ten grounds of appeal against the judgment under appeal, which can be subdivided into four groups:

— two pleas concern procedural defects;

— three pleas concern the finding of the infringement referred to in Article 1 of the decision;

— three pleas concern the finding of the infringement referred to in Article 2 of the decision;

— lastly, two pleas concern the amount of the fine.

11. The first three pleas are more or less self-contained. The fourth and fifth pleas, the sixth, seventh and eighth pleas, and the ninth and tenth pleas are more closely connected with each other. Grouped together in that way, I shall discuss the individual pleas below.

A — *The first plea: illegality of the questions put by the Commission during the investigation*

1. Context and reasoning of the Court of First Instance

12. On 13 February and 22 April 1997, the Commission requested from the appellant information relating inter alia to Dalmine's alleged participation in unlawful practices, in particular, agreements to observe domestic markets and prices. Dalmine did not reply fully to that request.

13. On 12 June 1997, the Commission again requested Dalmine to provide the information sought. Since the Commission took the view that the answers given by Dalmine were still incomplete, on 6 October 1997, it adopted a decision [4] requiring the appellant to supply the information requested within 30 days or face a periodic penalty payment. Dalmine brought an action against that decision before the Court of First Instance. That action was declared inadmissible. [5]

14. At first instance, Dalmine again contested the lawfulness of the aforementioned decision, claiming that it compelled it to incriminate itself, and that it therefore suffered damage.

15. In its assessment of the relevant plea, the Court of First Instance first confirmed, with reference to the judgments in *Orkem* v *Commission* [6] and *Mannesmannröhren-Werke* v *Commission*, [7] that undertakings in receipt of a request for information pursuant to Article 11(5) of Regulation No 17 [8] have a right to silence only to the extent that they would otherwise be compelled to provide answers which might involve an admission on their part of the existence of an infringement, or face a periodic penalty payment (paragraph 45 of the judgment under appeal).

16. The Court of First Instance then recalled that it is settled case-law [9] that undertakings are under no obligation to provide answers pursuant to that rule following a simple request for information under Article 11(1) of Regulation No 17. They cannot therefore claim that their right not to incriminate themselves has been infringed when they voluntarily replied to such a request (paragraph 46 of the judgment under appeal).

17. Without examining whether the plea in question could in fact be considered admissible, the Court of First Instance merely noted that the contested decision could be unlawful in this regard only to the extent that the questions which were the subject of the decision of 6 October 1997 induced an admission on Dalmine's part of the existence of the infringements found in the decision. However, whilst the Commission had asked a long series of questions in its initial request of 22 April 1997, the only questions which it addressed to Dalmine in its decision of 6 October 1997 concerned the production of documents and purely objective information and were therefore not capable of

4 — C(1997) 3036, IV 35.860, not published.

5 — Order in Case T-596/97 *Dalmine* v *Commission* [1998] ECR II-2383.

6 — Case 374/87 [1989] ECR 3283, paragraph 35.

7 — Case T-112/98 [2001] ECR II-729, paragraph 67.

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

9 — The Court of First Instance refers here to Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission ('Cement')* [2000] ECR II-491, paragraph 734).

inducing Dalmine to admit the existence of an infringement (paragraph 47 of the judgment under appeal).

2. The appellant's complaints

18. The appellant submits that the Court of First Instance misapplied the law and infringed the rights of the defence by holding that the questions put by the Commission in the course of its investigation were lawful. The appellant's right not to be compelled to contribute to its incrimination was thus infringed. It refers in support of its submission to question 1(d), which is included in Annex I to the Commission's decision of 6 October 1997. [10] Answering that question would undeniably, in its view, have involved self-incrimination.

19. At the hearing, the appellant again observed that this plea could not be assessed by mechanical reference to the existing case-law, as summarised again by the Court of First Instance in its judgment in *Mannesmannröhren-Werke*. The factual circumstances which contributed to determining the decision in *Mannesmannröhren-Werke* are very different from those underlying this case.

3. The Commission's response

20. The Commission draws attention to the fact that the premiss on which the appellant's reasoning is based is incorrect. The question to which Dalmine refers is in fact included in point 1(d) of Annex I to the decision of 6 October 1997. However, the appellant was not obliged to answer that question, as is clear from Article 1 of the operative part of the decision. [11]

21. Since Dalmine was under no obligation to answer that question, the Court of First Instance was entitled to find that, in this case, there could not have been an infringement of the rights of the defendant.

22. Moreover, as the Commission again observes, Dalmine never answered question 1(d).

10 — Question 1(d) read: 'Please describe, for meetings for which you are unable to find the relevant documents, the purpose of those meetings, the decisions taken at them, the type of documents which were received before and after those meetings, the sharing keys discussed and/or adopted for the various geographic sectors and their period of validity, specifying the type (Target Price-TP, Winning Price-WP, Proposal Price-PP or Rock Bottom Price-RBP).'

11 — The operative part of the decision read: 'Article 1. Within 30 days after notification of this request: — Dalmine shall provide the information requested in questions 1(b), 3(b) and 8, which are set out in Annex I to this decision.'

4. Assessment

23. The right of natural or legal persons who are the subject of an investigation into possible infringements of the competition provisions of the EC Treaty not to be compelled to incriminate themselves is one of the principles inherent in a fair hearing, in which the rights of the defence must be respected.

24. Both the Court of Justice and the Court of First Instance have expressly recognised that in their case-law already cited above.

25. The central element of this principle of a fair hearing is that no one may be *compelled*[12] to incriminate himself. If that compulsion is absent, the party against which the investigation is directed is able to decide for itself whether and how it will answer the questions put to it.

26. It may allow itself to be guided in that decision by very diverse considerations, such as the advantages and disadvantages of cooperating with the Commission in the subsequent course of the investigation, the quality of the evidence produced against it and, in connection with that, its expectations as to the success or failure of the investigation.

27. If that discretion is absent because the party concerned is obliged to answer the questions put to it, the determination of whether or not the prohibition of compulsion to incriminate oneself has been complied with will then depend on the content of those questions.

28. In assessing this first plea, I do not by any means reach that second stage, which in the present case could necessitate a closer examination of the content of question 1(d) in Annex I to the decision of 6 October 1997.

29. Article 1 of the operative part of that decision gives an exhaustive list of the questions which Dalmine was required to answer. Question 1(d) is not among them.

30. Dalmine was thus free to answer or not to answer that question. It chose not to answer it.

31. It follows from this that the plea is unfounded: there was no compulsion and no answer was forthcoming from Dalmine which could be regarded as self-incrimination.

12 — Emphasis added.

32. If the plea is more far-reaching, as the appellant suggested at the hearing, and implies that the prohibition on putting questions which give rise to self-incrimination should also be extended to questions which the party under investigation does not need to answer, that would lead in extremis to the rather absurd result that an investigating authority could no longer ask the subject of the investigation for a voluntary confession, even though the other evidence was overwhelming.

33. Such a broad interpretation of the plea — if it is possible at all, since the appellant's argument at the hearing was neither clear nor precise on this point — therefore does not increase its prospects of being considered well founded.

B — *The second plea: infringement and misapplication of Community law and infringement of the rights of the defence in that the sharing key document was declared admissible and used as evidence*

1. Context and reasoning of the Court of First Instance

34. At first instance, the appellant maintained that the sharing key document was inadmissible as evidence of the infringements found in Articles 1 and 2 of the decision because the Commission did not disclose the identity of its author or its source. Without such information, the authenticity and probative value of that evidence should be treated with caution (paragraph 67 of the judgment under appeal).

35. In the judgment under appeal, the Court of First Instance, invoking the principle of the unfettered evaluation of evidence which, according to settled case-law, is the prevailing principle of Community law,[13] concluded that, whilst Dalmine's arguments were relevant in evaluating the reliability and, therefore, the probative value of the sharing key document, it should not be regarded as inadmissible evidence (paragraphs 72 and 73 of the judgment under appeal).

36. At first instance, the appellant also objected to the use of minutes of examinations of former Dalmine managers, which were statements given in the context of a — criminal — investigation other than the Commission's investigation at issue here.

13 — The Court of First Instance refers here to the Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhone-Poulenc* v *Commission* [1991] ECR II-867 and the judgments in Joined Cases C-310/98 and C-406/98 *MetTrans and Sagpol* [2000] ECR I-1797, paragraph 29, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and Tecnagrind* v *Commission* [2002] ECR II-4547, paragraph 223.

Those minutes were inadmissible as evidence. In support of its submission, it referred to the judgment in the *Spanish banks* case, [14] which ought to be applied by analogy to the present case (paragraphs 76 and 77 of the judgment under appeal).

37. The Court of First Instance rejected the reference to the *Spanish banks* case, holding that that case-law concerns the use by national authorities of information obtained by the Commission pursuant to Article 11 of Regulation No 17. That situation is governed by Article 20 of Regulation No 17. Consequently, the questions whether the information concerned may lawfully be made available to national authorities by the Commission and whether it may lawfully be used as evidence by those authorities are matters for Community law (paragraphs 84 and 85 of the judgment under appeal).

38. However, the question whether the competent national authorities may lawfully transmit to the Commission information obtained in application of national criminal law is, in principle, a question covered by the national law governing the national investigations concerned. It must therefore be determined by the national courts. [15] It is not apparent from Dalmine's arguments that the issue of the lawfulness of the transmission and use of the minutes in question at Community level was brought before a competent Italian court; nor did it adduce any evidence before the Court of First Instance to show that that use was contrary to the applicable provisions of Italian law (paragraphs 86 and 87 of the judgment under appeal).

39. The Court of First Instance concluded its reasoning by holding that Dalmine's arguments affect only the probative value of the minutes in question, and not the admissibility of that evidence in the present proceedings (paragraph 90 of the judgment under appeal).

2. The appellant's complaints

40. The complaints put forward by the appellant are directed against the fact that the sharing key document and the minutes of examinations of former Dalmine managers were declared admissible as evidence.

41. In support of the first complaint, the appellant asserts that the sharing key document is anonymous in two respects: the

14 — Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4795, paragraph 35 et seq.

15 — The Court of First Instance adds that, in an action brought under Article 230 EC, the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority. The Court refers in this context, by analogy, to Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 9.

identity of the person who handed it over to the Commission was not disclosed, and its author and the circumstances in which it was drawn up are also unknown.

42. Relying on the case-law in *Commission* v *Tordeur and Others*, [16] *Vela and Tecnagrind* v *Commission* and *Met-Trans and Sagpol*, [17] the appellant submits that the Court of First Instance should have declared that document inadmissible.

43. The appellant then points out that, for an anonymous document to be declared admissible as evidence, its authenticity and reliability should in any event have been examined. Even then, such a document could at most have given rise to the opening of an investigation, but should not have been used as evidence for the alleged infringement of the competition rules of the Treaty itself.

44. In this connection, Dalmine points out that the judgment under appeal is inconsistent, since on the one hand the Court of First Instance states that Dalmine's arguments could be relevant for the purpose of assessing the credibility of the document, but on the other hand it fails to carry out such an assessment on the substance.

16 — Case 232/84 [1985] ECR 3223.

17 — Cited in footnote 13.

45. Lastly, the Court of First Instance should have ascertained whether there were in fact compelling reasons for the Commission not to disclose the identity of its informant.

46. With regard to the second complaint, the appellant points out, first, that the Commission should have informed it as soon as possible that it was in possession of the minutes in question. Such an omission constitutes an infringement of the principle of the right to a fair trial, as enshrined in Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and developed in the case-law of the European Court of Human Rights.

47. Secondly, the appellant submits that, although the Court of First Instance ruled on the question whether the minutes came into the Commission's possession lawfully, it failed to answer the central question of whether the Commission was entitled to make use of such documents in carrying out its own investigation. In the appellant's view, the Commission was entitled to use those documents only as circumstantial evidence,

and not as evidence, of the existence of an infringement allegedly committed by Dalmine.[18] It points out in this connection that the documents in question were only provisional and that their credibility had not yet been established in the criminal proceedings for which they had been drawn up.

3. The Commission's arguments

48. With regard to the first complaint, the Commission disputes the claim that the Court of First Instance should have declared the sharing key document inadmissible. That submission on the part of the appellant is in no way supported by the case-law to which it referred.

49. In particular, no argument can be inferred from paragraph 29 of the judgment in *Met-Trans and Sagpol*[19] to support the assertion that evidence which is inadmissible in the procedural law of the Member States may not be declared admissible at Community level. Even if that assertion were correct, which it is not, the 'similar proceedings' which must be taken into account in order to assess the admissibility of evidence in proceedings brought by the Commission in the field of competition must certainly not concern the law of criminal procedure of a single Member State, but at least the procedural and substantive criminal laws of *several* Member States.

50. In response to the submission that the Court of First Instance should, before declaring the sharing key document admissible and usable, have at least examined its credibility, the Commission states that the appellant did not put forward any such arguments at first instance. The appellant cannot therefore complain that the Court of First Instance did not consider the credibility of that document.

51. For the sake of completeness, the Commission points out in this connection that the issue of the credibility of the sharing key document was expressly raised in the two parallel cases at first instance.[20]

18 — In this connection, the appellant refers, by analogy, to the judgment in *Spanish banks* (cited in footnote 14), from which the principle is to be inferred that an authority which is in possession of information may not use it for purposes other than that for which it was obtained. If it is given to other authorities, the latter may use it only as circumstantial evidence which may be taken into account when deciding whether or not to initiate an investigation. However, such information must remain within the internal sphere of the national authorities. They may therefore not use it as evidence (paragraphs 37, 39, 42 and 53 of that judgment).

19 — Cited in footnote 13. Of particular relevance here is the passage '... that, given that there is no legislation at Community level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible'.

20 — Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 94, and 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 274.

52. The Court of First Instance held in that regard 'that the credibility of that document is undeniably reduced by the fact that the context in which it was drawn up is largely unknown and the Commission's statement in that regard cannot be verified'. [21] Nevertheless, 'the sharing key document retains some probative value such as to corroborate, in the context of a body of consistent evidence used by the Commission, certain of the essential assertions contained in Mr Verluca's statements in relation to the existence of a market-sharing agreement covering seamless OCTG'. [22]

53. As regards the appellant's argument that the Court of First Instance wrongly omitted to ascertain whether there were in fact compelling reasons for not disclosing the identity of the informant, the Commission points out that the Court of Justice has already rejected it in its judgment in *Adams* v *Commission*. [23]

54. As regards the second complaint, the Commission observes that there is no legal basis for the assertion that it should have informed the appellant immediately once it came into possession of the minutes in question. Nor can any such legal basis be inferred from the ECHR and the case-law of the European Court of Human Rights.

55. Moreover, under the Community legislation in force, the appellant has the right of access to the file as from the time when, or immediately after, the statement of objections is sent. That represents a sufficient safeguard for the rights of the defence. The appellant has failed to show why its rights as a defendant were prejudiced by the fact that it was able to inspect the minutes only at the time of the communication of the statement of objections and not beforehand.

56. With regard to the appellant's second submission, the Commission maintains that, if it is entitled, under Article 11(1) of Regulation No 17, to obtain all necessary information from the Governments and competent authorities of the Member States, it is also entitled to use that information.

57. Moreover, the Court of First Instance correctly held that neither it nor the Commission has jurisdiction to rule on the lawfulness of the origin of such information in the light of the relevant national procedural law. [24] That assessment is a matter for the competent national court.

21 — *JFE Engineering and Others* v *Commission*, cited in footnote 20, paragraph 274.

22 — Ibid., paragraph 288.

23 — Case 145/83 [1985] ECR 3539, paragraph 35.

24 — Paragraph 86 of the judgment under appeal.

58. However, at first instance, as the Court of First Instance observes, [25] the appellant did not put forward any arguments from which it was apparent that the issue of the lawfulness of the transmission and use of the minutes in question at Community level was even brought before an Italian court.

4. Assessment

59. As regards the first complaint in this plea, I need only refer to my Opinion in *Salzgitter Mannesmann, formerly Mannesmannröhren-Werke* v *Commission*. [26]

60. In points 50 to 70 of that Opinion, I assessed and rejected the corresponding, albeit rather more detailed, arguments of the appellant in that case against the admissibility of the sharing key document.

61. In my opinion, the reasoning which I followed in that context is fully applicable to the arguments which Dalmine has put forward in support of its first complaint.

62. Nor is there any need for me to deal at great length with the second complaint in this plea.

63. As for the first argument put forward by the appellant, namely that the Commission should have informed it immediately after it came into possession of the relevant minutes, I am unable, as is the Court of First Instance in paragraph 83 of the judgment under appeal, to find any basis for it in the relevant Community legislation.

64. Nor is there, it seems to me, any reason to construe the principle of the right to a fair hearing as capable of including the obligation attributed to the Commission by the appellant. If the Commission, as the competent authority, were required, in the first phase of its investigation, to communicate information which could give grounds for suspicion of an infringement of the competition rules of the Treaty to the parties suspected of being involved in that infringement, such an obligation could seriously hamper, if not render impossible, the continuation and completion of the investigation.

65. The undertakings concerned could then take the necessary measures, while the investigation was still in its initial phase, to

25 — Paragraph 87 of the judgment under appeal.

26 — Case C-411/04 P [2007] ECR I-959.

prevent the securing of further evidence by the Commission. [27]

66. The second argument is somewhat more complex.

67. In essence, the appellant argues that the Court of First Instance should not have confined itself, in its assessment of whether the minutes concerned were admissible and usable as evidence, to the question of according to which law and by which courts the lawfulness of the transmission to the Commission of that material, which had been obtained in the context of a national criminal investigation, and its use as evidence of the alleged infringement should have been assessed.

68. The Court of First Instance should, in addition, have questioned whether material which the Commission obtained from national authorities and in regard to which there may be a suspicion that it was not transmitted lawfully is, as such, admissible and usable as evidence.

69. It is in this context that the appellant refers to the judgment in the *Spanish banks* case, already cited on several occasions, and argues, by analogy, that information obtained by the Commission from national authorities may only be used internally and only as circumstantial evidence of a possible infringement, as is also the case, according to that judgment, with information provided by the Commission to national authorities.

70. In my view, this ingenious reasoning cannot succeed, since it overlooks the fact that the judgment of the Court of Justice cited above is based on a systematic analysis of the Commission's powers to obtain information, the scope of those powers and the interests of the parties concerned, which the Commission must respect when exercising its powers. On that basis, the Court of Justice concluded that restrictions may be attached to the use of information provided by the Commission to national authorities.

71. However, the question whether a national authority may provide information to the Commission, what restrictions and conditions must be attached to the use of that material by the Commission and whether it may be made public are matters solely for the national courts to determine on the basis of the applicable national legislation, as pointed out by the Court of First Instance in paragraph 86 of the judgment under appeal.

72. It follows that, if it requests information from national authorities pursuant to Article 11(1) of Regulation No 17, the Commission may assume that it is entitled to use that

27 — This is also pointed out by Court of First Instance in the last sentence of paragraph 83 of the judgment under appeal.

information as evidence, where possible and necessary, in so far as the national authority has not attached any restrictions and conditions based on national law to the use of that information. That information is therefore admissible and usable as evidence, without prejudice to the restrictions and conditions attached to it by the competent national authorities.

73. That result is not in conflict with the defendant's right to a fair hearing. The defendant retains up to two opportunities, both before the Commission and before the Court of First Instance, to show that the information concerned was wrongly provided under national law or that, wrongly, no specified conditions and restrictions were attached to its use.

74. However, such an argument will need to be based on steps taken previously before the national courts with jurisdiction to interpret the relevant national legislation, and on their case-law.

75. Mere reliance on national legislation is therefore insufficient for the purpose of establishing that the relevant national information is inadmissible as evidence. That would either amount to automatic rejection of the evidence in question as inadmissible, or require the Community judicature to carry out a review for which it has no jurisdiction.

76. Since the file of this case at first instance does not show that the appellant took any steps to obtain a review before the competent national courts of the lawfulness of the transmission of the minutes concerned and their use by the Commission, or contain specific information which may show that such use is contrary to the applicable provisions of Italian law, the Court of First Instance was entitled to find that those minutes were admissible and usable as evidence of an infringement imputable to Dalmine.

77. The second complaint in this plea must therefore also be rejected as unfounded.

C — The third plea: infringement of Article 81 EC by the inclusion in the decision of arguments unrelated to the objections notified to the appellant

1. Context and reasoning of the Court of First Instance

78. At first instance, the appellant objected to the fact that the decision refers to certain facts which, while unrelated to the infringe-

ments found, might nevertheless be damaging to it, such as the observations with regard to cartels on markets outside the Community and to price fixing,[28] which were unrelated to the infringements found in Articles 1 and 2 of the decision.

79. In paragraph 134 of the judgment under appeal, the Court of First Instance held 'that there is no rule of law which enables the addressee of a decision to challenge some of the grounds of that decision by way of an action for annulment under Article 230 EC unless those grounds produce binding legal effects such as to affect that person's interests.[29] ... The grounds of a decision are not in principle capable of producing such effects. In the present case, the applicant has not shown how the contested grounds are capable of producing effects such as to change its legal position.'

2. The appellant's complaints

80. In support of this plea, the appellant puts forward, in essence, a single complaint to the effect that, in paragraph 134 of the judgment under appeal, the Court of First Instance wrongly disregarded Article 21(2) of Regulation No 17. Under that provision, the Commission could and should have confined itself to reproducing the main content of the decision, thereby having regard to the legitimate interest of undertakings in the protection of their business secrets.

3. The Commission's arguments

81. In the Commission's view, the Court of First Instance rightly held that, on the one hand, the addressee of a decision is not entitled to challenge some of the grounds of a decision by way of an action for annulment unless those grounds produce binding legal effects such as to affect that person's interests, and that, on the other hand, Dalmine had not shown how the contested grounds were capable of producing effects such as to change its legal position.

4. Assessment

82. This plea cannot succeed. If the appellant objects to the reference in the decision to certain facts which it considers irrelevant to the Commission's finding of the infringement, it cannot, as the Court of First

28 — In this connection, the appellant refers to recitals 54 to 61, 70 to 77 and 121 and 122 to the decision.

29 — The Court of First Instance refers here to Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraphs 77 and 80 to 85.

Instance correctly observes, contest those facts in an action specifically directed towards the annulment of the decision establishing the infringement.

83. If the appellant finds the disclosure of those facts objectionable, either because its business secrets meriting protection are then made public, or because it could then be vulnerable to actions for damages brought by third parties, it can ask the Commission to take that into account in the publication of the decision in the Official Journal. [30]

84. Should the appellant nevertheless be of the opinion that the decision as published is damaging to it, it is entitled, on that ground, to bring an action for damages, as referred to in the second paragraph of Article 288 EC, before the Court of Justice, provided that the conditions for bringing such an action are otherwise satisfied. I need therefore dwell no further on the assessment of this plea in the context of the appeal.

30 — The Commission points out that the appellant did not lodge an objection to the Commission's decision to publish the non-confidential version of the decision.

D — *The fourth plea: error of law, distortion of the facts and failure to state reasons in respect of the infringement referred to in Article 1 of the decision*

— *The fifth plea: errors of law, distortion of the evidence and failure to state grounds as regards the effects of the infringement on trade between Member States*

1. Context and reasoning of the Court of First Instance

85. At first instance, Dalmine contested Article 1 of the Commission decision with two pleas:

— the decision does not contain a sufficient statement of reasons for the purposes of Article 253 EC and is vitiated by an incorrect application of Article 81 EC. In particular, the Commission failed to make a thorough analysis of the relevant market and was thus unable to assess whether the conditions for applying Article 81(1) EC were satisfied and therefore infringed that provision (paragraph 137 of the judgment under appeal);

— its participation in the infringement referred to in Article 1 of the decision did not have an appreciable effect on competition, inter alia because of its modest position in the Italian market for standard thread OCTG and project line pipe and as a result of its undisciplined conduct as regards compliance with the cartel rules (paragraph 159 of the judgment under appeal).

86. The first plea is set out in more detail in three arguments reproduced in paragraphs 138 to 141 of the judgment under appeal:

— the Commission failed to provide specific data on the market for standard thread OCTG and project line pipe; it based its market analysis on a much broader range of products. As a result, the table in recital 68 to the decision gives a completely distorted picture of the situation on the Italian market for standard thread OCTG. The Commission's analysis of the relevant market is therefore incorrect (paragraphs 138 and 139 of the judgment under appeal);

— while Dalmine does enjoy a relatively strong position on the market for project line pipe in Italy, project line pipe represents only a small proportion of the total Italian market for line pipe (paragraph 141 of the judgment under appeal).

87. In paragraphs 145 to 158, the Court of First Instance examined in detail the arguments reproduced above.

88. The first argument is assessed by the Court of First Instance in paragraphs 145 to 151 of the judgment under appeal. After summarising, in paragraphs 145 and 146, first the relevant case-law concerning the requirements to be satisfied by the statement of reasons, then that concerning complaints directed against grounds included purely for the sake of completeness, the Court of First Instance recalls, in paragraph 147 the settled case-law that, in order to establish an infringement of Article 81 EC, there is no need to demonstrate an adverse effect on competition once the existence of an agreement or concerted practice having as its object the restriction of competition has been established.

89. The central element of the Court of First Instance's reasoning then follows in paragraph 148:

'In the present case, the Commission relied primarily on the anti-competitive object of the market-sharing agreement, covering the German, United Kingdom, French and Italian markets in order to establish the

infringement found in Article 1 of the decision and it relied on documentary evidence for that purpose (see, in particular, recitals 62 to 67 to the decision and *JFE Engineering and Others* v *Commission*, paragraph 111 above, paragraphs 173 to 337).' [31]

90. In paragraphs 149 and 151 of the judgment under appeal, the Court of First Instance draws from that reasoning, in turn, the following conclusions:

— recital 68 to the decision, concerning the effects of that agreement, is an alternative ground and is therefore included purely for the sake of completeness in the general scheme of the grounds of the decision. Thus even if Dalmine were able to show that those alternative grounds were inadequate, that would be of no use to it since the anti-competitive object of the agreement is already established in this case;

— since the Commission is not required to demonstrate an adverse effect on competition in order to establish an infringement of Article 81 EC when it has established the existence of an agreement having as its object the restriction of competition, Dalmine's arguments concerning the effects of the agreement have become irrelevant.

91. The Court of First Instance assessed the second argument in paragraphs 152 to 155 of the judgment under appeal:

— the Commission based the object of the agreement in question on a body of evidence, *the relevance of which Dalmine does not question*, [32] particularly on the statements of Mr Verluca, and not merely on the single piece of evidence whose probative value is challenged by Dalmine. Even if those criticisms were merited, they alone could not result in the annulment of the decision (paragraph 152);

— moreover, Mr Biasizzo's statement is corroborated by those of colleagues and it is not in dispute that he was responsible for sales of the products covered by the decision during a certain period (paragraphs 153 and 154);

31 — The Court of First Instance refers here to its judgment of the same day (8 July 2004, cited in footnote 20), in which it had to assess in detail the probative value of the documentary evidence produced by the Commission in recitals 62 to 67 to the decision.

32 — Emphasis added.

— Mr Biasizzo's statement is therefore reliable, particularly to the extent that it corroborates Mr Verluca's statements as to the existence of the agreement to share domestic markets (paragraph 155).

92. The third argument, that the market-sharing agreement had no effect on trade between Member States, is rejected by the Court of First Instance with the simple observation that an agreement the object of which is to share national markets within the Community, as in the present case, necessarily has the potential effect of reducing the volume of trade between Member States, which would be realised if the agreement was implemented [33] (paragraphs 156 and 157 of the judgment under appeal).

93. The Court of First Instance rejected the second plea at first instance with the following two arguments:

— the Commission took into account the restrictive object of the market-sharing agreement to which Dalmine was a party, so that any lack of evidence of the anti-competitive effects of Dalmine's individual conduct has no bearing on the finding of infringement against it in Article 1 of the decision [34] (paragraph 161 of the judgment under appeal);

— as for Dalmine's claim that it retained its freedom of action in practice, the Court of First Instance points out that, according to settled case-law, [35] where an undertaking takes part in meetings between undertakings which have an anti-competitive object without publicly distancing itself from what occurred at them, thereby giving the impression to the other participants that it subscribed to the cartel resulting from those meetings, it may be considered to have participated in the cartel in question (paragraph 162 of the judgment under appeal).

2. The appellant's complaints

94. The appellant puts forward two complaints in support of the fourth plea.

33 — The Court of First Instance refers in this connection to Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraphs 79 and 90, and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 48.

34 — In this connection, the Court of First Instance refers to *Cement*, cited in footnote 9, paragraphs 1084 to 1088.

35 — See, inter alia, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98; Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 85 and 86; and *Cement*, cited in footnote 9, paragraph 1353.

95. In the first complaint, on which it elaborates in detail, the appellant alleges that the Court of First Instance misrepresented the facts and failed to state grounds with regard to the existence of the infringement referred to in Article 1 of the decision.

96. The appellant maintains that its arguments put forward at first instance were — contrary to what the Court of First Instance held — directed in the first place at refuting the claim that the alleged agreement had appreciable effects on the market for the products concerned, but primarily at refuting or at least casting serious doubt on the claim that such a market-sharing agreement existed at all.

97. The Court of First Instance committed a twofold error by simply accepting in the cited passages of the judgment under appeal, without assessing the documentary evidence referred to in recitals 53, 54 and 62 to 67 to the decision, that the existence of an agreement with the object of sharing markets had been proved, and by therefore considering that there was no need for it to undertake an analysis of the market relations from which the existence of such an agreement might be inferred.

98. The arguments put forward by it at first instance should have prompted the Court of First Instance to examine all the items of evidence expressly referred to in the decision so as to ascertain whether they constituted proof of the existence of an agreement to share the Community markets.

99. The appellant cites, in turn, the following items of evidence which, it claims, the Court of First Instance wrongly omitted to analyse:

— Mr Verluca's statement (decision, recital 53);

— 'entretien BSC' (decision, recital 62);

— British Steel's reply of 31 October 1997 to the Commission's request for information (decision, recital 54);

— Mr Biasizzo's statement to the public prosecutor in Bergamo (decision, recitals 54 and 64);

— Mr Becher's statement (decision, recital 63);

— Dalmine's written reply of 4 April 1997 to the Commission's request for information of 13 February 1997 (decision, recital 65).

100. In the appellant's view, a more detailed analysis of all those items of evidence should have led to the conclusion that it was impossible, on the basis of that evidence, to conclude that the market-sharing agreement referred to in Article 1 of the decision existed.

101. By its second complaint, the appellant submits that an analysis of the relevant product markets within the Community, which the Court of First Instance failed to carry out, should have led to the conclusion that no agreement to share domestic markets within the Community could have existed.

102. However, the existence of an agreement to share domestic markets with regard to project line pipe could possibly be inferred from the data produced in that regard by the appellant, which contradict the table in recital 68 to the decision, but not under any circumstances with regard to standard thread OCTG.

103. It must be inferred from the foregoing that, even assuming that an agreement of any kind existed between the European and Japanese producers, and that such an agreement related to the Community market, it was not applied and, in any event, had no effect on market trends.

104. The appellant further submits that Article 81 EC should not be interpreted and applied in such a way that the actual effects of a prohibited agreement are equated with the objectives of that agreement, even though it was not implemented and therefore could not have had any effect. Equating the object and the effects of an allegedly existing agreement could lead to disproportionate penalties being imposed in all cases where proposed anti-competitive agreements have not been applied and, in any case, have had no significant effects.

105. In the light of those two complaints, the appellant claims that paragraphs 145 to 155, 161 and 162 of the judgment under appeal should be set aside, with all the consequences which flow from that for the decision and the fine imposed by it on Dalmine.

106. The fifth plea contains a single complaint to the effect that, since the existence of a market-sharing agreement has neither been proved by the Commission in its decision nor established by the Court of First Instance in the judgment under appeal, the Court of First Instance's statement that such an agreement automatically affects trade between States becomes untenable.

107. Even if the existence of such an agreement were proved — which it is not — the Court of First Instance would have to ascertain whether it had actually affected

trade between States, particularly since, as the Court of First Instance itself observes, those actual or potential effects must not be insignificant.

108. Since no such effects which were not insignificant are proved in the decision, the Court of First Instance should not have concluded that the conditions for applying Article 81(1) EC were satisfied.

3. The Commission's arguments

109. The Commission disputes the first complaint in the fourth plea by arguing that Dalmine failed to put forward at first instance its objections to the documentary evidence by which the Commission substantiated, in recitals 53, 54 and 62 to 67 to the decision, the existence of a market-sharing agreement.

110. Instead, it directed its criticism primarily at the alleged inadmissibility or lack of credibility of some of those items of evidence, in particular the sharing key document and Mr Biasizzo's statements. Furthermore, at first instance, it sought principally to show that the Commission was not in a position:

— to assess correctly either the effects of the agreement between the producers on competition or the gravity of the infringement and the role of the various participants in regard to compliance with the agreement;

— to ascertain whether the agreement had resulted in any restriction of competition, had in fact been complied with or was even capable of restricting or distorting competition;

— to realise that Dalmine's position on the market was weak, that the role which it played in the agreement was minor and that the advantages which it stood to gain from it were negligible.

111. Neither the application nor the reply at first instance contains any argument by which Dalmine seeks to contest the probative value or credibility of the evidence, objections which it now draws to the attention of the Court for the first time.

112. The appellant cannot therefore maintain that the evidence in question was incorrectly assessed in the judgment under appeal, since it never asked the Court of First Instance to rule on it.

113. The Commission therefore submits, on the basis of the settled case-law of the Court of Justice, [36] that parties may not put forward on appeal pleas which they did not raise at first instance, that this complaint is inadmissible, except in so far as it relates to Mr Biasizzo's statements.

114. However, the arguments which the appellant puts forward against the passages in the judgment under appeal concerning those statements cannot succeed in the light of the observation made by the Court of First Instance at the end of paragraph 152: 'Thus, even if those criticisms were merited, they alone could not result in the annulment of the decision.'

115. Nor, in the Commission's view, can the second complaint in support of this plea succeed in the light of the settled and abundant case-law of the Court of Justice and the Court of First Instance, [37] according to which it is unnecessary to consider the actual effects of a (prohibited) agreement if it is apparent that it has the object of preventing, restricting or distorting competition.

116. With regard to the appellant's fifth plea, the Commission points out that the appellant never denied before the Court of First Instance that the agreement had the object of sharing national markets. The Court of First Instance was therefore right to take as its basis the case-law according to which the actual existence of damage to trade between Member States does not need to be proved for the purposes of applying Article 81(1) EC, since it is sufficient to show that the agreement is potentially capable of having that effect. [38]

4. Assessment

117. The first complaint in support of the fourth plea must, for the most part, be rejected as manifestly inadmissible. An examination of its merits is justified only in so far as it relates to paragraphs 152 to 155 of the judgment under appeal, in which the Court of First Instance dismissed the objections raised by Dalmine against Mr Biasizzo's statements.

118. That conclusion follows inevitably, in my view, from the verification of the finding of fact made by the Court of First Instance in

36 — The Commission refers here to Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and Case C-155/98 P *Alexopoulou* v *Commission* [1999] ECR I-4069, paragraphs 40 and 41.

37 — The Commission refers here, inter alia, to Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 39; Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265; and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136.

38 — In addition to the judgments cited in the judgment under appeal, the Commission also refers, inter alia, to Case 19/77 *Miller* v *Commission* [1978] ECR 131, and Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 48.

the second sentence of paragraph 152 of the judgment under appeal: 'It suffices to note in this regard that, in the decision, the Commission relied on a body of evidence relating to the object of the agreement in question, *the relevance of which Dalmine does not question*, [39] particularly on the concise yet explicit statements of Mr Verluca, and not merely on the single piece of evidence whose probative value is challenged by Dalmine.'

119. Examination of the pleadings exchanged at first instance shows conclusively that Dalmine did not at that stage dispute the existence of the agreement referred to in Article 1 of the Commission decision, but claimed that it did not relate to the Community domestic markets and therefore did not fall under the prohibition in Article 81(1) EC.

120. In support of that claim, Dalmine put forward two pleas in the written procedure at first instance:

(a) inadequate and contradictory statement of reasons, and infringement of Article 81 EC in regard to the market analysis and the conduct of the undertakings concerned on the market, and in particular Dalmine's role in that respect, and in regard to the assessment of the restrictive character of the agreement concluded within the Europe-Japan Club. [40]

(b) the minor role played by Dalmine in the context of the agreements between the producers. [41]

121. In the detailed arguments put forward in support of the first plea in the application at first instance, Dalmine first directs its criticism at the lack of care in the definition of the relevant market which, in its submission, the Commission demonstrated, as is apparent from the table in recital 68 to the decision and the table in Annex 1 to that decision. In those tables, the Commission wrongly made no distinction either between standard OCTG and OCTG in general or between project line pipe and line pipe in general. [42] Dalmine then considers in more detail the Italian market and the position which it occupies on that market and observes that the Commission failed to analyse properly the actual conduct of the undertakings on the specific markets for standard OCTG and project line pipe. [43]

39 — Emphasis added.

40 — Points 104 to 121 of the application at first instance and points 36 to 51 of the reply at first instance.

41 — Points 122 to 131 of the application at first instance and points 52 to 57 of the reply at first instance.

42 — Points 105 to 112 of the application at first instance and points 37 to 42 of the reply at first instance.

43 — Points 113 to 116 of the application at first instance and points 45 to 49 of the reply at first instance.

Dalmine then contests the reliability of Mr Biasizzo's written statements. [44] Lastly, Dalmine points out that it sold certain quantities of project line pipe within the common market outside Italy and that the Commission failed to examine properly the competitive relations between welded and seamless tubes. [45]

122. The arguments in support of the last-mentioned plea concern, in turn, Dalmine's position on the relevant product markets, from which it follows that it could not have operated as market leader, a fact of which, wrongly, no account was taken in the decision. [46] Next, in its market conduct, Dalmine paid little attention to the existing agreements which, moreover, had little binding force and only limited consequences in practice. [47] Lastly, in the light of the trend of prices, the agreements did not harm consumers and were of minor significance for the total volume of trade on the markets concerned. [48]

123. It is not apparent from the passages of the application and reply at first instance examined here that Dalmine explicitly contested in those pleadings the existence of the market-sharing agreement as such, as it is substantiated in the decision by the items of evidence mentioned in recitals 53, 54 and 62 to 67.

124. In so far as its arguments at the hearing sought to claim that the existence of an intra-Community market-sharing agreement could not be inferred from the other evidence referred to in recitals 53, 54 and 62 to 67, [49] the appellant thereby attempted to put forward a new plea. [50] The Court of First Instance rightly did not consider it.

125. The rule that no new plea in law may be introduced in the course of proceedings, as laid down in Article 48(2) of the Rules of Procedure of the Court of First Instance, must be interpreted strictly. [51]

44 — Points 117 and 118 of the application at first instance and points 50 and 51 of the reply at first instance.

45 — Points 119 and 120 of the application at first instance and point 48 of the reply at first instance.

46 — Points 122 to 124 of the application at first instance and points 52 to 55 of the reply at first instance.

47 — Points 125 to 127 of the application at first instance and points 56 and 57 of the reply at first instance.

48 — Points 128 to 131 of the application at first instance.

49 — The submissions contained in the reply on appeal, which the appellant used at the hearing at first instance, correspond broadly to those put forward by it in point 37(a) of its notice of appeal.

50 — The arguments which the appellant now puts forward in point 37(a) of its notice of appeal bear a strong similarity, as regards content, to the arguments which at first instance it put forward belatedly since it did not do so until the hearing.

51 — Of the abundant case-law, I would mention Case T-547/93 *Lopes* v *Court of Justice* [1996] ECR-SC I-A-63 and II-185, paragraph 39; Case T-4/96 *S* v *Court of Justice* [1997] ECR II-1125, paragraph 104; Case T-186/98 *Inpesca* v *Commission* [2001] ECR II-557, paragraphs 33 to 35; and the order in Case T-53/96 *SPVB and Others* v *Commission* [1996] ECR II-1579, paragraphs 20 to 26.

126. The reason for this is that due process implies that the other party must be able at the outset to set up a complete defence against the complaints lodged against it. Consequently, the introduction of new pleas in law at a later stage of the proceedings, apart from the limited exception defined in Article 48(2) of the Rules of Procedure of the Court of First Instance, is not allowed, even in the form of an 'interpretation' of the matters raised in the application. [52]

127. I would also observe, as an incidental point, that the applicants in the parallel cases Case T-44/00 *Mannesmannröhren-Werke* v *Commission*, [53] and *JFE Engineering and Others* v *Commission* [54] did contest the probative value of items of evidence produced by the Commission in order to establish the existence of a market-sharing agreement. The pleas explicitly put forward in that connection were examined in detail by the Court of First Instance. [55]

128. I therefore conclude that the Court of First Instance had good reason to observe, in the second sentence of paragraph 152 of the judgment under appeal, that Dalmine did not question the probative value of a body of evidence relating to the object of the agreement in question. It follows from this that the relevant parts of the first complaint in support of the fourth plea are being put forward for the first time on appeal and are therefore inadmissible. [56]

129. In my view, the remainder of the first complaint, which is directed against the statement of the grounds on which the Court of First Instance based its rejection of the appellant's objections to Mr Biasizzo's statements, is also inadmissible.

130. As the Court of First Instance itself pointed out in paragraph 152 of the judgment under appeal, even if Dalmine's criticisms of the probative value of Mr Biasizzo's statements were merited, that alone could not result in the annulment of the decision, which is based on a body of evidence, including the explicit statements of Mr Verluca.

131. Since it has been established above that the relevance of that evidence was not challenged in a legally valid manner at first

52 — See, to that effect, the order in Case 76/63 *Prakash* v *Commission* [1964] ECR574.

53 — Cited in footnote 20.

54 — Cited in footnote 20.

55 — The relevant findings of the Court of First Instance were the subject of appeals in *Salzgitter Mannesmann, formerly Mannesmannröhren-Werke* v *Commission*, cited in footnote 26, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729.

56 — See, inter alia, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 49; *Commission* v *Brazzelli Lualdi and Others*, cited in footnote 36, paragraphs 57 to 60; and the order in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 25.

instance and therefore could no longer be challenged on appeal, it follows that, even if the appellant's objections to the relevant part of the judgment under appeal were well founded, that could not lead to the setting-aside of that judgment. Consequently, this part of the first complaint must also be declared inadmissible. [57]

132. By its second complaint in support of the fourth plea, the appellant questions one of the classic tenets concerning the interpretation and application of Article 81(1) EC, [58] namely, that there is no need to examine the effects on competition of an agreement which, on the basis of its content, has as its object the restriction of competition between parties and/or third parties.

133. The appellant's objection to that case-law is that it affords no scope, or insufficient scope, for a differentiated application in cases where an undertaking involved in the agreement has not implemented it or done so only to a limited extent, or where its market conduct was not capable of substantially affecting competitive relations on the relevant market.

134. Indeed, the Court of Justice and the Court of First Instance have up to now taken an extremely strict approach to agreements which manifestly have as their object the restriction or distortion of competition. Well-known cases concern horizontal price-fixing agreements [59] and agreements aimed at territorial protection, [60] such as the agreement at issue in this case.

135. Pleas put forward by a party to such an agreement, to the effect that it did not carry out the agreement or did so only partially, [61] or that its contribution to the agreement could only have been ineffective, [62] are rejected in the case-law as irrelevant for the purposes of a finding of infringement of Article 81(1) EC. At best, such defences may be taken into account in the determination of the amount of the fine.

57 — See inter alia Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, paragraph 48, and Case C-362/95 P *Blackspur and Others* v *Council and Commission* [1997] ECR I-4775, paragraphs 18 to 23.

58 — See Case 56/65 *Société technique minière* [1966] ECR 392, subsequently confirmed on numerous occasions, inter alia in the recent judgment in Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraphs 175, 177 to 179 and 183.

59 — See, inter alia, Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 12.

60 — See, inter alia, Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraphs 37 and 38, and Case T-66/92 *Herlitz* v *Commission* [1994] ECR II-531, paragraph 29.

61 — See *Miller* v *Commission*, cited in footnote 38, paragraphs 6 and 7; as well as, inter alia, Case C-277/87 *Sandoz* v *Commission* [1990] ECR I-45, paragraph 13; and Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 55.

62 — See, inter alia, *Cement*, cited in footnote 9, paragraphs 1085 to 1088.

136. The rationale for that strict approach lies in the fact that, as a general rule, agreements which have as their object the restriction of competition constitute serious infringements of Article 81(1) EC, which as such involve considerable risks for competitive relations and trade between States. Any operator which participates in such agreements should be aware of their illegality per se.

137. Against that background, there is, in my view, no reason to follow the suggestion implicit in this complaint. That applies a fortiori since the consequences associated with it — a considerable increase in the burdens of investigation and proof placed on the Commission since it will also have to investigate and substantiate the effects of such infringements of Article 81(1) EC, which are already serious in themselves — will severely impair the effectiveness of that core provision of the EC Treaty.

138. I therefore propose that this complaint should be declared unfounded.

139. In my view, the fifth plea, which is directed in particular against paragraphs 156 to 158 of the judgment under appeal, is also unfounded.

140. The agreement referred to in Article 1 of the decision contested at first instance had as its object the sharing of markets both outside and within the Community.

141. Since Dalmine confined itself at first instance to claiming that that agreement had no effect on trade between Member States and, as already stated above, did not contest in a legally valid manner the finding of its existence as such, the Court of First Instance was entitled to confine itself in paragraph 156 to making a reference to the settled case-law [63] to the effect that an agreement may have an adverse effect on trade between Member States where it is possible to foresee such an effect on the basis of a set of objective factors.

142. Since this case concerns an agreement which has as its object the sharing of markets as such, the Court of First Instance was entitled simply to assume, in paragraph 157 of the judgment under appeal, that the intended effect of that agreement could significantly influence trade between States. [64]

63 — The Court of First Instance refers here to *Atlantic Container Line and Others* v *Commission*, cited in footnote 33, paragraphs 79 and 90. That judgment, which was still recent at the time of delivery of the judgment under appeal, is based on earlier settled case-law of the Court of Justice, including *Miller* v *Commission*, cited in footnote 38, paragraph 15; Case 107/82 *AEG Telefunken* v *Commission* [1983] ECR 3151, paragraph 60; and *Bagnasco and Others*, cited in footnote 38, paragraph 48.

64 — The requirement that the effect on trade between States must be of a certain significance is clear from *Ambulanz Glöckner*, cited in footnote 33, paragraph 48.

143. Even if the intended purpose of the agreement was no more than the reciprocal protection of the Community market and the Japanese producers' domestic market, it could still have had a substantial effect on trade between States. Restrictions on imports of certain products within the common market will inevitably affect both the pattern and, more often than not, the volume of intra-Community trade in the products concerned.

E — *The sixth, seventh and eighth pleas*

— *Misuse of powers, error of law and incorrect assessment of the facts with regard to the infringement referred to in Article 2 of the decision*

— *Misuse of powers, error of law and incorrect assessment of the effects of the infringement referred to in Article 2 of the decision*

144. For that reason alone, the fifth plea cannot succeed.

— *Error of law and incorrect assessment of the facts with regard to the provisions of the supply contract between Dalmine and British Steel*

145. In so far as the fifth plea seeks to assert that the Court of First Instance wrongly assumed in certain paragraphs of the judgment under appeal that the appellant at first instance did not dispute the existence of a market-sharing agreement, I refer to my consideration of the first complaint in the fourth plea. I concluded there that, in the light of the submissions contained in the application and the reply at first instance, it could and had to be assumed that Dalmine did not dispute the existence of the agreement as such.

1. Context and reasoning of the Court of First Instance

146. The background to the infringement found in Article 2 is described in recitals 78 to 97 to the decision contested at first instance.

147. In the context of the protection of domestic markets, a problem arose in 1990 from the fact that British Steel was then proposing to cease hot-rolled steel tube and pipe production. The British market would thereby lose its domestic character.

148. To compensate for that, following the closure of its Clydesdale plant, British Steel concluded contracts, in 1991 with Vallourec and Dalmine and in 1993 with Mannesmann, for the supply of plain end pipes for TSSL, its heat-processing and threading subsidiary, in each case for a fixed percentage of British Steel's total requirements.

149. Under the contracts, the prices of the plain end pipes which Vallourec, Dalmine and Mannesmann had undertaken to supply depended on the prices of the threaded pipes sold by British Steel. British Steel also undertook to inform its plain end pipe suppliers quarterly of the prices which it charged.

150. For their part, Vallourec, Dalmine and Mannesmann undertook inter alia to supply British Steel with unspecified quantities (because unknown in advance) of plain end pipes so as not to impose discriminatory prices and conditions of sale as compared with other customers operating in the United Kingdom.

151. Those agreements were concluded for a period of five years. They then remained in effect for as long as none of the parties gave 12 months' notice of termination.

152. At the beginning of 1993, a restructuring of the seamless tubes sector took place in Europe. As part of that process, British Steel decided to discontinue its activities in that sector completely. Those activities were taken over by Vallourec, which in 1994 acquired control of British Steel's Scottish plants specialising in threading. Vallourec's resulting subsidiary was the leader on the North Sea market for threaded pipes with premium and standard joints.

153. On 31 March 1994, Vallourec renewed the supply contracts with Dalmine and Mannesmann.

154. The sharing key document shows that the restructuring of the European industry had a favourable influence on the negotiations with the Japanese producers: Europe remained the preserve of the European producers.

155. The infringement referred to in Article 2 of the decision is the main subject of paragraphs 164 to 246 of the judgment under appeal.

156. The sixth, seventh and eighth pleas are directed against certain passages of that part of the judgment delivered at first instance.

157. The sixth plea is directed in particular against paragraphs 210, 234 and 244 of that judgment.

158. In the part of the judgment in which those paragraphs occur, the Court of First Instance considered Dalmine's claim that the supply contracts which the European producers had concluded with British Steel were the result of a cartel. Its supply contract with British Steel had the legitimate objective of increasing its sales of plain end OCTG pipes on the United Kingdom market (paragraph 193 of the judgment under appeal).

159. In particular, Dalmine took issue with the Commission's interpretation to the effect that the purpose of the British Steel supply contracts was to keep prices on the European market artificially high. It also took issue with the conclusions which the Commission drew from the length of the delivery times. Dalmine then disputed the probative value of a number of items of evidence and rejected the hypothesis of a cartel agreement to share the United Kingdom market among the European producers and, even on the assumption that such an agreement did exist, denied its participation in it (paragraphs 194 to 198 of the judgment under appeal).

160. Next, Dalmine drew attention to the fact that the evidence put forward by the Commission related only to Vallourec and British Steel. It also disputed the Commission's assertion that it subsequently joined in the existing agreement between Vallourec and British Steel. Moreover, in its view, Vallourec's decision that after purchasing British Steel's seamless tube business it would renew the existing supply contracts which British Steel had concluded with Mannesmann and Dalmine did not constitute circumstantial evidence of the existence of a cartel. Lastly, Dalmine again drew attention to the insignificant effects on the market of the supply contract entered into by it with British Steel (paragraphs 199 to 202 of the judgment under appeal).

161. Against those arguments the Commission maintained its view that the supply contracts in question formed part of the fundamentals, which sought to ensure respect for domestic markets, agreed within the Europe-Japan Club. By concluding such a supply contract, Dalmine had knowingly

helped to implement the agreement to respect domestic markets and to coordinate its own business activities with those of its competitors (paragraphs 203 to 208 of the judgment under appeal).

162. In paragraphs 209 to 225 of the judgment under appeal, the Court of First Instance analysed Dalmine's arguments and held them to be unfounded.

163. In the context of this appeal, paragraph 210 merits particular attention, since the appellant's sixth plea is directed in particular against it. It reads: 'Regardless of the precise extent of collusion between the four European producers, it must be held that each of them signed one of the supply contracts, restricting competition and forming part of the infringement of Article 81 EC found in Article 2 of the decision. Whilst Article 2(1) of the decision states that the supply contracts were concluded in the context of the infringement mentioned in Article 1, recital 111 makes clear that it is the very fact of having entered into those anti-competitive agreements that constitutes the infringement found in Article 2 of the decision.' [65]

164. In addition, the sixth plea is also specifically directed against paragraphs 234 and 244 of the judgment under appeal, contained in the part devoted to Dalmine's pleas relating to the relevant market and the connection with the infringement mentioned in Article 1 of the decision.

165. Paragraphs 234 and 244 read:

'234 It should be noted first of all that the Commission found in Articles 1 and 2 of the decision that there were two separate infringements affecting two adjacent product markets. Thus, there is nothing wrong in itself in the fact that the relevant market for the purposes of the infringement found in Article 2 of the decision is the market for plain

65 — Recital 111 to the decision reads: 'The object of these contracts was the supply of plain ends to the leader of the North Sea OCTG market, and their purpose was to maintain a domestic producer in the United Kingdom with a view to securing respect for the fundamentals in the Europe-Japan Club. The main object and effect of the contracts was to share between MRW, Vallourec and Dalmine (Vallourec from 1994) all the requirements of their competitor, BS. The contracts made the purchase prices of the plain ends dependent on the prices of the pipes and tubes threaded by BS. They also contained a restriction on BS's freedom of supply (on Vallourec's from 1994) and forced it to communicate to its competitors the selling prices applied and the quantities sold. In addition, MRW, Vallourec (until February 1994) and Dalmine undertook to supply a competitor (BS, then Vallourec from March 1994) with quantities not known in advance.'

end pipes whilst that for the purposes of the infringement found in Article 1 of the decision is the market for standard thread OCTG, in accordance with the relevant market definitions set out in recital 29 to the decision.

infringement found in Article 2 of the decision in fixing the amount of the fines imposed on European producers notwithstanding that the object and effects of that infringement went beyond their contribution to the continuation of the Europe-Japan agreement (see, in particular, paragraph 571 of that judgment).'

...

166. By the seventh plea, the appellant challenges that part of the judgment under appeal devoted to the assessment by the Court of First Instance in paragraphs 164 to 193 of the clauses of the supply contract between British Steel and Dalmine.

244 However, it should be stated, in so far as it may be relevant, that the Commission's assertion in the first sentence of recital 164 to the decision, [66] that the supply contracts constituting the infringement found in Article 2 of the decision were merely a means of implementing the infringement found in Article 1 of the decision, goes too far since that implementation was one objective of the second infringement amongst several separate but connected anti-competitive objects and effects. The Court held in *JFE Engineering*, paragraph 111 above (paragraph 569 et seq.), that the Commission misconstrued the principle of equal treatment in that it failed to take account of the

167. In paragraphs 164 to 174, Dalmine disputed the Commission's interpretation of a number of clauses in the supply contract as being indicative of the object of that contract to restrict competition, such as the manner in which the quantities of plain end pipes to be supplied by Dalmine and the other producers were fixed and the method of calculating contract prices.

66 — That recital reads: 'As to the contracts concluded between BS, MRW, Dalmine and Vallourec, the Commission considers that, in fact, these represented only a means of ensuring the application of the principle of respect of domestic markets in the framework of the Europe-Japan Club. For this reason the Commission does not intend to impose an additional fine.'

168. In paragraphs 179 to 187 of the judgment under appeal, the Court of First Instance examined Dalmine's arguments relating to the method of fixing the quan-

tities to be supplied to British Steel by each of the suppliers and held that they were unfounded. The relevant clauses of the supply contract showed unequivocally that its object was to restrict competition in supplying British Steel by supplying it with plain end pipes and forgoing the possibility of profiting directly from any growth of the United Kingdom market for threaded pipes.

169. In paragraphs 188 to 191 of the judgment under appeal, the Court of First Instance then found that the mathematical relationship which existed between the price of the threaded pipes sold by Corus and the price paid to its three suppliers for plain end pipes enabled those suppliers to ascertain precisely the direction, timing and extent of every fluctuation in the price of the threaded pipes sold by British Steel. It held that the provision of such information to competitors was contrary to Article 81(1) EC.

170. The eighth plea likewise concerns the passages in the judgment under appeal which relate to the clauses of the supply contract between British Steel and Dalmine.

2. The appellant's complaints

171. By the sixth plea, the appellant criticises three paragraphs in particular of the judgment under appeal. In them, the Court of First Instance substituted its own assessment of the facts described in Article 2 of the decision for that of the Commission. In so doing, it rewrote that decision in essential respects and thus exceeded the powers conferred on it by the Treaty.

172. First, paragraph 210 of the judgment under appeal is susceptible to that criticism, since the Court of First Instance asserts that 'recital 111 makes clear that it is the very fact of having entered into those anti-competitive agreements that constitutes the infringement found in Article 2 of the decision'. The appellant, however, is of the opinion that it is clear from a reading of recital 111 that it is not the conclusion of the agreements in question that constitutes the infringement, but their purpose of 'securing respect for the fundamentals in the Europe-Japan Club'. The Court of First Instance thereby transformed acts which merely implemented the fundamentals into a separate infringement of Article 81 EC.

173. Secondly, in the appellant's view, serious criticism is merited by paragraph 244 of the judgment under appeal: 'However, it should be stated ... that the Commission's assertion in the first sentence of recital 164 to the decision, that the supply contracts constituting the infringement found in Ar-

ticle 2 of the decision ... goes too far.' [67] The Court of First Instance should have drawn the only possible conclusion from that observation by annulling recital 164 to, and also therefore Article 2 of, the decision.

174. However, by drawing from that observation the conclusion that '... that implementation was one objective of the second infringement amongst several separate but connected anti-competitive objects and effects', the Court of First Instance assumed a role which it was not its own.

175. Thirdly, by its sixth plea, the appellant challenges paragraph 234 of the judgment under appeal, where the Court of First Instance separates, even more clearly than in paragraph 210, Article 2 of the decision from Article 1 by stating that this case concerns two infringements affecting two adjacent product markets. By adding, on its own initiative, to the relevant markets for standard OCTG pipes and project line pipe which are defined in the decision, yet a third market, namely that for plain end pipes, the Court of First Instance far exceeded its powers.

176. Dalmine also makes the incidental point that the reinterpretation by the Court of First Instance of the relationship between Articles 1 and 2 of the decision proved favourable to the Japanese producers, which were not found guilty of the 'separate' infringement referred to in Article 2 and consequently benefited from a reduction in the fine imposed.

177. By the seventh plea, the appellant disputes the conclusion of the Court of First Instance that by entering into contracts with British Steel for the supply of plain end pipes, Dalmine, Mannesmann and Vallourec had in effect denied themselves access to the United Kingdom market for threaded pipes (both premium OCTG pipes and standard OCTG pipes).

178. The appellant claims in the first place that, in the absence of the required licence for the production of threaded pipes by the VAM process, it could never have entered the United Kingdom market independently.

179. Secondly, the appellant points out that the supply contracts related to plain end pipes, that is to say, a market to which the decision did not refer.

180. Thirdly, the Court of First Instance erred in its assessment of the facts by

67 — This is worded more tersely in the French version of the judgment under appeal: '... il convient de constater ... que l'affirmation de la Commission ... *est excessive*' (emphasis added).

assuming in paragraphs 219 and 229 that there was an agreement between the undertakings concerned to share the supplies of plain end pipes to British Steel.

181. Fourthly, the Court of First Instance failed to recognise that the supply contract concluded by Dalmine with British Steel was based on obvious commercial considerations.

182. By its eighth plea, the appellant disputes the Court of First Instance's finding that the provisions of the supply contract between Dalmine and British Steel as such were unlawful.

183. The appellant supports this plea with the following arguments:

— the obligation undertaken by Dalmine to supply unspecified quantities of plain end pipes to British Steel was in the interests of the latter and therefore lawful;

— the Court of First Instance should have realised that British Steel had sufficient market power to be able to impose its will on its potential suppliers;

— the Court of First Instance misinterpreted Article 4 of the supply contract by assuming that it obliged the parties to supply and purchase plain end pipes up to a certain percentage, specified in advance, of British Steel's total requirements;

— in the absence of proof of horizontal coordination between the suppliers, it was perfectly permissible to sell plain end pipes to British Steel in quantities which were related to its sales of threaded pipes;

— neither the decision nor the judgment clarifies the precise nature of the alleged anti-competitive effects of the price formulae in the supply contract;

— since Dalmine did not sell any premium OCTG pipes on the United Kingdom market and was therefore not a competitor of British Steel on that market, it cannot be criticised for the exchange of information on prices of OCTG pipes;

— lastly, the Court of First Instance's statement in paragraph 189 of the judgment under appeal that the fact

that British Steel did not disclose any confidential information to its suppliers cannot exculpate the signatories to the supply contracts in the circumstances of the present case is as apodictic as it is unfathomable.

3. The Commission's arguments

184. With regard to the sixth plea, the Commission contends that it is unfounded in its entirety.

185. In particular, the appellant's criticism of paragraph 210 of the judgment under appeal is unjustified because:

— the Commission had already established unequivocally in its decision that the supply contracts referred to in Article 2 of the decision constituted a separate infringement of Article 81 EC. That is clear from the wording of the operative part of the decision, in which a separate provision, in the form of Article 2, is devoted to that 'infringement' and an order, in the form of Article 3, is given to the undertakings concerned to terminate the 'abovementioned infringements'. This is further confirmed in recital 112 to the decision; [68]

— the fact that Article 2(1) of the decision refers to an infringement of Article 81(1) EC 'in the context of the infringement mentioned in Article 1' does not alter the fact that these are different infringements;

— the Court of First Instance was fully entitled to infer from recital 111 to the decision that the conclusion of the supply contracts constitutes the infringement found in Article 2 of that decision. Once it is established that those contracts constitute a separate infringement of Article 81(1) EC, their conclusion is the act by which the infringement is committed.

186. The appellant's criticism of paragraph 244 of the judgment under appeal is ineffective: if the Court of First Instance had drawn from its statement that the Commission's assertion in recital 164 to the decision 'goes too far' the conclusion that that recital should be annulled, that would

68 — That recital reads as follows: 'Article 81(1) of the Treaty expressly mentions as being incompatible with the common market all agreements which have as their object or effect the sharing of markets. Contracts whose object and effect [are] to share supplies to the principal producer of threaded pipes and tubes in a market representing nearly half of the Community's OCTG consumption (see recital 50) involve an appreciable restriction of competition within the common market.'

have had no effect at all on Article 2 of the decision. In that recital, the Commission merely explained why it did not impose a separate fine on the European undertakings for the infringement found in Article 2 of the decision. If that is the case, recitals 110 to 117 to the decision, which set out the arguments on which the Commission based its finding of that infringement, remain valid.

187. The appellant's criticism of paragraph 234 of the judgment under appeal begins with a repetition of the arguments put forward against paragraph 210 of that judgment. For the reasons already set out in point 185 of this Opinion, those arguments are untenable.

188. The complaint directed against the fact that, in paragraph 234, the Court of First Instance defines a separate market for plain end pipes, whereas the relevant markets in the decision are exclusively those for standard thread OCTG pipes and project line pipe, is incorrect, as is shown by recitals 28, 29 and 31 to the decision. [69]

189. In the Commission's view, the seventh plea is also unfounded.

69 — Recital 28 begins as follows: 'The products concerned in this case are seamless, carbon-steel pipes and tubes (that is, not stainless steel pipes and tubes) ...' The various categories of OCTG pipes and tubes are defined in recital 29. Recital 31 begins as follows: 'OCTG may be sold unthreaded ("plain ends", which are also defined in the API standard) or threaded. ...'

190. In the first place, the Commission takes issue with Dalmine's claim that it could not have entered the United Kingdom market for threaded pipes independently:

— in so far as this concerned premium thread OCTG, for which Dalmine did not hold the required licence, the Commission refers to paragraph 186 of the judgment under appeal, where the Court of First Instance concludes that it cannot be ruled out that Dalmine would have been able to obtain such a licence;

— moreover, it was established that Dalmine already sold standard thread OCTG, for which no licence is necessary, outside Italy.

191. The Court of First Instance was therefore entitled to conclude that Dalmine, by concluding a supply contract, first with British Steel and subsequently with Vallourec, had deprived itself of the opportunity to enter the United Kingdom market for threaded pipes.

192. The appellant's assertion that there is no question of competition between the continental European producers for the

supply of plain end pipes, since they thread them themselves and export them in limited quantities, cannot be taken seriously in the light of the fact that Dalmine entered into a supply contract for a potentially unlimited quantity of plain end pipes specifically in order to cover 30% of British Steel's requirements.

193. The objections raised by the appellant to paragraphs 219 and 220 are untenable in the light of the existing case-law:

— the Court of First Instance was entitled to conclude in paragraphs 219 and 220 of its judgment that there was a horizontal agreement on sharing supplies of plain end pipes to British Steel; [70]

— it is difficult to argue with the finding by the Court of First Instance that the fact that Dalmine might have a commercial interest in its contract with British Steel does not, as such, affect the illegality of that contract.

194. Regarding the eighth plea, the Commission observes that the complaints put forward in it are a repetition of the arguments used at first instance to dispute the anti-competitive nature of certain clauses in its supply contract with British Steel. They should therefore be declared inadmissible.

195. In the alternative, the Commission takes the view that those complaints are unfounded. It observes inter alia that commercial interests and the dominance of one of the parties in the negotiations cannot alter the unlawful character of an agreement which is contrary to Article 81(1) EC.

4. Assessment

196. The heavy artillery which the appellant places in position in the sixth plea against paragraphs 210, 234 and 244 of the judgment under appeal, and which it does not hesitate to use in accusing the Court of First Instance of distorting the facts and the Commission's intention, including the Commission's legal assessment of the conduct alleged in the decision, all of which, the appellant claims, is tantamount to a flagrant infringement of the rights of the defence, appears, on closer analysis, considerably less impressive than is suggested by the sonorous wording of the arguments and the qualifications attached to them.

70 — The Commission refers here to 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 57.

197. Before examining the three parts of this plea, which are either interconnected or overlapping, I shall reiterate the context of the infringement alleged in Article 2 of the decision, as it is described above in points 148 to 158 of this Opinion.

198. According to the account of the facts given by the Commission, Vallourec, Dalmine, Mannesmann and British Steel cooperated in order to secure the United Kingdom market for the European producers, in the first place by ensuring that Vallourec, Dalmine and, somewhat later, Mannesmann, would supply, each in a fixed proportion, the plain end pipes required by British Steel for processing into premium or standard thread pipes after it had ceased its own production of plain end pipes. Subsequently, in 1994, when British Steel had withdrawn completely from the sector, Vallourec took over British Steel's role on the United Kingdom market.

199. In essence, the following question of law was central to the proceedings at first instance: was the Commission entitled to regard that conduct of the European producers, which was intended to secure the United Kingdom market for themselves, as an infringement of Article 81(1) EC?

200. The answer which the Court of First Instance gave to that question in the criticised paragraphs of the judgment under appeal was unequivocally in the affirmative, including to the effect that the infringement of Article 81(1) EC referred to in Article 2, which, even though committed 'in the context of the infringement mentioned in Article 1', could nevertheless be considered separate.

201. The appellant bases the arguments by which it challenges that finding made by the Court of First Instance in paragraphs 210 and 234 on, in particular, recital 111 to the decision, [71] and specifically on the following passage: 'The object of these contracts was the supply of plain ends to the leader of the North Sea OCTG market, and their purpose was to maintain a domestic producer in the United Kingdom with a view to securing respect for the fundamentals in the Europe-Japan Club.' In the appellant's view, it follows from that passage that it was not the conclusion of the supply contracts in itself, but the fact that they were concluded with a view to securing respect for the fundamentals, that determined their offending nature for the purposes of recital 111 to the decision.

202. In my view, that finding does not follow at all from the connection between recitals 111 and 112 [72] to the decision. In the first sentence of recital 112, the Commission observes laconically: 'Article 81(1) of the

71 — Reproduced in full above in footnote 65.
72 — Reproduced in full above in footnote 68.

Treaty expressly mentions as being incompatible with the common market all agreements which have as their object or effect the sharing of markets.'

203. Since the supply contracts were intended to contribute to the protection of the — sizeable — United Kingdom market from outsiders, and thus had as their object the sharing of markets, they were in themselves capable of being regarded as infringements of Article 81(1) EC.

204. As is already apparent from the wording of Article 2(1) of the decision and is again confirmed in Article 3 of that decision, the Commission had already characterised the conduct of the European producers, aimed at securing the United Kingdom market following the restructuring in the seamless pipe and tube sector within the Community, as a separate infringement of Article 81 EC.

205. That characterisation was based on its analysis of the facts in the decision. It is apparent from this that, when British Steel ceased production of seamless pipes and tubes with the closure of its Clydesdale plant, but provisionally continued its heat-processing and threading activities through its subsidiary TSSL — in the period from 1990 to 1994 it remained the largest supplier of premium OCTG and standard OCTG pipes on the North Sea market — a separate market emerged on the United Kingdom market for the intermediate product, plain end pipes, with British Steel as the main customer.

206. In the light of that, the appellant's claim that the Court of First Instance acted ultra vires by holding, in paragraph 234 of the judgment under appeal, that the infringements referred to in Articles 1 and 2 of the decision took place on different markets, namely, that for standard threaded OCTG pipes and that for plain end seamless pipes respectively, is also unfounded.

207. As the Court of First Instance was able to state in paragraphs 235 and 236, this case concerns two independent but connected markets which were affected by two separate infringements which are connected: 'Thus, in the present case, the Commission described a situation in which agreements between European producers affecting the United Kingdom market for plain end pipes were conceived, at least in part, with the objective of protecting the United Kingdom market downstream from Japanese imports of standard threaded OCTG.'

208. The inevitable inference from this is that the appellant's serious accusation that, in paragraph 234 of the judgment under appeal, the Court of First Instance, ex post facto, not only misrepresented the facts but also distorted the Commission's intention, is totally unfounded.

209. The complaint directed against paragraph 244 of the judgment under appeal is, in essence, that the Court of First Instance should have drawn from its statement '... that the Commission's assertion in the first sentence of recital 164 to the decision, that the supply contracts constituting the infringement found in Article 2 of the decision were merely a means of implementing the infringement found in Article 1 of the decision, goes too far since that implementation was one objective of the second infringement amongst several separate but connected anti-competitive objects and effects' the conclusion that that recital should be 'annulled'.

210. The analysis made by the Court of First Instance in that paragraph of the judgment under appeal is a logical consequence of the finding made in paragraph 210 and, even more clearly, in paragraph 234, that Articles 1 and 2 of the decision refer to two separate infringements of Article 81 EC, even though there is a substantive connection between the two.

211. The Court of First Instance was therefore entitled to criticise the Commission for one-sidedness in its statement, in recital 164 to the decision, that the infringement found in Article 2 of its decision was merely a means of implementing the infringement found in Article 1.

212. However, that criticism, which is directed at the Commission in the context of its assessment of the gravity of the infringements, does not affect the Commission's earlier finding, held to be correct by the Court of First Instance in paragraphs 210 and 244, that the decision does actually relate to two separate, albeit connected, infringements of Article 81(1) EC.

213. The reasoning followed by the Commission in recital 164 to the decision leads to the conclusion that the close connection accepted by it between the two infringements ('a means of ensuring the application of the principle of respect of domestic markets in the framework of the Europe-Japan Club') gives no ground for the imposition of additional fines on the European producers.

214. The 'annulment' of that recital to the decision would therefore have the effect that the close connection accepted by the Commission between the two infringements could no longer constitute a ground for not imposing a separate fine for the infringement found in Article 2 of the decision.

215. The fact that, as is clear from paragraph 245 of the judgment under appeal, the Court of First Instance did not wish to draw that conclusion from its finding that, in recital 164 to its decision, the Commission was too one-sided in its characterisation of the infringement found in Article 2, spared

rather than harmed the appellant. If the Commission had in fact been required to attribute separate significance for the purpose of determining the amount of the fine to the infringement referred to in Article 2, that would inevitably, all other things being equal, have resulted in a higher fine.

216. It follows from the foregoing that the complaint directed against paragraph 244 of the judgment under appeal is unfounded, since it cannot lead to a different finding concerning the existence of two separate, albeit connected, infringements of Article 81 EC, and that it cannot succeed in so far as annulling recital 164 to the decision would have no implications for that finding and could, at best, result in the infringement defined in Article 2 of the decision being taken into account separately for the purpose of fixing the fine.

217. Of the three complaints put forward in support of the seventh plea, the first complaint is strongly factual in character, since the appellant challenges the findings of fact made by the Court of First Instance that British Steel bound its three Community competitors in such a way that any actual or potential competition — in respect of threaded pipes — on their part disappeared at the cost of sacrificing its freedom of supply [73] and that, if the supply contracts had not existed, the European producers other than British Steel would, but for the fundamentals, have had a genuine or at the very least a potential business interest in competing with British Steel on the United Kingdom market for threaded pipes and in competing amongst themselves to supply British Steel with plain end pipes. [74]

218. This complaint is admissible only in so far as the appellant seeks to show by it that the Court of First Instance made a manifest error in its assessment of the facts. [75] However, in that case, the arguments of fact put forward by the appellant need to be precise and substantial in order to be able to prove a manifest error of assessment of that kind.

219. The appellant is far from successful in that respect. Even accepting that Dalmine's entry into the United Kingdom market for the finished products standard threaded OCTG pipes and premium threaded OCTG pipes had not been easy, in view of the differences in the composition of its product range and the structure of the demand on the United Kingdom market (mainly for premium OCTG pipes with the special patented VAM joint), the appellant would still not have needed to conclude an agreement for the supply of the intermediate

73 — Paragraph 181 of the judgment under appeal.

74 — Paragraph 185 of the judgment under appeal.

75 — This is settled case-law: see, inter alia, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29, and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 49.

product plain end pipes to British Steel, which, on the one hand, fixed its market share for the intermediate product at 30% for at least five years and, on the other, excluded entry into the market for the finished products for the same period.

220. The facts and circumstances which the appellant puts forward, the composition of its product range and the fact that its production of plain end pipes was overwhelmingly destined for processing within its own undertaking do not undermine the justification for the finding of fact made by the Court of First Instance, namely, that Dalmine contributed, by concluding the supply contract with British Steel, if not to the elimination, then nevertheless to the serious restriction, of actual and potential competition on the United Kingdom market for the products concerned.

221. This complaint is therefore unfounded.

222. It follows from my assessment of the sixth plea above that the second complaint in support of the seventh plea is unfounded in so far as it is based on the presumption that the market for plain end pipes is a market to which the decision does not apply.

223. This complaint is also unfounded in so far as it contains the assertion that the supply agreement for plain end pipes was incapable of having any substantial effect on the market for standard OCTG pipes, referred to in Article 1 of the decision, since 80% of the plain end pipes supplied were processed into premium OCTG pipes. That assertion does not alter the fact that a considerable proportion of the plain end pipes to be supplied, namely 20%, would still be processed into standard OCTG pipes.

224. By the third complaint, the appellant disputes the finding of the Court of First Instance that the supply contracts were based on a horizontal strategy between the undertakings concerned, and in particular that Dalmine was involved in that.

225. I consider this complaint to be manifestly inadmissible because it implies a second evaluation on appeal of the evaluation made by the Court of First Instance of the extensive body of evidence which the Commission produced in its contested decision to establish the existence of such a strategy. That evaluation is to be found in paragraphs 214 to 225 of the judgment under appeal.

226. This complaint would be admissible only if the appellant were able, by its complaint, to establish a prima facie case

that the Court of First Instance made manifest errors in its assessment of the probative value of the evidence produced by the Commission in the decision. However, the arguments put forward in support of the complaint are so general and imprecise that they do not provide even a prima facie basis for the suspicion of such an incorrect assessment.

227. With that I come to the eighth plea, which the Commission contends is inadmissible because it contains a repetition of complaints raised at first instance against its decision.

228. Since this plea is supported by no fewer than eight different complaints, some of which concern the Court of First Instance's interpretation of the law and others its legal characterisation of the facts, I prefer to deal with the question of admissibility in relation to each of those complaints.

229. I propose that the first and second complaints should be declared inadmissible; by them, the appellant claims that the Court of First Instance should have taken into account:

(a) British Steel's commercial interest in the clause concerning thequantities to be supplied by Dalmine, expressed as a percentage (30%) of the fluctuating demand for plain end pipes;

(b) the dominance which British Steel enjoyed as a party to the supply contract.

230. So far as can be ascertained, these complaints were not explicitly [76] raised at first instance, so that the Court of First Instance cannot be criticised for its silence concerning them in the judgment under appeal.

231. Both complaints are in any event also unfounded.

232. British Steel certainly had an obvious interest in ensuring that its varying requirements for plain end pipes were met, but that is no justification for opting to meet those requirements by means of a contractual device which de facto excluded competition between its suppliers and which, moreover, safeguarded it from the potential competition of those suppliers on the markets for the finished products.

76 — They were, however, included as a defence in Dalmine's reply to the statement of objections. See Annex 12 to the application at first instance, pp. 19, 22 and 23.

233. The reliance on British Steel's dominance in concluding the supply contract is similarly untenable, because that cannot alter the illegality of the relevant supply clause. Moreover, if such dominance existed, it could only have been wielded after the appellant had taken the decision to enter into a contractual relationship with British Steel.

234. The third complaint, by which the appellant asserts that Article 4 of the supply contract could not be construed as binding on both parties as regards the predetermined percentage of plain end pipes to be supplied and purchased, is not supported by arguments of fact. The Commission has rightly pointed out that the reference to the appellant's reply to the statement of objections [77] provides no basis for that assertion. Nor is any factual basis to be found for it in the application and reply at first instance.

235. This complaint is therefore inadmissible, since it has been put forward belatedly, and is in any event unfounded, since it is not, or not sufficiently, reasoned.

236. The fourth complaint contains a repetition of the assertion already made under the seventh plea — and already rejected in points 225 and 226 of this Opinion — that the existence of horizontal coordination between the European producers prior to the conclusion of the supply contract has not been proved. It is therefore unfounded.

237. The fifth complaint, by which the appellant argues that the Court of First Instance did not clarify the nature of the alleged anti-competitive effects of the price formula contained in the supply contract, is contradicted by paragraphs 181 and 188 to 191 of the judgment under appeal, in which the Court of First Instance explains that that application of that price formula had the effect that the three suppliers concerned received precise information as to the direction, timing and extent of any fluctuation in the price of the threaded pipes sold by British Steel. In addition, that price formula had the effect that British Steel's suppliers no longer had any interest in engaging in competition with regard to the price of threaded pipes on the United Kingdom market. The reduction in the price of those pipes which might result from such competition would immediately have the effect of lowering the price of the plain end pipes which they supplied to British Steel. [78]

77 — Annex 12 to the application at first instance, pp. 21 and 22.

78 — See paragraph 181 of the judgment under appeal, which refers to recital 153 to the decision contested at first instance.

238. The fifth plea is therefore, in the absence of adequate grounds, manifestly unfounded.

239. The same applies to the sixth complaint. While it is true that the appellant can maintain that the exchange of information on prices was of no importance to it, in so far as it related to premium OCTG pipes, a product for which it had no access to the United Kingdom market for technical reasons connected with the licence, that does not alter the fact that that information was important for its — limited — activities in the field of standard OCTG pipes on that market. De facto, the availability of that information could lead it to adjust its prices for that product on the United Kingdom market.

240. The seventh complaint is pure assertion. It will not do to take a paragraph (189) of a judgment out of its context and then characterise the argument of the Court of First Instance contained in it as 'apodictic and unfathomable', even though the substantiation of that argument is to be found in the following paragraphs of the judgment under appeal. This complaint should therefore, in the absence of any reasoning, be declared manifestly unfounded.

241. The eighth complaint contains a repetition of the appellant's complaints which it put forward in support of the sixth plea. It follows from my assessment of those complaints that the present complaint must also be declared unfounded.

F — *The ninth and tenth pleas*

— Infringement of Article 81 EC and failure to state reasons in the assessment of the Commission's compliance with Article 15 of Regulation No 17 and the Guidelines on the method of setting fines[79] *in regard to the assessment of the gravity of the infringement attributable to Dalmine*

— Infringement of Article 81 EC and failure to state reasons in the assessment of the Commission's compliance with Article 15 of Regulation No 17 and the Guidelines on the method of setting fines in regard to the assessment of the duration of the infringement and of the attenuating circumstances

1. The appellant's complaints

242. In the very detailed argument by which the appellant substantiates the ninth plea, three principal complaints must be distinguished:

(a) the Court of First Instance wrongly failed to have regard to the fact that

79 — Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the Guidelines').

the size of the relevant market, as the only objective criterion, must form the basis of the assessment of the gravity of the offence;

(b) the Court of First Instance wrongly failed to have regard to the fact that the Commission misapplied point 1 A of the Guidelines;

(c) the Court of First Instance wrongly failed to take into account, in its determination of the amount of the fines, the conduct and size of the undertakings involved.

243. The appellant's arguments in support of the first complaint may be summarised as follows:

— the size of the relevant market is the only objective criterion which can be taken into account in the assessment of the gravity of the infringement. Consequently, any finding concerning the gravity of the infringement must be based first and foremost on that criterion;

— the Court of First Instance was therefore wrong to hold that the size of the market affected is just one of the relevant factors; [80]

— the Court of First Instance's finding that 'the fine imposed ... for an infringement of the competition rules must be proportionate to the infringement as a whole and, in particular, to the gravity of that infringement' [81] is therefore a tautology lacking any objectivity.

244. The arguments which the appellant puts forward in support of the second complaint are essentially the following:

— according to the Guidelines, the gravity of the infringement must be determined on the basis of three criteria: the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant market;

— in the first place, the Court of First Instance assessed the nature of the infringement incorrectly by assuming that it involved a market-sharing agreement between the European producers;

80 — Paragraph 259 of the judgment under appeal.

81 — Paragraph 259 of the judgment under appeal.

— in the second place, the Court of First Instance wrongly based its assessment on the table of the market shares of the producers concerned, set out in recital 68 to the decision,[82] since that table could have no value for the purposes of assessing the effects of the alleged infringements on the relevant product markets;

— in the third place, the Court of First Instance wrongly disregarded, in its review of the Commission's finding that this case concerned a 'very serious' infringement, the — limited — size of the relevant geographic and product markets;

— lastly, the Court of First Instance failed to provide an adequate statement of reasons for its finding that the Commission was entitled to characterise the alleged infringements as very serious. This casts doubt on its finding concerning the fine imposed.

245. The third complaint is essentially based on the following arguments:

— in its assessment of the fines imposed by the Commission, the Court of First Instance wrongly did not applying weightings to the undertakings involved in the infringement according to their size as expressed in their turnover. A limited fine for a very large undertaking could easily exceed the upper limit of 10% in the case of a smaller undertaking, or in any event be excessively high. In support of this assertion, the appellant derives an argument from the sixth paragraph of point 1 A of the Guidelines;[83]

— the Court of First Instance further failed to examine the arguments which Dalmine put forward[84] regarding the discrepancy between the amount of the fine and the proceeds from its sales of the products in question on, respectively, the world market, the Community market and the French, German, Italian and United Kingdom markets;

— the 'appreciable impact on the Community market' referred to in paragraph 290 of the judgment under appeal should, in the appellant's view, be assessed not only in terms of the size of the market, but primarily in terms of the actual impact of Dalmine's participation on competitive relations. How-

82 — Paragraph 296 of the judgment under appeal.

83 — The relevant passage reads: 'Where an infringement involves several undertakings ..., it might be necessary in some cases to apply weightings to the amounts determined ... in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.'

84 — Reproduced in paragraph 320 of the judgment under appeal.

ever, when it is a matter of determining the amount of the fine and assessing its proportionality, the relative amount of the turnover of the undertakings involved is the factor which must be taken into account;

— lastly, the appellant disagrees with the Court of First Instance's statement that, once an undertaking has been proved to have participated in collusion with its competitors to share markets, the fact that it did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account when determining the amount of the fine.

246. The tenth plea contains four complaints:

— the Court of First Instance wrongly did not acknowledge and sanction the Commission's failure in the decision to explain why it took no account of the attenuating circumstances relied on by the appellant;

— the Court of First Instance wrongly did not examine the appellant's arguments to the effect that its role in concluding the market-sharing agreements was limited and that it complied only very partially with those agreements;

— the appellant then submits that the Court of First Instance wrongly did not regard as an attenuating circumstance the fact that it ceased its unlawful conduct immediately after the Commission intervened;

— lastly, the Court of First Instance gave insufficient recognition as an attenuating circumstance to Dalmine's cooperation during the administrative procedure.

2. The Commission's arguments

247. The Commission contends that the ninth plea is unfounded in its entirety.

248. With regard to the first complaint, it observes that the premiss on which the appellant bases its claim, namely, that the only objective, and therefore decisive, criterion for determining the gravity of the

infringement is the size of the relevant market, is contradicted by the wording of the Guidelines itself. The introductory paragraph of point 1 A of the Guidelines leaves no doubt as to the fact that the size of the market is only one of the criteria to be taken into account: 'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.'

249. With regard to the second complaint, the Commission observes that the first argument which the appellant puts forward in support of it, namely, that the Commission has not proved conclusively that the infringement had as its object the sharing of markets, is inadmissible since the appellant did not contest that allegation at first instance. [85]

250. The criticism that, in paragraph 296 of its judgment, the Court of First Instance wrongly used the table in recital 68 to the decision to prove the actual impact of the infringement on market relations is misleading since that paragraph of the judgment does not concern the determination of the effects of the infringement on the market, but rather the question whether the conduct and size of the undertakings must be taken into account along with the other factors in setting the amount of the fine.

251. In any case, the Commission adds, the case-law cited by the appellant [86] provides no support for its submission that, when determining the gravity of the infringement, the Commission must always ascertain its impact on the market.

252. The argument that paragraph 263 of the judgment under appeal is inconsistent is equally untenable, since the Court of First Instance is clearly referring in one case to the — extensive — geographic size of the market, and in the other case to the relevant market for standard OCTG pipes and project line pipe, referred to in Article 1 of the decision, which forms only a limited part of the total market for OCTG pipes and seamless line pipe.

253. The Commission further points out that it did take proper account of the latter fact when determining the amount of the fine — EUR 10 million — as the Court of First Instance also held.

254. As regards the third complaint, the Commission points out that, under the Guidelines, [87] in setting fines, it may take

85 — For a more detailed consideration of this question, see points 118 to 128 of this Opinion.

86 — Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 99, and *CMA CGM and Others* v *Commission*, cited in footnote 58, paragraph 264.

87 — See the sixth paragraph of point 1 A of the Guidelines, cited in footnote 79.

account of disparities between the sizes of the undertakings involved in an infringement, but that it is not bound to do so.

255. In any event, in the exercise of its unlimited jurisdiction to assess the penalties imposed, the Court of First Instance found no reason to apply a further weighting according to the size of the undertakings concerned. [88]

256. The Commission does not understand why it should follow from the sales figures referred to by the appellant for the products in question that the fine imposed is disproportionately heavy. The same applies to the alleged obligation of the Commission to adjust the amounts of fines to the turnover of the undertakings involved in the cartel.

257. The arguments which the appellant draws from its conduct as regards compliance with the market-sharing agreement overlap the complaints which it put forward in support of the tenth plea. The Commission proposes that they be examined in the context of that plea.

258. The Commission briefly examines the four complaints put forward in the context of the tenth plea.

259. The Commission submits that the first complaint is unfounded since the Court of First Instance itself, in paragraph 327 et seq. of the judgment under appeal, exercising its unlimited jurisdiction in that regard, explained clearly why the attenuating circumstances put forward by the appellant could not be accepted.

260. Moreover, as the Commission observed in its rejoinder, it is not required, in stating the reasons on which its decision is based, to take a view on the arguments concerning the applicability of attenuating circumstances which were put forward by the applicant at the investigation stage. [89]

261. As regards the second complaint that, contrary to the Guidelines, the Court of First Instance took insufficient account in the judgment under appeal of the fact that the appellant, in its de facto market conduct, did not act in compliance with the agreements concluded with its competitors, the Commission observes that the Guidelines are not binding on the Court of First Instance.

262. The Commission responds to the third complaint by submitting that, in paragraphs 331 and 332 of the judgment under appeal, the Court of First Instance correctly held

88 — The Commission refers here to paragraphs 284 to 287 of the judgment under appeal.

89 — In support of this view, the Commission refers to Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 127.

that the infringement had probably ceased or that it was at least in the process of coming to an end when the Commission carried out its investigations on 1 and 2 December 1994 and therefore the argument that the appellant terminated its infringement after the Commission intervened does not justify any reduction in the fine imposed.

263. The Commission contends that the fourth complaint is unfounded, for the following reasons:

— the appellant's cooperation in the investigation fell far short of that of Vallourec, with which it compares itself;

— the appellant does not differentiate between its attitude in answering the questions put by the Commission and its response to the (subsequent) statement of objections. For its cooperation in not contesting the facts wrongly described in the statement of objections, the appellant has already been 'rewarded' by the Commission with a 20% reduction in the amount of the fine. Paragraph 345 of the judgment under appeal must be understood to that effect.

3. Assessment

264. The assessment of the ninth and tenth pleas calls for a number of preliminary observations.

265. I would point out that there is a fundamental difference between the Commission's obligations when determining sanctions and stating its reasons in that regard in decisions by which it establishes infringements of the competition rules of the Treaty, and those of the Court of First Instance when exercising its unlimited jurisdiction pursuant to Article 17 of Regulation No 17 to review the fines and penalty payments imposed by the Commission.

266. According to settled case-law, in setting the amount of the fine the Commission is obliged to use the calculation method which it has imposed on itself in the Guidelines. In fact, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion, there arises a self-imposed limitation of that discretion inasmuch as it

must then follow those policy guidelines. [90] That case-law is based on the general legal principle of the protection of the legitimate expectations of persons subject to law.

267. On the other hand, the Commission is not required, when stating the reasons for its decisions, to examine expressly all the arguments which the undertakings concerned put forward during the investigation procedure. [91] In order to comply with the obligation to state reasons laid down in Article 253 EC, the statement of reasons must, firstly, enable the legal or natural persons to whom it is addressed to verify the facts and circumstances justifying the measure adopted so that, if necessary, they can defend their rights and ascertain whether or not the decision is well founded and, secondly, enable the Community judicature to exercise its power of judicial review. [92]

268. The Court of First Instance is not bound, in the exercise of its unlimited jurisdiction when forming its view of what constitutes an appropriate fine or penalty payment, by the Guidelines which the Commission has imposed on itself in the exercise of its discretion. [93] Account must be taken of that fact when decisions of the Court of First Instance concerning the determination of fines are reviewed on appeal.

269. However, the Court of First Instance may be required to express its view on the arguments advanced before it against the fine imposed in the decision.

270. Lastly, it must be recalled that the Court of Justice has taken a cautious approach, in the context of appeals, in its assessment of the weighing of factors by the Court of First Instance when adopting its decision on the amount of the fine. [94] That does not alter the fact that the Court of Justice must correct those decisions of the Court of First Instance if they are based on a manifestly incorrect assessment of the facts [95] or vitiated by an error of law. [96]

271. Moving on to the assessment of the ninth plea, I immediately find that the first complaint is manifestly unfounded. It cannot

90 — See, inter alia, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 182 and 183, and the case-law cited.

91 — See, inter alia, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 42; 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 ('PVC II')* [1999] ECR II-931, paragraphs 386 to 388, and the case-law cited in those paragraphs.

92 — See, inter alia, Case T-28/95 *IECC* v *Commission* [1998] ECR II-3597, paragraph 125, and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 119, and the extensive case-law listed in the paragraphs cited.

93 — Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 188.

94 — See, inter alia, *Volkswagen* v *Commission*, cited in footnote 89, paragraph 151.

95 — For an example of this, see *Aalborg-Portland and Others* v *Commission*, cited in footnote 70, paragraphs 384 to 387.

96 — For an example of this, see my Opinion in Case C-301/04 P *Commission* v *SGL Carbon* [2006] ECR I-5915, points 63 to 70.

be complained that the Court of First Instance erred in its assessment of the Commission's application of the Guidelines, since the first paragraph of point 1 A of the Guidelines expressly states that not only the size of the relevant geographic market, but also the nature of the infringement itself and its actual impact on the market, where this can be measured, must be taken into account in assessing the gravity of the infringement. Nor is it possible to infer from the wording of the Guidelines an argument for attaching particular importance to the criterion of market size.

272. With regard to the first part of the second complaint, I share the Commission's view that it is inadmissible. The appellant puts forward here an argument which it failed to put forward at first instance and which I have already concluded in this Opinion [97] should be rejected as inadmissible.

273. I find the second part of the second complaint rather more puzzling. The appellant directs its criticism at paragraph 296 of the judgment under appeal. That paragraph forms part of the assessment by the Court of First Instance of the appellant's complaint that, in determining the fines, the Commission wrongly failed to apply any differentiation according to the size of the undertakings and their involvement in the infringement.

274. In terms of its content, however, this part concerns the grievance that the Court of First Instance, in its review of the Commission's application of the Guidelines, did not properly ascertain whether the Commission did in fact take due account of 'the actual impact of the alleged infringement on the market' as a criterion for determining the gravity of the infringement.

275. The Court of First Instance carried out that review in paragraphs 258 and 272. As for the criterion of 'the actual impact of the alleged infringement on the market', paragraphs 264 to 268 are of particular relevance.

276. In those paragraphs, the Court of First Instance first observes that, in its decision, [98] the Commission specifically referred to the limited impact of the infringement on the market, because the two specific products covered by the infringement represented just 19% of Community consumption of seamless OCTG and line pipe, and stated that welded pipes could now meet part of the demand for seamless pipes given the technological progress in their manufacture (paragraph 264).

97 — See points 118 to 128 above.

98 — Recital 160 to the decision.

277. The Court of First Instance then draws attention to the conclusions which the Commission drew from that in determining the amount to reflect gravity, [99] namely EUR 10 million, whereas under the Guidelines an amount of [EUR] 20 million or more would have been possible (paragraph 265).

278. In paragraphs 267 and 268 of the judgment under appeal, the Court of First Instance states that it is clear from the Commission's decision [100] that, had it not been for the unlawful agreements, there would have been a worldwide market for OCTG pipes and a European market for line pipe. However, the conduct of the addressees of the decision had the object and, to a certain extent, the effect of excluding each of the addressees from the domestic markets of the other undertakings, including the market of the four largest Member States of the European Communities. [101] Consequently, according to the decision, that conduct constituted 'a very serious infringement'.

279. The passages of the judgment under appeal reproduced in brief above show beyond all doubt that the Court of First Instance carefully ascertained whether, in its decision, in assessing the gravity of the infringement, the Commission had examined the actual impact of that infringement on the market and whether it was entitled to conclude from this that it constituted a 'very serious infringement'.

280. On that basis, the Court of First Instance was entitled to hold that the circumstances referred to by Dalmine — the share of standard OCTG pipes and premium line pipe in the total OCTG and line pipe markets, its insignificant sales of standard OCTG pipes and the emerging competition from welded pipes — could not affect the Commission's conclusion regarding the gravity of the infringement.

281. Even if the arguments derived by the appellant from the judgments in *Commission* v *Anic Partecipazioni* and *CMA CGM and Others* v *Commission* [102] are correct, they cannot succeed, because the Commission did in fact examine the actual impact of the infringement on the market and the Court of First Instance drew from this the — correct — conclusion that the Commission was entitled to find that the infringement in question was 'very serious'.

282. This part of the second complaint is therefore unfounded.

283. The third part of the second complaint, that the Commission, in its decision, and the Court of First Instance, in its judgment, made contradictory findings with regard to

99 — Recital 162 to the decision.

100 — Recitals 35 and 36 to the decision.

101 — Recitals 53 to 57 of the decision.

102 — Cited in footnotes 86 and 58 respectively.

the examination in the light of the third criterion in the Guidelines, namely, 'the size of the relevant geographic market', is also unfounded.

284. In regard to this criterion, the Commission and the Court of First Instance were easily entitled to find that an infringement which covers the markets of the four largest Member States affects 'an extended geographic market'.

285. The contradiction which the appellant believes it can detect between that finding and the finding that the products to which the infringement relates represent just 19% of the total market for OCTG pipes and line pipe is based on a comparison between two fundamentally different things.

286. The determination of the relevant geographic market on which the infringement took place is distinct from the determination of the product markets which were the object of the infringement and on which the infringement had its impact.

287. Of the four elements of the third complaint, I shall discuss the last — the appellant's role and conduct in the conclusion of and compliance with the agreements as a factor in the determination of the fine — under the tenth plea, which is supported by a similar argument.

288. By the first element, the appellant complains that the Commission and the Court of First Instance *should* have differentiated between the amounts of the fines imposed according to the size of the undertakings involved in the infringement.

289. The first question which arises here is whether, under the sixth paragraph of point 1 A [103] of the Guidelines, the Commission has any such obligation to differentiate, compliance with which should have been reviewed by the Court of First Instance.

290. The answer to that question is in the negative since the relevant passage of the Guidelines is formulated in clearly discretionary terms: '... it might be necessary in some cases ...'.

291. The Court of First Instance reaches the same conclusion in paragraph 282 of the judgment under appeal, where it finds that a

103 — Reproduced above in footnote 83 (cited in footnote 79).

weighting according to the individual size of the undertakings is not a systematic step in the calculation which the Commission is required to take. Citing extensive case-law,[104] the Court of First Instance then recalls that the Commission has a broad discretion when it determines the amount of fines.

292. Consequently, the claim that the Commission, in its decision, should have applied a weighting to the amounts of the fines and that the Court of First Instance should have verified that, is, in my view, unfounded.

293. By the other two elements of this complaint, the appellant contests the reasoning followed by the Court of First Instance concerning the amount of the fine imposed on it. In essence, it alleges that the Court of First Instance failed, contrary to the principle of proportionality, to take into account the fact that, compared with other participants in the infringement, its size in terms of its turnover, staff and balance sheet was much less significant.

294. For the assessment of these elements, I refer to my preliminary observations in points 268 and 270 of this Opinion.

295. It follows from those observations, first, that the Court of First Instance is not bound by the Guidelines in its assessment of what constitutes the appropriate amount of the fine. Even if the Guidelines had required the Commission to apply a weighting, that would have had no implications for the assessment by the Court of First Instance.

296. Secondly, what I stated there implies that the Court of Justice has reason to substitute its own view for that of the Court of First Instance only if there has been a manifest error of assessment of the facts or a manifest error of law.

297. In the relevant paragraphs of the judgment under appeal, the Court of First Instance was able to hold, first, that Dalmine was a 'large' undertaking (paragraph 286) and then that the fine imposed on it was substantially below the upper limit of 10% of the turnover, as laid down in Article 15(2) of Regulation No 17 (paragraph 287).

298. Nor can any manifest failure to state reasons be found in the following paragraphs (288 to 296) of the judgment under appeal.

299. Lastly, the allegation that the Court of First Instance wrongly failed to examine the appellant's argument, reproduced in paragraph 320 of the judgment under appeal, is

104 — See, inter alia, the order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and *PVC II*, cited in footnote 91, paragraph 465.

misplaced in this context. By that argument, the appellant sought to show that there were grounds for taking attenuating circumstances into consideration, whereas the issue here is whether the Court of First Instance, in its assessment of the amounts of the fines, should have applied a weighting according to the size of the undertakings involved.

300. For the sake of completeness, it should be pointed out that the appellant does not explain why the figures to which it refers in paragraph 320 should have been taken into account in such a weighting.

301. In the light of the foregoing, I find that the third complaint in the ninth plea is also unfounded in its entirety.

302. The conclusion that the first complaint in the tenth plea is manifestly unfounded follows from the preliminary observation made in point 267 of this Opinion: the Commission was not required, in stating the reasons for its decision, to examine expressly all the arguments which the appellant put forward.

303. The second complaint is also manifestly unfounded. The Court of First Instance was entitled, according to the settled case-law [105] on this subject, to find that the appellant's role and conduct in the conclusion of and compliance with the agreements referred to in the decision did not constitute attenuating circumstances capable of giving rise to a reduction in the amount of the fine.

304. The third complaint is likewise manifestly unfounded. An infringement cannot be regarded as being terminated after the Commission's intervention where the parties involved in the infringement had already decided to terminate it before the Commission intervened. The Court of First Instance found, without being contradicted, that the undertakings involved had decided to end their cooperation before the Commission intervened on 1 and 2 December 1994. There is therefore no causal link between the two events.

305. In so far as the fourth complaint is directed against the comparison by the Court of First Instance of the extent of the appellant's cooperation in the Commission's investigation before it issued the statement of objections and that of Vallourec, I am inclined to declare it inadmissible because it relates to the finding and assessment of facts.

105 — The Court of First Instance has confirmed on a number of occasions that strict criteria apply in this regard, inter alia in Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 142, and *Cement*, cited in footnote 9, paragraph 1389.

306. The fourth complaint is unfounded in so far as the appellant derives an argument from paragraph 345 of the judgment under appeal, in which it is held that the Commission's task was made significantly easier by the decision not to contest the facts set out in the statement of objections. Account had already been taken of that in the form of a 20% reduction in the amount of the fine.

VI — Costs

307. Since I conclude that this appeal is unfounded in its entirety, I propose that the appellant should be ordered to pay the costs.

VII — Conclusion

308. In the light of the above, I propose that the Court should:

— declare the present appeal unfounded in its entirety;

— order Dalmine SpA to pay the costs.