OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 15 May 2008 [1]

Table of contents

1 — Original language: German.

I — Introduction

1. This case concerns an appeal brought by Archer Daniels Midland Company ('ADM' or 'the appellant') against the judgment of the Court of First Instance of the European Communities of 27 September 2006 in Case T-329/01 *Archer Daniels Midland* v *Commission* ('the contested judgment'). In the contested judgment, the Court of First Instance dismissed ADM's action for annulment, which was directed essentially against two articles of Commission Decision C(2001) 2931 final of 2 October 2001 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/E-1/36.756 — Sodium Gluconate; 'the decision at issue').

2. It concerns the consequences of ADM's participation, which is not essentially at issue, in a cartel in the first half of the 1990s in respect of the sodium gluconate market, in particular in the form of a price cartel. The case displays certain parallels with Case C-397/03 P *Archer Daniels Midland and Others* v *Commission*, which concerned a cartel — also in the first half of the 1990s — in respect of the market for amino acids, in particular lysine. [2]

3. The pleas put forward by ADM before the Court of First Instance, all of which relate to the setting of the fine imposed on it, concern

2 — Case C-397/03 P [2006] ECR I-4429.

(i) whether the relevant Commission Guidelines [3] on the method of setting fines ('the 1998 Guidelines') apply to this case, (ii) the gravity of the infringement, (iii) the duration of the infringement, (iv) the existence of attenuating circumstances, (v) ADM's cooperation during the administrative procedure and (vi) observance of the rights of the defence.

4. By its appeal, ADM claims that the contested judgment should be set aside in part and that the fine imposed by the decision at issue should be cancelled or substantially reduced.

5. The 1998 Guidelines, even though not directly and formally challenged as such, are once again [4] a cardinal theme of the complaints. [5]

3 — 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.

4 — The 1998 Guidelines and their application have already been the subject of the case-law of the Court of First Instance and the Court of Justice on several occasions. Doubts as to the lawfulness of those guidelines and their application to past situations have been dismissed by the Court of Justice in a number of judgments; see, in particular, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425; *Archer Daniels Midland and Others* v *Commission*, cited above in footnote 2; and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331.

5 — In the appeal, ADM itself describes the decision at issue as the 'high-water mark of the excesses' (referring to the determination of fines in accordance with the 1998 Guidelines).

II — Legal framework

6. Article 81 EC prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

A — *Regulation No 17*

7. Article 15(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty ('Regulation No 17'), [6] entitled 'Fines', provides:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of

6 — OJ, English Special Edition 1959-1962, p. 87, as last amended by Regulation (EC) No 1216/1999 (OJ 1999 L 148, p. 5).

account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) or Article [82] of the Treaty;

…

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

8. Regulation No 17 has since been replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [7] which, according to Article 45 of the latter regulation, has applied since 1 May 2004.

B — *Guidelines*

9. The Commission's 1998 Guidelines [8] state by way of introduction:

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

10. They then explain that the new method of determining the amount of a fine will adhere to rules which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances. The rules for determining the fine which then follow consist of a number of steps:

7 — OJ 2003 L 1, p. 1.

8 — See Introduction above.

11. Under Section 1 of the 1998 Guidelines, the Commission will first determine the basic amount of the fine 'according to the gravity and duration of the infringement'. With regard to the first-mentioned aspect, infringements will be put into one of three categories: 'minor', 'serious' and 'very serious' infringements, according to their nature, their actual impact on the market, where this can be measured, and the size of the relevant geographic market (Section 1(A) of the 1998 Guidelines). Criteria for the classification of infringements are set out for each of those three categories. In Section 1(B) of those guidelines, when account is taken of duration, a distinction will be made between infringements of short duration (in general, less than one year), medium duration (in general, one to five years) and long duration (in general, more than five years).

12. After the basic amount has been determined, the 1998 Guidelines provide, in Sections 2 and 3, that it must be examined whether that amount should be increased on account of aggravating circumstances [9] or reduced on account of attenuating circumstances, including 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)'. [10] The next step (Section 4 of the 1998 Guidelines) provides for application of the Notice of 18 July 1996 on the non-imposition or reduction of fines. [11]

13. Section 5(a) of the 1998 Guidelines provides inter alia:

'It goes without saying that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17.'

14. In 2006, the 1998 Guidelines were replaced by a new version [12] ('the 2006 Guidelines'). These are applied in cases where a statement of objections is notified after the

9 — Section 2 of the 1998 Guidelines provides that the basic amount will be increased where there are aggravating circumstances. Such circumstances may, for example, include the role of leader in, or instigator of, the infringement.

10 — Under Section 3 of the 1998 Guidelines, further attenuating circumstances include, for example, an exclusively passive or 'follow-my-leader' role in the infringement.

11 — OJ 1996 C 207, p. 4. It sets out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them ('the leniency notice'). It was superseded by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

12 — Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (Text with EEA relevance), OJ 2006 C 210, p. 2.

date of publication of the Guidelines in the Official Journal (1 September 2006). [13]

III — Facts

15. The following facts are apparent from the contested judgment:

16. ADM is the parent company of a group of companies which operate in the cereal and oil seed processing industry. ADM entered the sodium gluconate market in 1990.

17. Sodium gluconate is a chelating agent, products which inactivate metal ions in industrial processes. Those processes are used, inter alia, in industrial cleaning (bottle washing, utensil cleaning), surface treatment (de-rusting, degreasing, aluminium etching) and water treatment. Chelating agents are thus used in the food industry, the cosmetics industry, the pharmaceutical industry, the paper industry, the concrete industry and in various other industries. Sodium gluconate is sold worldwide and competing undertakings have a worldwide presence.

18. In 1995, total sales of sodium gluconate on a worldwide level were around EUR 58.7 million and sales in the European Economic Area (EEA) around EUR 19.6 million. At the material time, almost all of the sodium gluconate produced worldwide was in the hands of five undertakings, namely (i) Fujisawa Pharmaceutical Co. Ltd ('Fujisawa'), (ii) Jungbunzlauer AG ('Jungbunzlauer'), (iii) Roquette Frères SA ('Roquette'), (iv) Glucona vof ('Glucona'), a joint venture controlled jointly, until December 1995, by Akzo Chemie BV, a wholly-owned subsidiary of Akzo Nobel NV ('Akzo'), and Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA ('Avebe') and (v) ADM.

19. In March 1997, the United States Department of Justice informed the Commission that following an investigation into the lysine and citric acid markets, an investigation had also been opened into the sodium gluconate market. In October and December 1997 and February 1998, the Commission was informed that Akzo, Avebe, Glucona, Roquette and Fujisawa acknowledged that they had participated in a cartel to fix the price of sodium gluconate and to allocate sales volumes of the product in the United States and elsewhere. Pursuant to agreements entered into with the

13 — Point 38 of the 2006 Guidelines.

United States Department of Justice, those undertakings and ADM were fined by the United States authorities. The fine imposed on ADM with regard to the cartel on the sodium gluconate market was part of the global USD 100 million fine paid in the context of the lysine and citric acid cases.

20. In February 1998, the Commission sent requests for information to the main producers, traders and customers of sodium gluconate in Europe. That request was not sent to ADM. Following receipt of the request for information, Fujisawa approached the Commission and offered cooperation, in the course of which, on 12 May 1998, Fujisawa supplied a written statement and a file containing a summary of the cartel's history and a number of documents. In September 1998, the Commission carried out inspections at the premises of Avebe, Glucona, Jungbunzlauer and Roquette.

21. On 10 November 1998, the Commission sent a request for information to ADM. On 26 November 1998, ADM announced that it intended to cooperate with the Commission. During a meeting held on 11 December 1998, ADM provided a 'first instalment of [its] cooperation'. A statement from the company and documents relevant to the case were subsequently handed to the Commission on 21 January 1999.

22. On 2 March 1999, the Commission sent detailed requests for information to Glucona, Roquette and Jungbunzlauer. By letters of 14, 19 and 20 April 1999, those undertakings made it known that they wished to cooperate with the Commission and provided it with certain information about the cartel. On 25 October 1999, the Commission sent additional requests for information to ADM, Fujisawa, Glucona, Roquette and Jungbunzlauer.

23. On 17 May 2000, the Commission, on the basis of the information supplied to it, sent a statement of objections to ADM and the other undertakings concerned for infringement of Article 81(1) EC and Article 53(1) of the Agreement on the EEA ('the EEA Agreement'). ADM and all the other undertakings concerned submitted written observations in response to the Commission's objections. None of the parties requested an oral hearing, nor did they substantially contest the facts as set out in the statement of objections.

24. On 2 October 2001, after sending additional requests for information to ADM and the other undertakings concerned, the Commission adopted the decision at issue, the operative part of which includes the following provisions:

'*Article 1*

[Akzo], [ADM], [Avebe], [Fujisawa], [Jungbunzlauer] and [Roquette] have infringed Article 81(1) EC and — from 1 January 1994 onwards — Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the sodium gluconate sector.

The duration of the infringement was as follows:

— in the case of [Akzo], [Avebe], [Fujisawa] and [Roquette], from February 1987 to June 1995,

— in the case of [Jungbunzlauer], from May 1988 to June 1995,

— in the case of [ADM], from June 1991 to June 1995.

...

Article 3

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

(a) [Akzo]	EUR 9 million
(b) [ADM]	EUR 10.13 million
(c) [Avebe]	EUR 3.6 million
(d) [Fujisawa]	EUR 3.6 million

(e) [Jungbunzlauer] EUR 20.4 million

(f) [Roquette] EUR 10.8 million

…'

25. In the Decision, for the purpose of calculating the amount of the fines, the Commission applied both the method set out in the abovementioned 1998 Guidelines and the Leniency Notice.

26. First, the Commission determined the basic amount of the fine by reference to the gravity and duration of the infringement.

27. In that context, as regards the gravity of the infringement, the Commission found, first, that, taking into account the nature of the infringement, its actual impact on the EEA sodium gluconate market and the scope of the relevant geographic market, the undertakings concerned had committed a very serious infringement.

28. Next, the Commission considered that it was necessary to take account of the actual economic capacity of the offenders to cause significant damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, taking as its basis the relevant undertakings' worldwide turnover from the sale of sodium gluconate in 1995, the last year of the infringement, communicated by the relevant undertakings following the Commission's requests for information, and from which the Commission calculated the respective market shares of those undertakings, the Commission divided the undertakings into two categories. In the first category, it placed the undertakings which, according to the data in its possession, held worldwide shares in the sodium gluconate market above 20%, namely Fujisawa (35.54%), Jungbunzlauer (24.75%) and Roquette (20.96%). The Commission set a starting amount of EUR 10 million for those undertakings. In the second category, it placed the undertakings which, according the data in its possession, held worldwide shares in that market of below 10%, namely Glucona (approximately 9.5%) and ADM (9.35%). The Commission set the starting amount of the fine at EUR 5 million for those undertakings, that is to say, for Akzo and Avebe, which jointly owned Glucona, at EUR 2.5 million each.

29. In order to ensure that the fine had a sufficient deterrent effect and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law,

the Commission also adjusted the starting amount. Consequently, taking account of the size and the worldwide resources of the undertakings concerned, the Commission applied a multiplier of 2.5 to the starting amount for ADM and Akzo and therefore increased that starting amount, so that it was set at EUR 12.5 million as regards ADM and EUR 6.25 million as regards Akzo.

30. As regards the duration of the infringement committed by each undertaking, the starting amount was moreover increased by 10% per year, i.e. an increase of 80% for Fujisawa, Akzo, Avebe and Roquette, of 70% for Jungbunzlauer and of 35% for ADM.

31. Accordingly, the Commission set the basic amounts of the fines at EUR 16.88 million as regards ADM. As regards Akzo, Avebe, Fujisawa, Jungbunzlauer and Roquette, the basic amount was set at EUR 11.25 million, EUR 4.5 million, EUR 18 million, EUR 17 million and EUR 18 million respectively.

32. Second, on account of aggravating circumstances, the basic amount of the fine imposed on Jungbunzlauer was increased by 50% on the ground that the undertaking had acted as ringleader of the cartel.

33. Third, the Commission examined and rejected the arguments of certain undertakings, including ADM, that there were attenuating circumstances which should have applied in their case.

34. Fourth, under Section B of the Leniency Notice, the Commission allowed Fujisawa a 'very substantial reduction' (namely 80%) in the fine which would have been imposed if it had not cooperated. In addition, the Commission took the view that ADM did not meet the conditions laid down in Section C of the Leniency Notice and did not qualify for a 'substantial reduction' in the amount of its fine. Finally, under Section D of that notice, the Commission allowed a 'significant reduction' in the fine for ADM and Roquette (40% each) and for Akzo, Avebe and Jungbunzlauer (20% each).

IV — Proceedings before the Court of First Instance and the contested judgment

35. In 2001, five of the undertakings on which fines had been imposed, including ADM, brought actions against the decision at issue. ADM's application was lodged at the Registry of the Court of First Instance on 21 December 2001.

36. In its application, ADM claimed that the Court should annul Article 1 of the decision at issue in so far as it pertained to it, or at least to the extent that it found that it was party to an infringement after 4 October 1994. In addition, it claimed that the Court should annul Article 3 of the decision at issue in so far as it pertained to ADM; in the alternative, that the Court should annul or substantially reduce the fine imposed on ADM. Finally, ADM claimed that the Court should order the Commission to pay the costs.

37. By the contested judgment, the Court dismissed the action and ordered ADM to pay the costs. According to the acknowledgement of receipt, the judgment was notified to ADM on 2 October 2006.

V — Proceedings before the Court of Justice

38. By its appeal lodged at the Registry of the Court of Justice on 11 December 2006, [14] ADM claims that the Court should:

— (i) set aside the judgment in so far as it dismisses the application brought by ADM in respect of the decision;

— (ii) annul Article 3 of the decision in so far as it pertains to ADM;

— (iii) in the alternative to (ii), modify Article 3 of the decision to reduce further or cancel the fine imposed on ADM;

— (iv) in the alternative to (ii) and (iii), refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice as to the law;

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

39. The Commission contends that the appeal should be dismissed and that the appellant — ADM — should be ordered to pay the costs.

14 — The appeal was lodged at the Court Registry by fax on 11 December 2006 and in the original on 15 December 2006. Since, under the first paragraph of Article 56 of the Statute of the Court of Justice, an appeal may be brought within two months of the notification of the decision appealed against, which, in this case, according to the acknowledgement of receipt, took place on 2 October 2006, the date of lodgment of 11 December 2006, allowing for the extension on account of distance by a single period of 10 days under Article 81(2) of the Rules of Procedure of the Court of Justice, is within the time-limit.

VI — The appeal

40. ADM relies on 12 grounds of appeal against the contested judgment. In the appeal, those complaints, all of which relate to the amount of the fine imposed, have been placed, according to their content, in four categories: infringements of various principles governing the calculation of the fine, infringements in connection with the criterion of the cartel's market impact, infringements in connection with the question of termination of the cartel and, finally, in the alternative, an infringement with regard to taking into account an attenuating circumstance.

41. For the purposes of the examination to be carried out, I think it is useful, because of the connected subject-matter (which I shall specify briefly at the relevant points below), to group the 12 grounds of appeal put forward by the appellant somewhat differently from the grouping suggested by it, without fundamentally altering the sequence chosen by it for their presentation in the appeal.

42. I shall summarise and examine the grounds of appeal in six sections based on subject-matter:

(a) failure to observe a supposedly mandatory criterion for the calculation of fines, namely the criterion of 'necessity' when raising the level of fines, and failure to state reasons in that regard (first and second grounds of appeal);

(b) disregard of EEA-wide product turnover as the starting point for the calculation of fines (third ground of appeal);

(c) infringement of the principle of equal treatment in the calculation of the fine (fourth ground of appeal);

(d) errors of law in the determination of the cartel's market impact (fifth, sixth and seventh grounds of appeal);

(e) errors of law in regard to the date of termination of the cartel (8th, 9th, 10th and 11th grounds of appeal);

(f) errors of law in the examination of the attenuating circumstance of termination of the infringement — failure to observe the principle that self-imposed rules must be followed (12th ground of appeal, put forward in the alternative).

43. By way of introduction, I would like to make in advance some general observations on the scope of review on appeal, in particular

in view of the fact that all of the grounds of appeal put forward here ultimately concern the setting of the amount of the fine imposed on ADM.

44. In principle, under Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal to the Court of Justice is limited to points of law. Consequently, there can, in principle, be no fresh examination of the facts. [15]

45. With regard to the fines imposed pursuant to Article 15(2) of Regulation No 17, it should be noted that, under Article 229 EC, the Court of First Instance has unlimited jurisdiction. In appeal proceedings, it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law. [16] In this respect also, only points of law may be covered by the review.

46. On appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the Court of First Instance took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Articles 81 EC and 82 EC and Article 15 of Regulation No 17 and, second, to ascertain whether the Court of First Instance responded to the requisite legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced. [17]

A — *Failure to observe a supposedly mandatory criterion for the calculation of fines, namely the criterion of 'necessity' when raising the level of fines, and failure to state reasons in that regard (first and second grounds of appeal)*

47. I summarise below the first two grounds of the appeal: the complaint of failure to state reasons as to the necessity of raising the level of fines in comparison with previous practice and that of failure to observe the mandatory criteria supposedly developed by the Court of Justice in *Musique Diffusion française and Others* v *Commission* [18] (referred to by the appellant as '*Pioneer*').

15 — The Court of Justice has only limited jurisdiction to consider questions of fact, in particular with regard to a distortion of the evidence, an issue which will need to be examined later (see below, point 202 of this Opinion).

16 — See, for settled case-law, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 128 and 129; *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 128; and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 98.

17 — *Groupe Danone* v *Commission*, cited above in footnote 4, paragraph 69 with further references.

18 — Joined Cases 100/80 to 103/80 [1983] ECR 1825.

1. Introductory observations

48. With regard to the calculation of fines, it should first be remembered that the framework for this — in respect of the material time in this case [19] — is essentially set by Article 15(2) of Regulation No 17. Under that provision, the Commission may impose fines on undertakings where they either intentionally or negligently infringe Article 81(1) EC. In addition, it is clear from Article 15(2) of Regulation No 17 that, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

49. According to the Court's case-law, the penalties provided for in Article 15(2) of Regulation No 17 have a twofold purpose which consists, in particular, in suppressing illegal activities [20] and preventing their recurrence. [21] That is because the Commission's power — in the context of the task of supervision conferred on it under Article 81 EC — to impose fines on undertakings which have, intentionally or negligently, infringed Article 81(1) EC or Article 82 EC, not only includes the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. [22]

50. Article 15(2) of Regulation No 17 contains little by way of concrete requirements; as already mentioned, they are essentially the criteria of the 'gravity' and 'duration of the infringement'. In addition, there is the upper limit for fines of 10% of the turnover in the preceding business year. In individual

19 — For Commission decisions adopted from 1 May 2004 onwards, the relevant legislation is no longer Regulation No 17 but Regulation No 1/2003; see above in the 'Legal framework' section.

20 — In 'suppressing' them without being a 'punishment'; see, on this question, the Opinion of Advocate General Gand in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, 706, 726, in regard to Article 15(4) of Regulation No 17, according to the wording of which fining decisions are 'not of a criminal law nature'. With regard to the classification of fining decisions as administrative penalties which must nevertheless satisfy fundamental principles of criminal law and criminal procedural law, in so far as, in terms of their object and effect, they are similar to criminal law in character, such as cartel fines, see Schwarze, 'Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht', EuZW 2003, p. 261 et seq. See also 'area … at least akin to criminal law' in the Opinion of Advocate General Kokott in Case C-280/06 *ETI and Others* [2007] ECR I-10893, point 72.

21 — Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 172 to 176 [173], and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 22.

22 — See, on this point, *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18, paragraph 105, with regard to Articles 85(1) and 86 of the EC Treaty, as they were numbered at that time, and *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 170.

cases, the fixing of the amount of the fine is within the Commission's discretion; for that purpose, the Commission is explicitly allowed a 'wide discretion' or 'particularly wide discretion', [23] which is nevertheless subject to certain rules, which are not only fixed by Regulation No 17, but also follow in part from the general principles laid down in the case-law, [24] the observance of which the Court must ensure.

51. In accordance with settled case-law, the Commission has such a discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account. [25]

52. As already observed, the fixing of fines is subject to the unlimited jurisdiction of the Court of First Instance, and the review by the Court of Justice is then limited to the consideration of points of law. [26]

53. At the end of the 1970s, with the decision which formed the basis of the judgment in *Musique Diffusion française and Others* v *Commission*, [27] the Commission introduced a policy of high financial penalties for serious competition infringements. [28] In its judgment in that case, the Court held as follows with regard to raising the level of the fine: 'the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy'. [29]

54. As regards the setting of the amount of the fine, the Commission adopted, in 1998, its first guidelines — the 1998 Guidelines —, later the 2006 Guidelines. After the adoption of the

23 — Inter alia, Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 36, and *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 172.

24 — See, inter alia, Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 87; Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, point 59; and Opinion of Advocate General Bot in *Britannia Alloys & Chemicals* v *Commission*, cited above in footnote 21, point 127 et seq.

25 — Inter alia: *Ferriere Nord* v *Commission*, cited above in footnote 16, paragraph 33, and *Groupe Danone* v *Commission*, cited above in footnote 4, paragraph 37.

26 — See above, points 44 to 46 of this Opinion.

27 — Cited above in footnote 18.

28 — Dannecker/Biermann: 'Kommentierung Verordnung 1/2003', paragraph 93, in: Immenga/Mestmäcker, *Wettbewerbsrecht*, Vol. 1 EG Teil 2, 4th edition; see also, in this regard, in *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18, the submissions of the applicants in that case and the Commission in paragraphs 101 to 103.

29 — Cited above in footnote 18, paragraph 109.

1998 Guidelines, the amount of the fines imposed was again increased. [30]

55. Although such guidelines are not regarded by the case-law as rules of law which the administration is always bound to observe, they are nevertheless viewed as rules of conduct, which indicate the administrative practice to be followed and from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. The Court of Justice has pointed out that, in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission has imposed a limit on the exercise of its discretion. It cannot depart from the guidelines under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects. [31]

56. In the case-law of the Court of Justice, the 1998 Guidelines have been judged entirely favourably: the fact that the Guidelines determine, generally and abstractly, the method of assessing the fines imposed under Article 15 of Regulation No 17 ensures legal certainty on the part of the undertakings. [32] Although the Guidelines do not constitute the legal basis for setting the amount of the fine, they do however clarify the application of Article 15(2) of Regulation No 17. [33] And they are compatible not only with Article 15(2) of Regulation No 17, but also with the principles of non-retroactivity, equal treatment and proportionality. [34]

2. Requirement to state reasons as to the necessity of raising the level of fines

(a) Arguments of the parties

57. The first two grounds of appeal overlap to a considerable extent and I shall therefore examine them together.

30 — See, for more detail, Schwarze, cited above in footnote 20, p. 263.

31 — See, for the leading case, *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 209 et seq.

32 — Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 206, and *Groupe Danone* v *Commission*, cited above in footnote 4, paragraph 23.

33 — *Groupe Danone* v *Commission*, cited above in footnote 4, paragraph 28, and *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraphs 211, 213 and 214.

34 — *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 156 et seq. and 234 et seq. See also, in this regard, Debroux: 'L' "imprévisibilité transparente": La politique de sanction de la Commission en matière de cartels', *Concurrences* 2006, p. 2 et seq., p. 5; Völcker: 'Developments in EC competition law in 2005 — an overview', in: CMLRev 2006, p. 1409 et seq., p. 1416 et seq. Also affirmatively, as regards compatibility, Opinion of Advocate General Tizzano in *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, point 66 et seq.

58. With reference to paragraphs 38 to 50 of the contested judgment, the appellant submits that the Court of First Instance made an error of law by rejecting, without a statement of reasons, ADM's argument that the increase in fines resulting from the Guidelines is not necessary in order to ensure the implementation of EC competition policy. Moreover, in view of such a serious and retroactive increase as in this case, a particularly convincing statement of reasons is necessary. There is no infringement of the principle of non-retroactivity of criminal laws only where an increase in the level of fines was foreseeable. By contrast, in this case, the Commission did not use the necessity of the increase in the fine as its criterion, but was guided solely by Article 15 of Regulation No 17. Furthermore, the 1998 Guidelines themselves do not take into account a criterion of necessity of the increase in the fine for the purpose of implementing EC competition policy.

59. In its second ground of appeal, the appellant links that argument of a defective statement of reasons with the further argument that that also implies a substantial failure to observe the criteria developed by the Court of Justice in *Musique Diffusion française and Others* v *Commission*.[35] The Court of First Instance applied those criteria to the present case in a legally defective manner. The Commission did not plead a requirement of EC competition policy which justified the increase in fines in general or in this specific case, and the Court of First Instance did not demonstrate such requirements.

35 — Cited above in footnote 18.

60. Finally, the appellant supplements those two complaints put forward by it with a reference to the 2006 Guidelines, which are the result of the Commission's experience with guidelines in this sphere of activity and are ultimately, according to the Commission, the most suitable method. In the appellant's view, a lack of justification for the amount of the fines set using the 1998 Guidelines is made obvious, inter alia, by the current 2006 Guidelines. It submits that, in a case such as the present one, under those guidelines, only 25% of the amount of the fine imposed here would have been provided for. Even if the Commission had pleaded a requirement of EC competition policy as the basis for the increase in the fines, that increase could not be regarded as justified in the light of the 2006 Guidelines — and of the lower fines provided for in them.

61. The Commission is of the view that both grounds of appeal are in any case unfounded. The second ground of appeal is inadmissible simply because it is too vague and general in its formulation; in any case, the arguments are essentially the same as those of the first ground of appeal. The Court of First Instance responded in the contested judgment to the appellant's arguments relating to the application of the 1998 Guidelines to this case. It held that those guidelines were in principle applicable in this case and then examined whether they were actually applied in a legally correct manner. It is illogical and unnecessary to require a further, supplementary examination of whether the resultant increase in the amount of fines was necessary.

(b) Legal assessment

62. I do not share the doubts expressed by the Commission as to the admissibility of the second ground of appeal. It is clear that the appellant is alleging that the Court of First Instance failed to apply relevant case-law, namely an assessment criterion resulting from *Musique Diffusion française and Others* v *Commission*, to this case. [36]

63. As regards the ground of appeal alleging infringement of the obligation to state reasons, it should be recalled that this obligation, which is codified in Article 253 EC, is intended, on the one hand, to enable the persons concerned to ascertain, in a clear and unequivocal fashion, the reasons for the measure in order to defend their rights and, on the other, to enable the Community judicature to exercise its power of review on that basis. [37] The actual extent of the obligation to state reasons depends on the circumstances of each case. [38]

64. Finally, it should be borne in mind that the extent of the obligation to state reasons is a question of law reviewable by the Court of Justice on appeal, since a review of the legality of a decision carried out in that context must necessarily take into consideration the facts on which the Court of First Instance based its conclusion as to the adequacy or inadequacy of the statement of reasons. [39]

65. Within those parameters, it is necessary to consider what is to be understood in the present context by a sufficiently clear and unequivocal statement of reasons, in order to be able to establish whether the contested judgment conforms to that understanding.

66. The allegation of infringement of the obligation to state reasons refers here to the criterion of 'necessity' when raising the level of fines. The appellant is of the view that the obligation to provide a statement of reasons in this connection results from the judgment in *Musique Diffusion française and Others* v *Commission* [40] cited by it.

67. An analysis of the judgment in *Musique Diffusion française and Others* v *Commission* shows that, on that occasion, the Commission had stated reasons for the necessity of the increase in the level of the fines: such a level was justified by the nature of the infringement. A higher level of fines was particularly necessary for the most serious infringements where, as in that case, the principal aim of the infringement was to maintain a higher level of

36 — Cited above in footnote 18.

37 — See, for settled case-law, Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 124 with further references.

38 — Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 55 with further references.

39 — See *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 453 with further references.

40 — *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18.

prices for consumers. Many undertakings carried on conduct which they knew to be contrary to Community law because the profit which they derived from their unlawful conduct exceeded the fines so far imposed. Conduct of that kind could only be deterred by fines which are heavier than in the past.

68. In its subsequent legal assessment, the Court inferred from the Commission's task of supervision [41] and also, in particular, from its consequent duty to guide the conduct of undertakings in the light of the rules of Community law on competition, [42] 'that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community'. [43] The Commission was right to classify the infringements concerned as very serious infringements. It was also open to the Commission to have regard to the fact that practices of that nature, although they had long been established as being unlawful, were still relatively frequent on account of the profit that could be derived from them. Consequently, it was open to the Commission to raise the level of fines so as to reinforce their deterrent effect. [44] The previous level of fines was not binding for the future; on the contrary, the proper application of the Community competition rules required that the Commission might at any time adjust that level, within the limits set by Regulation No 17, to the needs of Community competition policy. [45]

69. Accordingly, in that case, the Court considered the aspect of the 'necessity of raising the level of fines', which is to be examined here, under the criterion of the 'gravity of the infringement' resulting from Article 15(2) of Regulation No 17. In addition to the 'particular circumstances of the case', the Court took into account in the assessment of that criterion 'the context in which the infringement occurs' and the need to ensure deterrent effect. In so doing, it accepted general reasons of competition policy as an explanation for the increase in the level of fines and even regarded the possibility of raising the level as necessary in the interests of the proper application of the Community competition rules.

70. Since, in this connection, the Court of Justice has not required the Commission to present a more detailed analysis of the necessity or to produce a statement of reasons referring to the individual case, it has in practice left the question of necessity to the discretion of the Commission [46] which must exercise it within the limits of the criterion of 'gravity of the infringement' resulting from Article 15(2) of Regulation No 17.

41 — See above, point 49 of this Opinion.

42 — *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18, paragraph 105.

43 — *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18, paragraph 106.

44 — *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18, paragraphs 107 and 108.

45 — *Musique Diffusion française and Others* v *Commission*, cited above in footnote 18, paragraph 109; see also, in that regard, point 53 of this Opinion.

46 — With regard to the Commission's wide discretion, see above, point 50 of this Opinion.

71. That case-law, which was rendered in 1983 in relation to a Commission decision dating from before that time (that is, at a time when neither the 1998 Guidelines nor anything comparable existed), continued to be followed by the Court after those guidelines entered into force and was adapted to the changed situation.

72. In the leading case on the 1998 Guidelines, *Dansk Rørindustri and Others* v *Commission*, [47] the Court of Justice reiterated its case-law that the previous level of fines was not binding for the future. [48] Undertakings could not acquire a legitimate expectation either in the level of fines previously imposed or in a method of calculating the fines. [49]

73. The Court emphasised that aspect in paragraph 229 of the judgment: 'Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past.'

74. The Court then went on unequivocally, in paragraph 230 of that judgment, to apply the case-law set out above to situations to which the 1998 Guidelines have been applied: 'That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines.' [50]

75. Moreover, according to settled case-law, when assessing the criterion of the 'gravity of the infringement', numerous factors must be taken into account, which also include the 'dissuasive effect of fines'. [51] That applies both to the imposition of fines in individual decisions and to their imposition by the

47 — See inter alia Debroux, cited above in footnote 34, p. 4. Defying widespread criticism, the Commission successfully defended the 1998 Guidelines and their application, as made clear, in particular, by the judgment in *Dansk Rørindustri and Others* v *Commission* (cited above in footnote 4) (Völcker: 'Rough justice? An analysis of the European Commission's new fining guidelines', in CMLRev. 2007, p. 1285 et seq., pp. 1285 and 1286).

48 — See above, points 53 and 68 of this Opinion.

49 — *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraphs 227 and 228. See also *Archer Daniels Midland and Others* v *Commission*, cited above in footnote 2, paragraphs 21 to 23. See also, in that regard, detailed analysis in the Opinions of Advocate General Tizzano in *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, points 159 to 165, and in *Archer Daniels Midland and Others* v *Commission*, cited above in footnote 2, points 66, 71 and 72.

50 — See also *Archer Daniels Midland and Others* v *Commission*, cited above in footnote 2, paragraph 24.

51 — 'The gravity of the infringement depends on numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up', inter alia Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 465, and *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 241. See also footnote 25 above.

application of rules of conduct of general application, such as the 1998 Guidelines.

76. In the light of the foregoing considerations, as an interim conclusion to the examination of the first two grounds of appeal, it does not follow from the judgment in *Musique Diffusion française and Others* v *Commission*, [52] cited by the appellant, that the Commission is required to give a detailed statement of reasons, or even one relating to the specific case, as to the necessity of raising the level of fines, which the Court of First Instance might have been required to take into consideration. That has also been demonstrated by the analysis of the subsequent case-law, in particular the leading case concerning the 1998 Guidelines, *Dansk Rørindustri and Others* v *Commission*. [53]

77. In the light of those requirements, the contested judgment of the Court of First Instance must now be analysed with regard to the allegation of failure to state reasons.

78. In the proceedings before the Court of First Instance — as evidenced by the contested judgment [54] —, the issues connected with raising the level of the fines were embedded in the fundamental question of whether the Guidelines apply, and specifically in allegations of infringement of the principles of legal certainty and non-retroactivity of penalties.

79. In paragraphs 38 to 50 of the contested judgment, which are cited by the applicant, the Court then dealt first with the principle of non-retroactivity, in particular as regards the 1998 Guidelines as an instrument of competition policy and their legal effects. It then pointed out that the main innovation which the Guidelines entail lies in the method of determining fines on a tariff basis. [55] Next, in paragraphs 44 to 46, it reiterated the case-law set out in detail above, [56] according to which the Commission is not estopped from raising the level of fines by reference to that applied in the past, within the limits indicated in Regulation No 17, if that is necessary to ensure the implementation of Community competition policy, both in the context of individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines. Finally, in paragraph 47 of the contested judgment, the Court states: 'Thus, without prejudice to the arguments set out in paragraph 99 et seq. below, ADM is wrong to contend in essence that, in the context of the cartel, the increase in the level of the fines by the Commission is manifestly disproportionate to the objective of

52 — Cited above in footnote 18.
53 — Cited above in footnote 4, paragraphs 227 and 228.
54 — Paragraph 31 et seq.
55 — Contested judgment, paragraph 43, with reference to *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 225: 'The main innovation in the Guidelines consisted in taking as a starting point for the calculation a basic amount, determined on the basis of brackets laid down for that purpose by the Guidelines; those brackets reflect the various degrees of gravity of the infringements but, as such, bear no relation to the relevant turnover. The essential feature of that method is thus that fines are determined on a tariff basis, albeit one that is relative and flexible.'
56 — See above, points 68, 72 and 74 of this Opinion.

ensuring the implementation of competition policy.'

80. The aforementioned paragraph 99 et seq. contains an examination of the plea alleging infringement of the principle of proportionality. The Court's observations concern the setting of the fine on the basis of the gravity and duration of the infringement, in particular as regards the importance of the market factor. It is true that those paragraphs contain no explicit observations on the necessity of the increase in the fine. However, the above analysis shows that, in accordance with the established requirements, [57] the Court examined the question of the raising of the level of fines in the context of the criterion of 'gravity of the infringement'.

81. In the light of all those considerations, the Court of First Instance, in accordance with the case-law of the Court of Justice, correctly examined the criterion of the 'necessity' of an increase in the level of fines, resulting from the judgment in *Musique Diffusion française and Others* v *Commission*, [58] in the context of the criterion of 'gravity of the infringement' and did not connect the latter criterion with an additional requirement to state reasons going beyond the 1998 Guidelines. The judgment in *Dansk Rørindustri and Others* v *Commission* shows that this was also not precluded by the principle of non-retroactivity of criminal laws.

82. It should be pointed out, moreover, that both grounds of appeal being examined here actually amount, in essence, even though the appellant does not explicitly say so, to a questioning of the lawfulness of the method of calculating the amount of fines set out in the 1998 Guidelines. However, the Court has recognised the compatibility of those guidelines with Article 15(2) of Regulation No 17, with the principle of non-retroactivity, with the principle of equal treatment and with the principle of proportionality. [59]

83. To require additionally that, in every individual decision, the general and abstract assessment policy underlying the Guidelines be justified afresh and with reference to the particular case would amount, in essence, to undermining the methods of calculation set out in the Guidelines. [60]

84. In passing, I would nevertheless point out that, notwithstanding the case-law of the Court of Justice, according to which the method of calculating fines set out in the 1998 Guidelines is compatible with the requirements of Article 15 of Regulation No 17, [61] the criticism of that method,

57 — See above, point 75 of this Opinion.

58 — Cited above in footnote 18.

59 — *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 156 et seq., 234 et seq. See also, in that regard, point 26 of this Opinion.

60 — That finding is further underlined by the 'other side of the coin', namely the aspect explained above concerning the Commission's commitment to be bound by the Guidelines in force at a given time (see above, point 55 of this Opinion): with regard to the application of the assessment criteria, additional reasons must be given, not in the case of decisions made pursuant to the Guidelines, but in the case of decisions made by way of derogation from the Guidelines in force at a given time (also, on this question, Demetriou/Gray: 'Developments in EC competition law in 2006 — an overview', in: CMLRev. 2007, p. 1429 et seq., p. 1452).

61 — See above, points 56 and 82 of this Opinion.

particularly as regards lack of transparency, has not been silenced, [62] even though some systematisation of the practice followed in applying it is noted. [63] With the entry into force of the 2006 Guidelines, many of those points of criticism have been dealt with, since the method has been changed; this applies inter alia to the classification of infringements in Section 1(A) of the 1998 Guidelines as 'minor', 'serious' and 'very serious infringements', the so-called 'determination on a tariff basis'. [64] However, the fact that the Commission enjoys a wide margin of discretion in the determination of fines has remained unchanged. [65] Although, under Article 229 EC and Article 15 of Regulation No 17, the Court's unlimited jurisdiction to review that discretion is established, [66] it is nevertheless desirable, for the purposes of legal certainty, that administrative discretion should have the benefit of clear criteria for the assessment of fines. [67]

85. With regard to the appellant's argument that the 2006 Guidelines should be applied, it should be added that there is no reason why, in addition to applying the 1998 Guidelines, the 2006 Guidelines which later superseded them should be applied and why the increase should be viewed in the light of the 2006 Guidelines. [68] The Commission decision at issue here was adopted on 2 October 2001. At that time, the 1998 Guidelines were relevant. The 2006 Guidelines apply to cartel cases only from 1 September 2006 onwards and are therefore of no account in these appeal proceedings.

86. Nor are they capable, as the anticipation of a later change in the Commission's policy, of retroactively clarifying the latter's discretion.

87. And finally, if the Court of Justice were to take them into account, that would amount to nothing other than the substitution, on grounds of fairness, by the appellate court of its own assessment for the assessment of the Court of First Instance. [69]

62 — See inter alia Dannecker/Biermann, cited above in footnote 28, paragraph 126, p. 1260. Völcker ('Rough justice', cited above in footnote 47, p. 1289) believes there are indications that changes which the Commission made in the 2006 Guidelines in contrast to the 1998 Guidelines, and in any case the abolition of 'determination on a tariff basis', are also attributable to the fact that, despite confirmatory case-law of the Court of First Instance and the Court of Justice, the criticism regarding lack of transparency and arbitrariness of the 1998 Guidelines did not stop. Soyez: 'Die Bußgeldleitlinien der Kommission — mehr Fragen als Antworten', EuZW 2007, pp. 596-600, sums up the situation to the effect that the proclaimed objective of the 1998 Guidelines, of increasing the transparency and impartiality of the Commission's decisions, was not achieved and that, retrospectively, many representatives of European competition authorities even viewed the 1998 Guidelines as a pure 'lottery' (ibid., p. 596).

63 — Dannecker/Biermann (cited above in footnote 28, paragraph 126).

64 — On this question, see also below, at point 90 of this Opinion.

65 — See footnote 50 of this Opinion; see also point 2 in the introduction to the 2006 Guidelines.

66 — See above, point 45 of this Opinion.

67 — An assessment of the extent to which the 2006 Guidelines are already fulfilling this recommendation, formulated by Schwarze (cited above in footnote 20, in particular p. 269) against the background of the 1998 Guidelines, is outside the scope of this Opinion.

68 — The appellant obviously puts forward this argument in the hope of receiving a lower fine. Some academic writings, on the other hand, assume that the Commission's warning that the 2006 Guidelines will, in some cases, entail a further raising of the level of fines is correct; see Demetriou/Gray (cited above in footnote 60, p. 1429); the problems of what, if any, purpose is served by a further increase are expounded by, inter alia, Völcker ('Rough justice', cited above in footnote 47, p. 1317).

69 — See above, point 45 of this Opinion.

88. The Court of First Instance therefore decided in a manner free from errors of law, in accordance with the requirements of the case-law of the Court of Justice, and gave a sufficiently clear and unambiguous statement of reasons for its decision. I therefore propose that the first and second grounds of appeal be rejected as unfounded.

B — *Disregard of EEA-wide product turnover as the starting point for the calculation of fines (third ground of appeal)*

1. Introductory observations

89. Attention should be drawn to the settled case-law, according to which the method of calculation set out in the Guidelines, in so far as it consists in taking as its starting point basic amounts which are not determined on the basis of the relevant turnover, does not infringe Article 15(2) of Regulation No 17. [70]

90. The main innovation in the 1998 Guidelines as compared with previous practice consisted in taking as a starting point for the calculation a basic amount determined on the basis of brackets laid down for that purpose by the Guidelines; those brackets reflect the various degrees of gravity of the infringements but, as such, bear no relation to the relevant turnover. The essential feature of that method is thus that fines are determined on a tariff basis, albeit one that is relative and flexible. [71]

91. Apart from in connection with the taking into account of 10% of the overall turnover of undertakings under Article 15(2) of Regulation No 17, [72] the term 'turnover' is not explicitly used in those guidelines. On the other hand, there are implicit references which are connected inter alia with the turnover of the undertakings. [73] Thus, the Guidelines do not preclude account being taken of the turnover not only as an upper limit, but also in the course of the procedure for the calculation of the fines. That is because turnover is a 'useful and important indication of the economic strength of an undertaking (total turnover) and of the impact on competition of its conduct (turnover in the relevant market)', [74] even though it represents only one

70 — *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraphs 243 to 312, and *Archer Daniels Midland and Others* v *Commission*, cited above in footnote 2, paragraph 34. Article 15(2) of Regulation No 17 contains the word 'turnover' without specifying it. Moreover, it is mentioned there only as a criterion for determining the maximum fine, and there is nothing in the wording of that provision which precludes the turnover from being used, not only for the maximum amount, but generally.

71 — *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, paragraph 225. See also M. Debroux, 'L' "imprévisibilité transparente"', footnote 34 above, p. 7.

72 — Or, in the case of agreements which are illegal under the ECSC Treaty, see Section 5(a) of the 1998 Guidelines.

73 — See only Section 1(A) of the 1998 Guidelines: 'It will also be necessary to take account of *the effective economic capacity* of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.'

74 — Opinion of Advocate General Tizzano in *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, point 71.

of the many criteria of appraisal which the Commission may take into account. [75]

2. Arguments of the parties

92. In this ground of appeal, the point at issue for ADM is the turnover in the relevant market, which the Commission, in the decision at issue, considered to be the '*world-wide*' *product turnover*, whereas the appellant is of the opinion that the relevant turnover is the '*EEA*' *product turnover*.

93. With reference, in particular, to paragraphs 75 to 81 of the contested judgment, the appellant complains that the Court of First Instance infringed legal principles applicable to the calculation of fines by permitting the Commission, in the decision at issue, to disregard completely the *relevant EEA-wide product turnover* as an appropriate starting point for the calculation of the fine. In the decision at issue, EEA-wide product turnover is, wrongly in law, not used either as a starting point for the calculation or at any stage subsequently to determine the fine. As a result, the fine is many times higher than the relevant EEA product turnover. [76]

94. The appellant accepts that the contested judgment correctly summarises, in paragraph 78, the principles applicable to the setting of fines. However, it claims that the Court of First Instance erred in law in then failing to apply its legal findings to the case before it.

95. The appellant states that the 2006 Guidelines demonstrate how the EEA-wide product turnover should be used as an appropriate starting point in order to assess the damage to competition on the relevant product market within the Community and the relative importance of the participants in the cartel in relation to the products concerned. With such a method of calculation, only a fraction of the fine at issue would have been imposed on ADM.

96. The Commission points out that the Court of First Instance alone has jurisdiction to review how in each particular case the

75 — See Opinion of Advocate General Tizzano in *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4, point 71.

76 — Moreover, the appellant previously raised a similar allegation in *Archer Daniels Midland and Others* v *Commission* (judgment cited above in footnote 2), but on that occasion it was linked with the submission that the principle of proportionality was infringed if the criterion applied was not the EEA-wide turnover (see Opinion of Advocate General Tizzano in *Archer Daniels Midland and Others* v *Commission*, cited above in footnote 2, point 128 et seq.).

Commission appraised the gravity of unlawful conduct.[77] The Court of First Instance took into consideration, in a legally correct manner, all the relevant factors and responded to ADM's arguments. The ground of appeal should therefore be rejected.

3. Contested judgment and legal assessment

97. In paragraphs 75 to 81 of the contested judgment, cited by the appellant, the Court of First Instance examines the plea alleging that the principle of proportionality was infringed, inasmuch as the fine imposed exceeds ADM's turnover in sales of that product in the EEA during the period of the cartel, and rejects it. In paragraphs 76 and 77, the Court refers to the settled case-law on assessing the gravity of an infringement, pointing out that it is permissible, for the purpose of fixing a fine, to have regard both to the total turnover of the undertaking and to the market share of the undertakings concerned on the relevant market, although it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and the fixing of an appropriate fine cannot therefore be the result of a simple calculation based on total turnover

98. In paragraphs 78 and 79 of the contested judgment, the Court observes that turnover in the relevant product is only one among a number of criteria to be taken into account. Contrary to the ADM's submission, if an assessment of the proportionality of the fine were confined merely to the correlation between the fine imposed and the relevant product turnover, that would confer disproportionate importance on that criterion.

99. Paragraph 80 goes on to state: 'In any event, the mere fact, relied on by ADM, that the fine imposed exceeds turnover through sales of that product in the EEA during the period of the cartel, or even exceeds it significantly, is not sufficient to show that the fine is disproportionate. It is necessary to assess the proportionality of that fine by reference to all the factors which the Commission must take into account when determining the gravity of the infringement, namely, the actual nature of the infringement, its actual impact on the relevant market and the scope of the geographic market. The merits of the Decision in relation to some of those criteria will be considered below, as they arise in ADM's arguments.'

100. It is thus apparent that it is not sufficient, for the purpose of assessing the merits of this allegation made by the appellant, to consider only the criticised paragraphs 75 to 81 of the contested judgment.

77 — Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 196.

101. For a better understanding, it is necessary, on the one hand, to refer to what the Court inferred from the decision at issue as regards the point under discussion here. In that regard, paragraph 59 of the contested judgment states, with respect to the Commission's assessment of the gravity of the infringement:

'For the purposes of assessing those elements, the Commission chose to rely on the worldwide sodium gluconate turnover of the undertakings concerned during the last year of the infringement, namely 1995. In this respect, the Commission found that "given [that the sodium gluconate market is] global, these figures g[a]ve the most appropriate picture of the participating undertakings' capacity to cause significant damage to other operators in the common market and/or the EEA" … The Commission added that, in its view, that approach was supported by the fact that this was a global cartel, the object of which was inter alia to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market. It found, moreover, that the worldwide turnover of any given party to the cartel also gave an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had that party not participated …'

102. Next, in paragraphs 82 to 87 of the contested judgment, the Court concludes that the Guidelines do not provide that the turnover figures of the undertakings concerned — whether the overall turnover or the relevant product turnover — constitute the starting point for calculating the fines and, still less, that they constitute the only relevant criteria for assessing the gravity of the infringement. However, the Commission may take account of turnover as one among a number of relevant factors, particularly where, in accordance with the third to sixth paragraphs of Section 1(A) of the 1998 Guidelines, the Commission adjusts the amount in order to ensure that the fines have a sufficiently deterrent effect.

103. It is clear from recitals 378 to 382 of the Decision, contrary to what ADM submits, that the Commission did indeed take account of the relevant product turnover of the parties concerned in that context. In order to apply that differential treatment to the undertakings concerned, the Commission relied on their worldwide sodium gluconate turnover during the last year of the infringement, namely 1995.

104. Paragraph 87 of the contested judgment then states: 'In the present case, the cartel is made up of undertakings which hold virtually the entire relevant product market at worldwide level. Moreover, the cartel concerns price-fixing and market-sharing by means of allocating sales quotas. In such a case, the Commission may legitimately rely on the

worldwide sodium gluconate turnover of the members of that cartel for the purpose of differentiating between the undertakings concerned. Since the objective of that differential treatment is to assess the effective economic capacity of offenders to cause damage to competition by their offending conduct and, therefore, to take account of their specific weight within the cartel, the Commission did not exceed its wide margin of assessment in finding that the worldwide market share of the respective members of the cartel was an appropriate indication.'

105. In the course of its further examination, the Court returns, in paragraphs 113 and 114, to the allegation of failure to take into account EEA-wide product turnover. In the context of considering whether there was an infringement of the principle of equal treatment as compared with the *Zinc phosphate* decision, [78] which the appellant had cited by way of comparison, the Court states in paragraph 113, inter alia, that 'the circumstances of the cartel to which the Decision relates differ from those in the *Zinc phosphate* decision. The zinc phosphate market cartel was limited to the territory of the EEA, whilst the sodium gluconate cartel was worldwide.' In paragraph 114, the Court goes on to state, inter alia, that 'the basic amount set by the Commission for the infringement committed by ADM in this instance is appropriate in the light of all the factors referred to by the Commission in the Decision and in the light of the assessment of some of those factors in this judgment.'

106. It follows that, contrary to the appellant's allegation, the Court not only summarised the relevant principles, but also applied the resultant findings to the particular case at issue here. In so doing, it responded to the argument relating to the taking into account of EEA-wide product turnover, [79] yet correctly in law regarded it as one criterion among several. It then explained that (and why) the turnovers of the cartel participants from their worldwide sales of soldium gluconate were ultimately the appropriate starting point for the calculation of the fine, thereby at the same time and implicitly explaining why the relevant EEA product turnover was not used. The Court therefore responded to the requisite legal standard to this argument put forward by the appellant.

78 — Commission Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — *Zinc phosphate*), OJ 2003 L 153, p. 1. That decision is the subject-matter of the judgment in *Britannia Alloys & Chemicals* v *Commission*, cited above in footnote 21.

79 — It should be noted that this argument of the appellant mentions two levels of disregard: The EEA-wide turnover was not used, 'either as a starting point' for the calculation or 'at any stage' subsequently to assess the fine. In so far as it is complained that the turnover in question was not used as the starting point for the calculation, that implies in essence a criticism of the 1998 Guidelines, in which the starting point specified for the calculation is clearly different; see above, points 1 and 90 of this Opinion.

107. Finally, the Court's assessment that 'the basic amount set by the Commission for the infringement committed by ADM in this instance is appropriate in the light of all the factors referred to by the Commission in the Decision and in the light of the assessment of some of those factors in this judgment' is not amenable to review on appeal. [80]

C — Infringement of the principle of equal treatment in the calculation of the fine (fourth ground of appeal)

1. Arguments of the parties

110. The appellant complains, with reference to paragraphs 107 to 113 of the contested judgment, that the Court of First Instance infringes the principle of equal treatment by finding that objective differences justify the difference in the amount of the fines as compared with the directly comparable *Zinc phosphate* case. [82]

108. In response to ADM's renewed attempt to apply the 2006 Guidelines as a corrective to the 1998 Guidelines, it must once again be stated that the 2006 Guidelines are not relevant here. [81]

111. First, the judgments cited by the Court in paragraphs 108 to 110 are not relevant. Once the Guidelines were adopted, it is settled case-law, in particular in paragraph 209 of the judgment in *Dansk Rørindustri*, that the Commission infringes the principle of equal treatment if it departs from them without giving reasons.

109. In the light of all the foregoing considerations, this ground of appeal should, in my view, be declared inadmissible, in so far as it is intended to secure a general reconsideration of the fine, and otherwise unfounded.

112. Second, the Court did not identify a single relevant factor which actually distinguishes the *Sodium gluconate* and *Zinc phosphate* cases from each other in terms of the aspects which the Commission took into account in its fining decision. In both cases,

80 — See above in that regard, points 44 and 45 of this Opinion.
81 — See above, points 85 and 86 of this Opinion.
82 — See above, footnote 78 of this Opinion.

the Commission took into account corresponding factors in calculating the basic amount of the fine. Contrary to what the Court maintained, worldwide turnover is not taken into account in setting that basic amount. Only at a later stage of the calculation was the worldwide turnover taken into account in the *Sodium gluconate* case as a criterion for the subdivision into three groups, with a view to a deterrent effect. The fine set in the decision at issue discriminates against ADM when compared with the fine set in *Zinc phosphate*.

113. Finally, ADM complains that, in exercising its unlimited jurisdiction, the Court found, in paragraph 114 of the contested judgment, on the basis of the factors taken into account by the Commission, that the fine was appropriate. [83] That finding is exceptionally reviewable by the Court of Justice for legal error. Even if, as the Court did, only the factors which the Commission referred to as the basis for its decision were considered, it would be concluded that the present case is directly comparable with the *Zinc phosphate* case. The Court did not identify any additional relevant factor that could produce a different result. ADM further submits that it is not open to the Court, in the exercise of its unlimited jurisdiction, to infringe the principle of equal treatment by allowing the Commission to impose a discriminatory penalty on ADM, while others are not so treated. Finally, if the Court found a relevant additional factor that justified a higher fine in this case, then it should have identified it with the necessary precision. In that respect, it submits, the reasoning, which merely refers to all the factors considered by the Commission in the Decision, is insufficient.

114. The Commission submits that the Court was legally correct in its decision. In particular, the appellant itself failed at first instance to produce adequate evidence to demonstrate in what specific respect the present case is comparable with the *Zinc phosphate* decision and in what the unequal treatment actually consists.

2. Legal assessment

115. The principle of equal treatment is a general principle of Community law, which must therefore also be observed in a proceeding under Article 81 EC.

116. It is settled case-law that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different

83 — In paragraph 114 of the authoritative English version of the contested judgment the Court used the term 'appropriate', although ADM uses the term 'proportionate' in the English original version of the appeal.

situations must not be treated in the same way unless such treatment is objectively justified. [84]

117. In so far as the appellant thus refers, with regard to the infringement of the principle of equal treatment, to the situation of another cartel and to the Commission's decision relating to that situation, it must be pointed out, as, moreover, the Court also did in paragraphs 108 to 112 of the contested judgment, that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same. [85]

118. In those circumstances, it would have been for the appellant to show before the Court of First Instance why the situation referred to by it was in fact a comparable situation within the meaning of the above-mentioned case-law.

119. The summary of the appellant's submission in the contested judgment of the Court of First Instance, which is not disputed by the appellant, states: 'Although the two cases are partly contemporaneous and are comparable not only as regards the size of the relevant markets but also as regards the gravity and duration of the infringement, the Commission took into account the limited size of the zinc phosphate market in Europe and in that case set the aggregate fine at EUR 11.95 million (75% of overall relevant product sales) as opposed to the aggregate fine of EUR 40 million in the sodium gluconate case (over 200% of relevant EEA product sales). Furthermore, in the *Zinc phosphate* case, the basic amount was set at EUR 3 million for undertakings with over 20% market share and at EUR 0.75 million for the undertaking which had a significantly smaller market share. However, in the sodium gluconate case, the Commission set the starting amount for calculating the fine at EUR 10 million for undertakings with over 20% market share and at EUR 5 million for undertakings with a significantly smaller market share.' [86]

84 — Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, paragraph 95 with further reference.

85 — *Britannia Alloys & Chemicals* v Commission, cited above in footnote 21, paragraph 60 with further reference to the settled case-law of the Court of Justice.

86 — Paragraph 95 of the contested judgment.

120. The Court responded to that submission in the contested paragraphs 113 and 114:

'113 In the present case, it must be held that, prima facie, the circumstances of the cartel to which the Decision relates differ from those in the *Zinc phosphate* decision. The zinc phosphate market cartel was limited to the territory of the EEA, whilst the sodium gluconate cartel was worldwide. Moreover, contrary to the circumstances of this case, only relatively small undertakings were involved in the zinc phosphate market cartel. Thus, the worldwide turnover of the undertakings involved in the *Zinc phosphate* decision ranged between EUR 7.09 million and EUR 278.80 million in 2000, whilst in this case the worldwide turnover of the undertakings involved ranged between EUR 314 million and EUR 14.003 billion in 2000, with ADM having worldwide turnover of EUR 13.936 billion.

114 In any event, even if all the circumstances relevant for the purposes of determining the appropriate amount in the *Zinc phosphate* decision could be regarded as comparable to those of this case, the Court considers, under its unlimited jurisdiction, that the basic amount set by the Commission for the infringement committed by ADM in this instance is appropriate in the light of all the factors referred to by the Commission in the Decision and in the light of the assessment of some of those factors in this judgment.'

121. In the first of those two paragraphs, the Court responded to the requisite legal standard to all the arguments put forward by ADM. Moreover, it must be observed, with regard to the present case, that the appellant — as evidenced by the setting out of its submission in the contested judgment — has not explained more fully in what specific respects the two cases are supposed to be comparable as regards the size of the relevant markets and the gravity and duration of the infringement.

122. Finally, as regards the assessment made by the Court in the second of those two paragraphs, it should be noted that it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines. [87]

123. Finally, it should be noted that the reference made by the appellant to *Dansk Rørindustri and Others* v *Commission* [88] is ineffective. In that argument, it claims that the

87 — See above, point 45 of this Opinion.
88 — *Dansk Rørindustri and Others* v *Commission*, cited above in footnote 4.

Commission infringes the Guidelines if it departs from them without giving reasons. The appellant does not demonstrate what that has to do with the principle of equal treatment in relation to the *Zinc phosphate* case.

124. In the light of all the foregoing considerations, I propose that the Court should reject this ground of appeal as unfounded.

D — *Errors of law in the determination of the market impact of the cartel (fifth, sixth and seventh grounds of appeal)*

1. Introductory observations

125. Section 1(A) of the 1998 Guidelines distinguishes, for the purpose of determining the basic amount, between three categories of gravity of infringement, to which different starting amounts are assigned, those categories being 'minor', 'serious' and 'very serious' infringements. The amount is assigned on the basis of a number of criteria, including the 'actual impact on the market, where this can be measured'.

126. In this connection, the appellant claims that the Court of First Instance made errors of law as regards the determination of the cartel's market impact. It alleges infringement of the principle that self-imposed rules must be followed, failure on the part of the Court to respond with regard to the question of impact where the market definition has changed and that the Court impermissibly reversed the burden of proof.

127. Since these three grounds of appeal overlap to a considerable extent, I shall examine them together.

128. The common starting point of these grounds of appeal is the fact that ADM considers that the Commission's definition of the relevant product market is too restrictive and that the related findings as regards the actual impact on the market are wrong. The Commission defined the relevant product market as the 'market consisting of sodium gluconate in its solid and liquid forms and its basic product, gluconic acid'. [89]

129. In response to the arguments raised by ADM during the administrative procedure, the Commission accepted that sodium gluconate had a number of partial substitutes depending on the field of application, but

89 — Paragraph 226 of the contested judgment.

found no evidence that those products would effectively constrain pricing of sodium gluconate. On the contrary, it found that several factors contradicted ADM's contention. Thus it argued that there was no general substitute for sodium gluconate and that, given that that product was more environmentally friendly, certain users preferred it to potential substitutes. Moreover, it found that that view was confirmed, first, by the replies provided by customers of the cartel members and, second, by the very existence of the cartel which was limited to sodium gluconate and thus in its view constituted evidence that the members themselves regarded the market as being limited to sodium gluconate. [90]

2. Arguments of the parties

130. The appellant submits that, in paragraph 238 of the contested judgment, the Court wrongly rejected the complaint that the relevant market was defined incorrectly.

131. With reference to paragraphs 226 to 239 of the contested judgment, it submits that the Court infringed the principle that the Commission must follow self-imposed rules, namely, in this case, the Guidelines on setting fines. When examining the impact of a cartel on the relevant market, a correct definition of the relevant product market is the indispensable starting point for that examination. Where, as in this case, the relevant product market is defined too restrictively, the conclusions based on that definition with regard to the cartel's impact will therefore also be incorrect. The Commission defined the relevant market wrongly, leading to an error in respect of market impact. Because sodium gluconate is only one among many chelating agents and is thus easily substitutable, the cartel did not have the market power imputed to it.

132. The appellant submits that the Court erred in law in its response to ADM's corresponding submission, stating that it was for ADM to show that the relevant market should be defined differently from how the Commission had defined it. ADM argues in this regard that it is, on the contrary, for the Commission to show the impact of the cartel on the relevant market, which, under the Guidelines, also includes the definition of the relevant product market. In the absence of that definition, the burden of proof cannot be imposed on the other side, namely ADM.

133. Secondly, the appellant complains, with reference to paragraphs 234 and 236 of the contested judgment, that the Court made an error of law in failing to respond to ADM's plea that the evidence would show lack of impact of the cartel on the market if the market definition used was wider.

90 — Paragraph 226 of the contested judgment.

134. In its application to the Court, ADM claims to have shown, inter alia by means of tables, that sodium gluconate accounts for 20% of the relevant chelating agents. That is, it submits, a strong argument in support of ADM's conclusion that the cartel was ineffective in controlling price. ADM showed that price developments for chelating substitutes before, during and after the cartel period showed a very close price correlation to sodium gluconate. According to ADM, such evidence undoubtedly shows that factors other than the cartel were responsible for the price developments.

135. Thirdly, the appellant complains, with reference to paragraphs 230, 234, 236 and 237 of the contested judgment, that the Court reverses the burden of proof by requiring ADM to show that prices in the absence of the cartel would have been the same.

136. In paragraphs 177 and 184 of the contested judgment, in response to ADM's argument that the Commission must show how prices would have developed in the absence of the cartel, and specifically that they were higher with the cartel than without it, the Court stated that this was an impossibly difficult task. Despite this, in paragraph 237, the Court imposed precisely that requirement on ADM, in order to show that the cartel had had no impact. ADM submits that the Court thus unlawfully reversed the burden of proof. The Guidelines require the Commission to show impact. However, they do not provide that ADM is required to show lack of impact.

137. The Commission submits that this allegation made by ADM is unfounded and attributable to a misunderstanding of the contested judgment. As the Court made clear in paragraph 229 of the contested judgment, the question of the market definition in this case arises not in connection with the finding of the existence of an infringement, but in connection with the assessment of the gravity of the infringement. The Court found that ADM had failed at first instance to show that the actual impact on the relevant market would have had to be assessed differently if a different market definition had been used. ADM is now requesting the Court of Justice to consider on appeal a point of fact which ADM itself failed to prove at first instance.

3. Contested judgment

138. In paragraphs 228 to 237 of the contested judgment, the Court of First Instance considers the substance of ADM's complaint that, by excluding sodium gluconate substitutes, the Commission defined the relevant product market too restrictively and therefore incorrectly.

139. The Court first points out that ADM did not make the allegation that the relevant product market was incorrectly defined in order to show that the Commission infringed Article 81(1) EC. ADM does not deny that its participation in the cartel on the sodium gluconate market constituted an infringement for the purposes of that provision. [91]

140. The Court further states that this case, by contrast, concerns the complaint that the Commission imposed on ADM an excessive fine, in particular because it found that the cartel had had an actual impact on the relevant product market and took into account that factor when setting the fine. However, that argument can be accepted only if ADM demonstrates that, had the Commission defined the relevant product market differently, it would have had to find that the infringement did not have an actual impact on the market defined as that consisting of sodium gluconate and its substitutes. [92]

141. The Court explains in this regard that consideration of the impact of a cartel on the relevant market under the first paragraph of Section 1(A) of the 1998 Guidelines necessarily involves recourse to assumptions, in particular in order to consider what the price of the relevant product would have been in the absence of a cartel. [93] In particular, the Commission — and, in the same way, the opponent in the event of denial [94] — is required to consider what the price of the relevant product would have been in the absence of a cartel, which involves hazardous speculation, which must be countered with evidence based on reasonable probability, which is not precisely quantifiable. [95]

142. ADM failed to refute the Commission's analysis in the Decision as regards the sodium gluconate market by at least providing a rough comparison between the prices which had actually been charged, during the cartel, on the wider chelating agent market with those which, in all probability, would have prevailed on that wider market had there not been a cartel limited to sodium gluconate. [96]

4. Legal assessment

143. Of the three grounds of appeal put forward here, I shall deal with the first one last, since I am of the view that clarifying the

91 — The Court was thus implicitly pointing out that, in such a situation (which does not arise in this case), the issue of the burden of pleading and proving the facts would have to be approached differently from how it is approached in the present context. With regard to the burden of pleading and proof as to the existence or non-existence of an infringement, see below, point 166 et seq. of this Opinion.

92 — Paragraph 230 of the contested judgment.

93 — See paragraphs 175 to 178 of the contested judgment and the reference to them in paragraph 230 of that judgment.

94 — See paragraphs 232 and 233 of the contested judgment.

95 — See paragraph 176 of the contested judgment and the reference to the summarising paragraph 178 in paragraph 230 of that judgment.

96 — Paragraph 236 of the contested judgment.

abovementioned issue of the 'burden of proof' will, in part, provide the answer to the other two grounds of appeal — infringement of the principle that self-imposed rules must be followed and failure to answer the question of impact if the definition of the market is changed.

144. In my view, the use of the term 'burden of proof' here is inadequate and misleading. That is because this is actually, first of all, a question of the procedural requirements of the burden of pleading facts and substantiating them. What is meant is the respective responsibility of each of the parties to proceedings to substantiate any facts which it may adduce in support of its particular view of the situation. Each party must first plead or give a convincing account of the facts favourable to it, the one party's account of the facts setting the standard for the other party's counter-submissions.

145. More precisely, that means that a substantiated submission by the Commission can be overturned only by an at least equally substantiated submission by the other party or parties. The rules governing the burden of proof are only applicable at all where both parties provide sound, conclusive arguments and reach different conclusions. [97]

97 — Opinion of Advocate General Kokott in Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, point 73.

146. In this case, the Commission based its assessment of the gravity of the infringement for the purpose of setting the fine on a definition of the relevant product market.

147. Under the abovementioned principles governing the burden of pleading the relevant facts, the Court obviously found that definition convincing, since it adopted that approach as the basis for its subsequent assessment. No error of law is apparent in that.

148. The Court made it clear in its reasoning that it is not sufficient for ADM merely to assert and, where appropriate, demonstrate that the original definition of the market is wrong; it must also be shown in what respect that results in a substantially changed assessment of the gravity of the infringement. The Court thus implicitly assumes that it is not self-evident that — as ADM submits — an incorrect definition of the relevant market in a case such as this results in an incorrect assessment of the cartel's impact. Methodically, the Court thus requires the party which seeks to cast doubt on the Commission's assessment, in this case ADM, to carry out and present *the same analytical steps* as the Commission is also required to observe in its own assessment.

149. The Court thus in effect required the appellant to present its analysis of the situation in submissions which were at least equally substantiated. If ADM wished to contest successfully the Commission's submissions, which were found by the Court to be clearly convincing, including the findings in the decision at issue — which were obviously equally convincing — that was rightly possible only on the basis of submissions which were both convincing and equally substantiated. In the given circumstances of this case, that necessarily includes not only the submissions regarding the original definition of the market, but also those regarding all the other assessments made by the Commission.

150. In paragraphs 230 and 237 of the contested judgment, the Court makes it clear by the words 'not have an actual impact', 'non-existent' and 'or at least negligible' that only if the cartel at issue did not have an impact on the wider chelating agent market alleged to exist by ADM would the defectiveness of the Commission's view concerning the cartel's impact on the relevant market have been satisfactorily contested. The submission that the market definition had changed should therefore be accompanied by the substantiated submission that the cartel had no impact on the relevant market, that is, it was unsuccessful in practice, because it was ineffective.

151. The Court takes the view that it would have been for ADM 'to demonstrate' this or support it by means of 'a body of consistent evidence showing with reasonable probability' [98] by comparing prices under the cartel with prices had there been no cartel, [99] although the latter, as the Court held in paragraphs 175 to 178 of the contested judgment, can be demonstrated only by recourse to assumptions.

152. By that analysis, the Court of First Instance therefore demonstrated validly and without error of law, in accordance with the general principles governing the burden of pleading and proof, why ADM had failed to refute the Commission's findings at issue here.

153. However, even if the Court of Justice, in its judgment, were unable to accept those arguments of the Court of First Instance, the latter's judgment would still not have to be set aside. That is because the operative part remains well founded on other legal grounds, which means that the appeal must be dismissed. [100] I should like — as a subsidiary point — to outline the considerations on which that finding is based:

154. The three grounds of appeal to be examined here contain an inherently and manifestly contradictory line of argument

98 — Paragraph 237 of the contested judgment.

99 — Paragraphs 232 to 236 of the contested judgment, with reference to paragraphs 196 and 197 of that judgment.

100 — See Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28.

which does not stand up to scrutiny under the rules of logic and experience and is therefore not capable of refuting the Commission's findings at issue here. More specifically: ADM admits that cartel agreements were reached over a number of years, but claims that they were ineffective since such a cartel could not have exerted any influence on the 'wider market'. There is not the slightest indication that that line of argument is correct. That is because participation in anti-competitive practices and agreements is generally designed to maximise an undertaking's profits. [101] Yet ADM maintains in this case that over a period of years it invested time, energy and money in a cartel without any profitable impact. That assertion is not even credible in itself. In view of the well-known illegality of cartels and the threat of fines, it appears paradoxical that such an unprofitable cartel should have been maintained for years. [102] If, therefore, this line of argument, including the market definition put forward with it, lacks even any logic, it cannot result in the refutation of the Commission's findings with respect to the cartel's impact on the relevant market, including the definition of that market.

155. Consequently, the ground of appeal alleging infringement of the rules governing the burden of proof must in any case be rejected.

156. It follows, with regard to the principle that self-imposed rules must be followed, non-observance of which has been alleged by ADM, that the Court did not make any errors of law in this respect either. That is because it was not for the Commission to demonstrate the impact of the cartel on the 'wider' market defined by ADM. There was no reason for that, since ADM had already failed to raise doubts as to the correctness of the definition and analysis put forward by the Commission.

157. The last of the three grounds of appeal examined together here, namely that the Court failed to respond to ADM's pleas that the evidence would show the cartel's lack of impact on the market if the market definition was wider, is also not valid.

101 — See 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 53.

102 — For reasons of completeness, it should be pointed out that the present assessment of the facts concerns a situation that is different — in terms of the law of evidence — from that appraised in paragraph 159 of the judgment in Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597. In that case, the Court rejected a Commission decision in so far as it asserted that '[i]t is inconceivable that the parties would have repeatedly agreed to meet in locations across the world to fix prices... over such a long period without there being an impact on the lysine market'. The Court held that that assertion had no probative force because it was based on pure conjecture rather than objective economic factors (see also Debroux, cited above in footnote 34, p. 8). I share that view of the Court, which concerns a situation in which the burden of pleading and proof lies with the Commission. In the present context, however, the situation is different. We have reached a point at which it is incumbent on the appellant to establish legitimate doubts as to the correctness of the Commission's findings with respect to the impact of the cartel on the relevant market and the definition of that market. In that context, it is for the appellant to demonstrate a course of events that is at least sufficiently coherent to trigger the aforementioned 'legitimate doubts'. In my view, it has not even begun to succeed in doing so in this case.

158. As already explained above, [103] under the general rules relating to the burden of pleading and proof, it is self-evident and therefore legally unobjectionable that the Court should require ADM, by means of substantiated submissions, to cast doubt on the Commission's findings at issue, including its market definition, to such an extent as to refute the Commission's findings. In that regard, it is for the Court of First Instance to assess the value which should be attached to the items of evidence produced to it, [104] which implies that, except in the case of a distortion of the evidence, [105] which has not been pleaded here, what matters is that the Court is convinced. It is therefore unobjectionable for the Court to require ADM to make a comparison of price levels: a comparison of the development of prices with and without the cartel, [106] which is an integral part of the assessment of the impact of a cartel on the relevant market. For that purpose, it is necessary to carry out and present the same analytical steps as the Commission is required to observe in its assessment.

159. The appellant may, [107] admittedly, have pleaded one of those price levels, [108] but manifestly not both. Nothing in its arguments indicates that it maintains that it had set out and pleaded the necessary assumptions [109] with which to show the level of prices 'which, in all probability, would have prevailed on that wider market had there not been a cartel limited to sodium gluconate'.

160. In paragraphs 234 and 236 of the contested judgment, the Court stated adequate reasons for that finding, and no defect is apparent.

161. In the light of all the foregoing considerations, the ground of appeal examined here should be rejected in its entirety.

E — *Errors of law in regard to the date of termination of the cartel (8th, 9th, 10th and 11th grounds of appeal)*

1. Introductory observations

162. Under Article 15(2) of Regulation No 17, the duration of the infringement affects the calculation of the fine, in the form of an

103 — See above, point 145 et seq. of this Opinion.

104 — See, for settled case-law, inter alia Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66, and Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 50.

105 — See for more detail with regard to the distortion of evidence point 202 of this Opinion.

106 — See paragraph 236 of the contested judgment: on the one hand, the level of prices charged, during the cartel, on the wider chelating agent market; on the other, the level of prices which, in all probability, would have prevailed on that wider market had there not been a cartel limited to sodium gluconate.

107 — Determining whether this is so is a matter of factual assessment and falls outside the jurisdiction of the appellate court; see above, point 44 of this Opinion.

108 — Presumably the facts mentioned above in point 134 if this Opinion are directed towards describing the level of prices charged, during the cartel, on the wider chelating agent market.

109 — See, in that regard, point 141 of this Opinion.

increase in accordance with Section 1(B) of the 1998 Guidelines. [110]

163. With regard to the four grounds of appeal specified by it in relation to the question of the date of termination of the cartel, the appellant argues that the Court of First Instance erred in law in upholding the Commission's conclusion that ADM participated in the cartel for three years and 11 months, from June 1991 to June 1995, which increased the fine by 35% on account of the duration of the infringement. In fact, the correct duration of ADM's involvement is three years and four months, from October/November 1991 to 4 October 1994. [111] The fine should be reduced accordingly.

164. In specific terms, the appellant submitted before the Court of First Instance that the Commission made errors of assessment in considering that the infringement continued until June 1995. It asserted that it terminated its involvement in the cartel at the meeting of 4 October 1994 in London and that the meeting held between 3 and 5 June 1995 in Anaheim (California) could not be regarded as a further part of the infringement. [112]

165. The appellant directs four grounds of appeal against the assessments made in that regard by the Court: infringement of Article 81 EC by misapplying the rules on termination of involvement in cartels, distortion of evidence in relation to the date of ADM's withdrawal, infringement of Article 81 EC as regards the meeting in Anaheim and distortion of evidence in relation to the note attributed to Roquette.

166. Before I examine those grounds of appeal in detail, I would again first like to make some observations on the procedural allocation of the burden of pleading and proof, since the question before us here is somewhat different, in part, from that considered above. [113]

167. It is true that the grounds of appeal to be examined here also relate, ultimately, to the setting of the fine. However, this part of the setting of the fine takes place by reference to

110 — Under Section 1(B) of the 1998 Guidelines: infringements of short duration (in general, less than one year): no increase in amount; infringements of medium duration (in general, one to five years): increase of up to 50% in the amount determined for gravity; infringements of long duration (in general, more than five years): increase of up to 10% per year in the amount determined for gravity.

111 — Although the information given by the appellant here, not only regarding the date of termination, but also regarding the date of commencement, is at variance with the Commission's findings in this connection, the appellant's substantive submissions, both before the Court of Justice and, obviously, before the Court of First Instance, are nevertheless confined to the date of termination.

112 — Paragraph 240 of the contested judgment.

113 — See above, point 144 et seq. of this Opinion.

the criterion of the cartel's duration. That criterion for setting the fine is fleshed out by the Commission's findings as to the existence of infringements of the competition rules and its conclusions in that regard.

168. In so far as there is dispute about the duration of the cartel or the involvement of individual cartel participants, as in this case, it is for the Commission to establish proof of the dates found by it in the decision at issue. [114] That is because, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. [115]

169. In this context, it is not unusual for the existence of an anti-competitive practice or agreement to be capable of being inferred only from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. [116]

170. Where the participation of undertakings in meetings of a manifestly anti-competitive character to that effect has been established, the applicable rule governing the burden of proof is that it is for the undertaking concerned to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. [117] It is not a valid defence to have withdrawn secretly or covertly from a cartel agreement. [118]

114 — As regards the objective burden of proof (that is, in regard to the case where a fact is unverifiable — *non liquet*), the first sentence of Article 2(1) of Regulation No 1/2003, which did not yet apply to the matters at issue here, contains an equivalent rule; see, in that regard, Säcker/Jaeks, 'Kommentierung zu Art. 81 EG', paragraph 815, in: Hirsch/Montag/Säcker, *Europäisches Wettbewerbsrecht, Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht)*, Volume 1.

115 — Settled case-law, see inter alia Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58. See also Hackspiel, '§ 24 Beweisrecht', paragraph 13, in: Rengeling/Middeke/Gellermann, *Handbuch des Rechtsschutzes in der Europäischen Union*: In competition law, it is in principle incumbent on the Commission to prove the existence of a competition infringement, in particular that an undertaking has participated in a cartel, and how long the infringement lasted.

116 — *Aalborg Portland and Others* v *Commission*, cited above in footnote 101, paragraph 57. See also, in that regard, paragraph 55: 'Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum' and paragraph 56: 'Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.'

117 — *Aalborg Portland and Others* v *Commission*, cited above in footnote 101, paragraph 81 with further references, and Case C-57/02 P *Acerinox* v *Commission* [2005] ECR I-6689, paragraph 46 with further references. See also Hackspiel, cited above in footnote 115, paragraph 13.

118 — *Aalborg Portland and Others* v *Commission*, cited above in footnote 101, paragraphs 84 and 85.

171. However, that clarification of the burden of proof must not lose sight of the aspect of the burden of pleading and substantiation already explored above. [119] For even though the burden of proving its findings made in the decision at issue rests with the Commission, it is nevertheless primarily for the party bringing the action — in this case, ADM — to plead circumstances and indicia which are capable of creating doubt as to the correctness of the findings on which the contested measure is based, [120] in which regard the cogency of the Commission's findings sets the standard for the depth of the submissions directed against them.

172. The assessment of facts and evidence is in principle a matter for the Court of First Instance, [121] which logically includes the assessment of the merits of the submissions, and is open to challenge on appeal only to a limited extent, in particular in respect of distortion of evidence. [122]

119 — See above, point 144 et seq. of this Opinion.
120 — Hackspiel (footnote 115 above), paragraph 13.
121 — See above, point 44 of this Opinion.
122 — See below, point 202 of this Opinion, for more detail regarding the distortion of evidence.

2. Infringement of Article 81 EC by misapplying the rules on termination of involvement in a cartel

(a) Arguments of the parties

173. The appellant complains, with reference to paragraphs 247 to 253 of the contested judgment, that the Court of First Instance infringes Article 81 EC by misapplying the rules on termination of involvement in a cartel. Although the Court rightly applied the 'public disassociation' test which is relevant as regards termination of involvement in a cartel, it should have concluded from the fact that ADM left the cartel meeting in London on 4 October 1994 that ADM thereby terminated its involvement in the cartel.

174. Instead, the Court did not draw that conclusion from the facts — namely that, during that meeting, ADM (i) threatened to withdraw from the cartel arrangement if its demands were not met; (ii) set an ultimatum; and (iii) left the meeting when the ultimatum was not met. The Court wrongly included a subjective component in the public disassociation test by assessing ADM's motives. It regarded leaving the meeting as a negotiating strategy and accordingly did not find 4 October 1994 to be the date of termination.

175. However, the public disassociation test must be understood solely as an objective test. It is apparent from the case-law that the concept of an illegal agreement or concerted practice is an objective one, requiring 'knowing consensus' [123] and 'manifest concurrence of wills'. [124] [125] According to the case-law, a secret withdrawal from a cartel agreement is also no defence. [126] The appellant submits that, equally, a hidden intention to continue a cartel, after public disassociation, is not an incriminating act. If it was a negotiating strategy, it was one that failed. In any event, Article 81 EC penalises overt acts, not improper thoughts.

176. Moreover, once the appellant left the meeting and thus the agreement, the latter in effect ended as a consequence of unresolved disputes. Thereafter there were no further acts in relation to the agreement, as the cessation of reporting of sales figures shows, a cessation which the Court itself accepted in paragraph 252 of the contested judgment.

123 — Wording of the English original.

124 — The English original text is not quite clear at this point. In the original, the appellant does admittedly write 'manifest concurrence of wills', but in the quotation from the judgment cited it emphasises the words 'manifestation of the wish'.

125 — The appellant cites two judgments to support its view: Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 102 ('For an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the *manifestation of the wish* of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly …'), and Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 64 ('… coordination between undertakings which … *knowingly* substitutes practical cooperation between them for the risks of competition …') (emphases supplied by the appellant).

126 — *Aalborg Portland and Others* v *Commission*, cited above in footnote 101.

177. Finally, the points set out in paragraphs 248 and 249 of the contested judgment are, firstly, incorrect and, secondly, irrelevant, since those points were not mentioned by the Commission either in its decision or in its defence.

178. The Commission defends the contested judgment.

(b) Contested judgment and legal assessment

179. In the contested judgment, the Court of First Instance draws attention, in paragraph 246, to the 'public distancing' test. It can be concluded that ADM definitively ceased to belong to the cartel only if it 'had publicly distanced itself from what occurred at the meetings'. Then, in paragraph 247 of the contested judgment, the Court regards the fact that ADM left the meeting in London on 4 October 1994 not as a definitive end to its involvement in the cartel, because ADM did not distance itself openly from the cartel objectives, but, on the contrary, because it sought to resolve the disagreements between the cartel members and to reach a compromise, as testifying to its acceptance of the principle that the cartel would continue to be

implemented. Consequently, the Court shares the Commission's view that the conduct in question could be regarded as a negotiating strategy rather than as the end of the cartel.

180. Since the appellate court is not entitled to undertake a fresh assessment of the facts, [127] consideration of this ground of appeal must be confined to the question whether the assessment of the facts is permitted to take into account the motives which prompted ADM to leave the meeting in London on 4 October 1994.

181. The appellant does not deny that the meeting in London on 4 October 1994 is one of the 'meetings of a manifestly anti-competitive character'. [128] In that case, it is for the appellant, as already demonstrated above, to put forward evidence to indicate — and, where appropriate, to prove — that its participation in those meetings was without any anti-competitive intention or that it had indicated to its competitors that it was participating in a spirit that was *different* from theirs. [129]

182. Contrary to the appellant's view, 'intentions' or 'motives' are taken into account and are of interest. The perspective of the addressee is also relevant. For it is a question of indicating to its competitors that it is participating in a spirit that is *different* from theirs. That means a spirit which specifically is *not (any longer) anti-competitive*.

183. That view is emphasised particularly forcefully in the judgment in *Aalborg Portland and Others* v *Commission*:

'84 In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.

85 Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting …'

127 — See above, point 172 of this Opinion.
128 — See above, point 170 of this Opinion.
129 — See above, point 170 of this Opinion.

184. Elsewhere, that judgment also states that it is question of *openly showing disapproval of those unlawful practices* or of *informing the other participants that the undertaking intended to take part in the meeting with* '*different*' — that is, other than anti-competitive — *objects in mind*. [130]

185. In the light of all those considerations, the Court therefore did not make an error of law with regard to the test; it determined and applied it correctly.

186. With regard to the points set out in paragraphs 248 and 249 of the contested judgment, which the appellant considers incorrect and irrelevant, it should be noted that they are no longer important, since the assessment in paragraphs 246 and 247 of the contested judgment is sufficient to support the rejection of the plea.

187. In the light of all the foregoing considerations, I propose that this ground of appeal also should be rejected as unfounded.

130 — *Aalborg Portland and Others* v *Commission*, cited above in footnote 101, paragraph 330.

3. Infringement of Article 81 EC as regards the meeting in Anaheim

188. In a slightly changed order, I shall now turn first to the June 1995 meeting in Anaheim, and then deal with both allegations of distortion of evidence together.

(a) Arguments of the parties

189. The appellant complains that the Court of First Instance infringed Article 81 EC by concluding that the conduct at the June 1995 meeting in Anaheim was anti-competitive. The meeting in Anaheim was not anti-competitive, since only non-firm-specific market data was exchanged. On the premise that the cartel was terminated at the meeting on 4 October 1994, it could at most have been the commencement of a new cartel. The attempt to establish the total size of the market by an anonymous information exchange is not prohibited *per se*. Nor, contrary to paragraph 265 of the contested judgment, did the Commission attempt to show that it had the effect of restricting competition. The Court thus erred in law by concluding that the June 1995 meeting continued the cartel.

190. The Commission responds to that argument by contending that the appellant's participation in the cartel did not end with the October 1994 meeting and that the meeting in Anaheim was a continuation of the cartel meetings. The Court did not make any error of law.

(b) Contested judgment and legal assessment

191. In paragraphs 258 to 268 of the contested judgment, the Court of First Instance made an appraisal of the character of the meeting in Anaheim from 3 to 5 June 1995. To that end, it assessed the facts before it in a series of five steps. In the first two sections of the appraisal, which are the subject of this ground of appeal, the proceedings of the meeting are assessed in paragraphs 258 to 262:

'258 First, it should be observed that, as the Commission notes at recital 232 of the Decision, ADM does not dispute that, at that meeting, attended by all the cartel members, the participants discussed sales volumes of sodium gluconate in 1994. In particular, the Commission observed — and ADM did not dispute — that, according to ADM, Jungbunzlauer had asked it "to bring ADM's total 1994 sodium gluconate sales figures" …

259 It should be noted that that approach was the same, in essence, as the standard practice within the cartel, which aimed to ensure that allocated sales quotas were adhered to and which, as is apparent from recitals 92 and 93 of the Decision, consisted in the cartel members communicating their sales figures before each meeting to Jungbunzlauer, which would aggregate those figures and distribute them during the meetings.

260 Second, ADM confirms the Commission's description of events at recital 232 of the Decision, according to which a new information exchange system relating to sales volumes was proposed at the meeting. That system was supposed to make it possible to establish, anonymously, that is in such a way that no member of the cartel could know the figures of another member, the total size of the sodium gluconate market as follows:

"[C]ompany A would write down an arbitrary number that represented a portion of its total volume. Company B would then show to company C the sum of company A + company B's number. Company C would add to that sum the total volume of company C. Company A would then add to that the remainder of this total volume and report the total to the group." …

…

262 The Commission was entitled to find that that conduct constituted a fresh attempt by the cartel members to "restore order on the market" and to maintain their anti-competitive practices implemented during previous years, aimed at ensuring control of the market through joint action, albeit, if necessary, in different forms and by different methods, and it is not necessary to assess whether, viewed in isolation, that conduct constituted an infringement of the competition rules. The fact that the cartel members had tried to set up an "anonymous" system of information exchange, as described in paragraph 260 above, could reasonably be interpreted by the Commission as a logical consequence of the conduct of the undertakings within the cartel which, as recital 93 of the Decision in particular shows, was characterised by a "context of growing mutual suspicion", but whose aim was nonetheless to share the market. From that point of view, the Commission was entitled to consider that by setting up the new information exchange system the cartel members showed that there "was still a firm intent to work out a solution to carry on with anti-competitive arrangements" …, and to "keep control of the market through joint action" …'

192. The following step in the appraisal ('third') concerns the note attributed to Roquette, an issue which will need to be examined later. The fourth step concerns statements of cartel members, which will also need to be examined later. In the section beginning 'fifth', the fact that the meeting was held in the context of a general industry meeting is described as irrelevant. The Court observes that that does not exclude the possibility that the undertakings concerned used that general meeting to discuss the cartel.

193. The Court's observations in paragraphs 258 to 262, which are to be examined here, are essentially an assessment of facts, of which, in principle, there can be no fresh examination in appeal proceedings. [131] The Court started from the assumption that the meeting in Anaheim was not the beginning of a new cartel, but a continuation of the old. According to the Court's findings, the appellant's submission that the cartel had already ended in London with the meeting on 4 October 1994 is incorrect. Both those findings of the Court are the result of an assessment of facts and there can therefore be no question of the Court of Justice substituting its own appraisal for that of the Court of First Instance in that regard.

194. The appellant's assertion that there was no unlawful exchange of information at the June 1995 meeting, since the attempt made

131 — See above, points 44 and 172 of this Opinion.

there at anonymous information exchange to establish the total size of the market did not have as its object a restriction of competition, is a borderline case between an assessment of facts and a point of law.

195. Considered in isolation, the question whether such an exchange of information constitutes anti-competitive conduct could in principle have to be regarded as a point of law. At least that appears to be assumed by the appellant, which draws attention to various sources to support its assertion. [132]

196. However, in the present context the Court was not faced with that question in isolation, but in relation to the classification and assessment of one of a number of meetings — the last, so far as is known in this instance — between the participants in a cartel. What characterises the context here is that it is undisputed that the cartel had existed for a number of years. In that context, the question at issue concerns the classification and assessment of the conduct of the participants in that apparently final meeting.

197. In that regard, the Court appraised the facts before it and found that all the cartel members were represented at that meeting and that, as at other meetings in the past, they discussed the preceding year's sales volumes. The Court certainly took into account in that regard the fact that a new system for the exchange of information on sales volumes had been proposed and put into practice. As already set out above, the Court observed in that connection that that system was supposed to make it possible to establish, anonymously, that is in such a way that no member of the cartel could know the figures of another member, the total size of the sodium gluconate market. However, the Court did not analyse that new system as such, as to whether or not it was anti-competitive — which would have been a point of law —, but assessed whether the Commission was reasonably entitled to regard the conduct of the cartel participants at that meeting as a continuation of their previous conduct in new forms and by new methods. It thus carried out an assessment of fact. There can therefore be no fresh examination by the Court of Justice here either.

132 — The appellant refers in this connection to, inter alia, point 42 of the Opinion of Advocate General Geelhoed in Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, and in particular to the following passage: 'Aggregate market information is, in principle, lawful provided that it does not make it possible to identify an individual competitor or become aware of its business strategy.' However, read in context, that passage is not by any means unequivocally favourable to an interpretation along the lines advocated by the appellant. In points 41 and 42 of that Opinion, Advocate General Geelhoed observes that the distinction between a lawful and an unlawful exchange of information depends on whether it is possible, by virtue of the degree of aggregation involved, to become aware of competitors' strategies, which ultimately depends on the number of competitors. In addition, the structure of the market concerned (oligopolistic or atomised) and also the frequency with which the information is exchanged are relevant factors. It should, moreover, be pointed out that, although formulated in general terms, those observations of Advocate General Geelhoed were made against the background of a totally different situation. That case concerned a system for the exchange of credit information between financial institutions, in concrete terms a register of information on customer solvency.

198. Nor is this ground of appeal supported by the appellant's further objection that the Commission did not show that the anonymous information exchange to establish the total size of the market had the effect of restricting competition.

199. In this regard, in paragraph 265 of the contested judgment, the Court rightly pointed out that, according to settled case-law, for the purposes of applying Article 81(1) EC, there is no need to take account of the concrete effects of an agreement once it appears that it *has as its object* the prevention, restriction or distortion of competition. [133] As may be seen from paragraph 262 of the contested judgment set out above, according to the Court's assessment the Commission was entitled to consider that the setting-up by the cartel participants of the new information exchange system *had as its object* the continuation of their anti-competitive arrangements for control of the market.

200. Consequently, the present ground of appeal also should be rejected.

133 — See only Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited above in footnote 51, paragraph 491.

4. Distortion of evidence in relation to the date of termination of the cartel or the date of ADM's withdrawal

201. I shall now examine two further allegations made by the appellant in regard to the distortion of evidence.

202. There is distortion of evidence where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect; [134] that may be the case, for example, where the assessment offends against rules of logic or where the meaning of the evidence has been completely distorted, [135] that is, the content of certain evidence has been construed in a way that is objectively inaccurate. [136]

134 — Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 37.

135 — Hackspiel, § 28,'Rechtsmittel und Rechtsbehelfe', paragraph 28, in: Rengeling/Middeke/Gellermann, *Handbuch des Rechtsschutzes in der Europäischen Union*.

136 — Opinion of Advocate General Kokott in *PKK and KNK* v *Council*, cited above in footnote 134, point 43.

(a) Assessment of documents of other cartel participants

(i) Arguments of the parties

203. The appellant complains, with reference to paragraphs 248 to 250 of the contested judgment, that the Court of First Instance distorted the evidence by not regarding the documents of other participants, namely Roquette and Jungbunzlauer, which are mentioned in those paragraphs, as evidence supporting ADM's submission that it withdrew from the agreement as early as 4 October 1994. Thus Jungbunzlauer stated: 'When, in London on 4 October 1994, Roquette declared it would no longer observe any of these agreements, all arrangements came to an end.' And Roquette declared: 'Roquette expressed its refusal to continue' and '[t]his brought an end to the understanding'. Roquette and Jungbunzlauer had thus indicated, in accord with ADM, the date on which the arrangement ended. The Court's interpretation to the contrary is not supported either by the decision at issue or by the Commission's defence.

204. The Commission challenges those arguments. The evidence in question does not show that the whole cartel ceased on 4 October 1994. The evidence merely shows that Roquette left the cartel on that date, but not the appellant. The Court was correct in reaching the conclusion that there was no evidence to indicate that the appellant ceased to participate in the cartel on 4 October 1994.

(ii) Contested judgment and legal assessment

205. Paragraphs 248 to 250, which are cited by the applicant, make up, together with paragraph 251, the abovementioned [137] fourth of five steps in the Court's reasoning in the contested judgment. The whole passage of the judgment reads:

'248 Nor is it evident from any document relied on by ADM that the other cartel members would have understood its conduct at that meeting as meaning that it was publicly distancing itself from the terms of the cartel.

249 Indeed, Jungbunzlauer's letter to the Commission of 21 May 1999 does not describe ADM's conduct at the meeting of 4 October 1994 in London. It merely states that "[w]hen, in London on 4 October 1994, Roquette declared it would no longer observe any of the

137 — See above, point 192 of this Opinion.

[cartel] agreements, all arrangements came to an end".

250 In Fujisawa's letter to the Commission of 12 May 1998, Fujisawa gave no account of that meeting; moreover, as is apparent from recital 224 of the Decision, it did not participate in it. Quite to the contrary, in that letter Fujisawa stated that the cartel was terminated only in 1995.

251 Nor does Jungbunzlauer's description of that meeting in its letter of 30 April 1999 to the Commission contain any indication that, at that meeting, ADM stated that it wished to withdraw from the cartel. On the contrary, Jungbunzlauer stated in that letter that ADM had requested a reallocation of sales quantities but that that request was not accepted.'

206. In that passage of the contested judgment, the Court thus drew from three letters from other cartel participants conclusions as regards the continued existence of the cartel during the period from 4 October 1994 to June 1995. Contrary to the appellant's submissions, it is not apparent that the assessment of that evidence is manifestly incorrect. The content of that evidence was not construed in an objectively inaccurate way.

207. On the contrary, the finding contained in paragraph 250 ('Quite to the contrary, in that letter Fujisawa stated that the cartel was terminated only in 1995'), in conjunction with the finding that there is no evidence to indicate ADM's premature withdrawal, points clearly in favour of the Court's appraisal.

208. Against that background, it is a legitimate possible interpretation to regard the testimonies referred to by the appellant, '[w]hen, in London on 4 October 1994, Roquette declared it would no longer observe any of the [cartel] agreements, all arrangements came to an end', 'Roquette expressed its refusal to continue' and '[t]his brought an end to the understanding', merely as Roquette's withdrawal and not to view them as representing an end to the cartel.

209. It follows that the Court of Justice does not have jurisdiction to respond to this ground of appeal, since it is not open to it to substitute, on grounds of fairness, its own assessment of facts for that of the Court of First Instance.

210. Since ADM's arguments do not contain any significant points that are capable of showing that the Court of First Instance might have distorted the evidence in question here, this ground of appeal also should be rejected as inadmissible.

(b) The note attributed to Roquette

(i) Arguments of the parties

211. The appellant complains, with reference to paragraph 263 of the contested judgment, that the Court of First Instance distorted the evidence by attributing the note mentioned in that paragraph to Roquette and then regarding that note as proof of the character of the June 1995 meeting. This (solitary) indication that subjects such as 'compensation', 'production' or 'price' were discussed at that meeting was in reality prepared, not by Roquette, but by the United States prosecuting authority, as the basis of discussion with Roquette's witnesses, not as a note on the meeting. The information contained in it is of unknown origin.

212. The Commission observes that, although Roquette was not the author of the note at issue here, it did supply it to the Commission, as is also accurately stated in recital 233 of the decision at issue. Any mistake made by the Court of First Instance with regard to the authorship of that note is immaterial. The note shows that the June 1995 meeting in Anaheim was anti-competitive in character. Moreover, the Court's observations in paragraph 263 of the contested judgment are only one link in a chain. The other parts show clearly the anti-competitive character of that meeting in Anaheim.

(ii) Legal assessment

213. In point of fact, with regard to the note at issue here, there is clearly no support for the authorship attributed to Roquette in paragraph 263 of the contested judgment. Roquette appears merely to have supplied that note to the Commission. That is also clear from the account of the parties' arguments in paragraph 255 of the contested judgment. [138]

214. However, that note and its origin are ultimately without importance. The fourth step in the reasoning examined here is only one of a series. The outcome does not hinge on this step in the reasoning.

138 — In the French-language — the Court's language of deliberation — version, the passage reads: '[l]es indications contenues dans un document obtenu auprès de Roquette'; in the English-language, delivered version, it reads: '[t]he evidence contained in a document obtained from Roquette'; and, finally, in the German-langauge version, it reads: 'die Angaben eines von Roquette vorgelegten Dokuments'.

215. As is apparent from my previous observations, the Court's other assessments regarding the character of the meeting in Anaheim are sufficient to support the characterisation of it as 'anti-competitive' in the contested judgment. There are thus already several adequate pointers towards the duration of cartel involvement found by the Commission, the value of which the appellant has been unable to call into question, namely (i) the assessment of the meeting in Anaheim as a continuation of the previous conduct by different methods and (ii) the assessment of the documents of other cartel participants. In paragraph 263 of the contested judgment, the Court also described the note at issue here merely 'as confirming' the Commission's argument and its previous assessment of the June 1995 meeting in Anaheim.

216. Consequently, the 8th, 9th, 10th and 11th grounds of appeal should be rejected.

F — *Error of law in examining the attenuating circumstance of termination of the infringement — breach of the principle that self-imposed rules must be followed (12th ground of appeal, raised in the alternative)*

217. As an introductory observation, it should be recalled that, under Section 3 of the 1998 Guidelines, a reduction in the basic amount of the fine is provided for where there are attenuating circumstances, including, pursuant to the third indent of that provision, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)'.

218. With regard to the assessment of attenuating circumstances, the list of which in the 1998 Guidelines is not exhaustive, [139] the Commission has a wide discretion. [140]

1. Arguments of the parties

219. The appellant claims in essence that the Court of First Instance made an error of law in paragraphs 272 to 287 of the contested judgment by allowing the Commission to disregard termination of the infringement as a relevant attenuating circumstance. That infringes the principle that the Commission must follow the rules which it has imposed on itself. The amount of the fine should be reduced accordingly.

139 — The non-exhaustive character of the list can be seen from the wording alone: 'The basic amount will be reduced where there are attenuating circumstances such as'. See also Demetriou/Gray (cited above in footnote 60), p. 1453, according to which the Guidelines do not contain any binding grounds for the application of attenuating circumstances.

140 — See inter alia Dannecker/Biermann (cited above in footnote 28), paragraph 164.

220. The Commission defends the corresponding passage of the contested judgment.

2. Contested judgment and legal assessment

221. It should be noted at the outset that the appellant, in its observations on the attenuating circumstance, as will be apparent below, makes contradictory statements in comparison with its own statements regarding the date of termination of the cartel.

222. It is clear from paragraph 270 of the contested judgment that ADM submits that the third indent of Section 3 of the Guidelines recognises that 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is an attenuating circumstance. The paragraph then goes on to state that ADM 'takes the view that it should have benefited from that attenuating circumstance, given that it put an end to the infringement as soon as the United States competition authorities intervened'.

223. That account of the parties' arguments is not contradicted by the appellant in the appeal, even though it obviously conflicts with the fact that it asserts elsewhere in the appeal that its involvement in the cartel had already ended with the meeting on 4 October 1994. [141] The contradiction lies specifically in the fact that a termination upon intervention of the United States authorities was dated, unchallenged, to 27 June 1995, [142] a date which agrees with the Commission's finding — which is disputed by the appellant — that the date of termination of the cartel was in 'June 1995'.

224. Quite irrespective of those contradictory accounts of the facts given by the appellant, I am of the opinion that the Court did not make any error of law with regard to the question of the taking into account of the attenuating circumstance.

225. In paragraphs 272 to 287 of the contested judgment, the Court observed and reasoned that the provision referred to here, set out in the third indent of Section 3 of the 1998 Guidelines, must be interpreted restrictively so as not to undermine the effectiveness of Article 81(1) EC and that the Commission could therefore not place itself under an obligation to consider the mere fact that the infringement was terminated as soon as it intervened to be an attenuating circumstance. [143]

141 — In so far as the appellant asserts that its involvement in the cartel ended with the meeting on 4 October 1994 (see above, point 163 et seq. of this Opinion), it makes no connection whatsoever between that assertion and the intervention of competition authorities, but places it in the context of a lack of agreement among the undertakings involved in the cartel.

142 — See paragraph 273 of the contested judgment.

143 — See, in particular, paragraph 279 of the contested judgment.

226. The contested judgment further states:

'280 Consequently, that provision must be interpreted as meaning that solely the particular circumstances of the specific case in which an infringement is actually terminated as soon as the Commission intervenes can warrant that termination being taken into account as an attenuating circumstance …

281 In the present case, it should be recalled that the infringement in question relates to a secret cartel whose object is price fixing and market sharing. That type of cartel is expressly forbidden by Article 81(1)(a) and (c) EC, and constitutes a particularly serious infringement. The parties must therefore have been aware of the unlawful nature of their conduct. The secret nature of the cartel confirms the fact that the parties were aware of the unlawful nature of their actions. Consequently, the Court finds that there can be no doubt that the infringement was committed intentionally by the parties in question.

282 The Court of First Instance has already held that the fact that an intentional infringement was terminated cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention …

283 In the light of the foregoing, the Court finds that, in the present case, the fact that ADM terminated the infringement as soon as a competition authority intervened is not capable of constituting an attenuating circumstance.

284 That finding is not affected by the fact that, in the present case, it was after the intervention of the United States authorities and not of the Commission that ADM put an end to the anti-competitive practices at issue … ADM's termination of the infringement as soon as the United States authorities intervened does not make that termination more intentional than if it had occurred as soon as the Commission intervened.'

227. I consider that reasoning to be free from errors of law and the underlying criterion to be correct.

228. In actual fact, a purely literal analysis of the third indent of paragraph 3 of the 1998 Guidelines could give the impression that the mere fact that an offender terminates an infringement as soon as the Commission

intervenes constitutes, generally and without reserve, an attenuating circumstance. [144]

229. However, such a purely literal interpretation of the provision in question would not fit the context of the objectives of Community competition law, which lie, in particular, in protecting competition within the internal market from distortion.

230. The Court correctly made the point that an attenuating circumstance for the purposes of Community competition law must imply a 'reward' or an 'independent initiative of the offending party'. [145] That is also correct, in my view, since the resultant reduction of the fine is ultimately a reward which must not be given simply where the illegal conduct is terminated more as a reflex-like response to the intervention of the competition authorities. Moreover, with a view to ensuring the desired reaction of termination of the illegal conduct, the 1998 Guidelines already provide for an adequate incentive, namely the classification of continuation of an infringement after the Commission intervenes as an aggravating circumstance. [146]

231. Moreover, to that effect, it is also logical for the case-law of the Court of First Instance to assume elsewhere that, in the case of secret cartels, no reduction in the basic amount is justified for termination as soon as the Commission intervenes, since, in the case of such anti-competitive practices, termination is an inevitable concomitant of the Commission's intervention. [147]

232. There can therefore be no objection to the Court's assumption that recognition of an attenuating circumstance must presuppose an initiative of the undertaking concerned which goes beyond the mere termination of the infringement after the Commission has intervened. [148] There is otherwise no apparent legal ground on which to challenge the assessment of fact made by the Court in this case, namely that the appellant showed no such initiative and is therefore not entitled to the benefit of the attenuating circumstance in question.

233. Moreover, in terms of its content, this understanding of attenuating circumstances, based on an assessment of conduct, accords with the case-law on attenuating circum-

144 — Paragraph 277 of the contested judgment.

145 — Paragraph 278 of the contested judgment.

146 — See also paragraph 278 of the contested judgment.

147 — See also Engelsing/Schneider, 'Kommentierung zu Art. 23 VO 1/2003', paragraph 144, in: Hirsch/Montag/Säcker, *Europäisches Wettbewerbsrecht, Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht)*, Volume 1. See, in addition, point 29 of the 2006 Guidelines, regarding mitigating circumstances, which now provides that the basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as 'where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels)'.

148 — Paragraph 285 of the contested judgment.

stances which, with regard to situations prior to the application of the 1998 Guidelines, presupposed cooperation during the administrative procedure as a condition for reduction of the fine. [149]

234. However, it should be pointed out that the reasoning advocated here, which measures the Commission's self-regulation contained in the 1998 Guidelines against the yardstick of Article 81(1) EC, goes further than the reasoning of the Court of Justice in *Dalmine* v *Commission*. [150] In that case — as also, for example, in the judgment of the Court of First Instance [151] in the same case — the relevant basis is simply the need for a causal connection with the Commission's first intervention.

235. For the sake of completeness, it should be noted that, in the present case, even if a mere causal connection with the Commission's first intervention is taken as a basis, no attenuating circumstance exists. For it is clear from the facts established by the Court of First Instance that the Commission only sent requests for information to the main producers, traders and customers of sodium gluconate in Europe from February 1998 onwards, [152] that is, at a time when ADM, according to its own statements, [153] had already ended its participation in the cartel some years previously.

236. Consequently, this ground of appeal also, which is put forward in the alternative, must be rejected as unfounded.

237. Since, in my view, none of the grounds of appeal is successful, I propose that the appeal in its entirety be dismissed.

VII — Costs

238. Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful and the Commission has applied for costs, the former must be ordered to pay the costs.

149 — See, for example, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 36 and 37. With regard to the Commission's practice, see also Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 154.

150 — *Dalmine* v *Commission,* cited above in footnote 148, paragraphs 158 to 160.

151 — Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraphs 328 to 330.

152 — Paragraph 5 of the contested judgment.

153 — See above, point 164 of this Opinion: the appellant maintains that its involvement in the cartel ended with the meeting in London on 4 October 1994.

VIII — Conclusion

239. In the light of those considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order Archer Daniels Midland Company to pay the costs.