JUDGMENT OF THE COURT (First Chamber)

19 March 2009 *

In Case C-510/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 11 December 2006,

Archer Daniels Midland Co., established in Decatur, Illinois (United States), represented by M. Garcia, Solicitor, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by A. Bouquet and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2008,

gives the following

Judgment

1 By its appeal, Archer Daniels Midland Co. ('ADM') asks the Court to set aside 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* [2006] ECR II-3255 ('the judgment under appeal'), dismissing its action for the partial annulment of Commission Decision C (2001) 2931 final of 2 October 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium gluconate) ('the contested decision') in so far as that decision pertained to the appellant.

Legal background

2 Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of 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) [EC] or Article [82 EC],…

…

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

3 The Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3, 'the 1998 Guidelines'), states, inter alia, the following:

'The principles outlined … should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst 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.

The new method of determining the amount of a fine will adhere to the following 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.'

4 According to the fourth and sixth subparagraphs of Section 1A 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.

…

Where an infringement involves several undertakings (e.g. cartels), it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.'

5 Section 3 of the 1998 Guidelines, headed 'Attenuating circumstances', is worded as follows:

'The basic amount will be reduced where there are attenuating circumstances such as:

…

— termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks),

…'

The contested decision

The cartel

6 The Commission addressed the contested decision to six undertakings which were producers of sodium gluconate, namely Akzo Nobel NV ('Akzo'), ADM, Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA ('Avebe'), Fujisawa Pharmaceutical Co. Ltd ('Fujisawa'), Jungbunzlauer AG ('JBL') and Roquette Frères SA ('Roquette').

7 Sodium gluconate is a chelating agent, that is to say, a product which inactivates metal ions in industrial processes. Those processes are used, inter alia, in industrial cleaning, surface treatment 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 other industries.

8 In October and December 1997, and again in February 1998, the Commission was informed that, following an investigation by the United States Department of Justice, Akzo, Avebe, Glucona vof ('Glucona'), an undertaking controlled until 1995 by Akzo Chemie BV, a wholly-owned subsidiary of Akzo and Avebe, Fujisawa and Roquette had acknowledged participating in a cartel to fix the prices of sodium gluconate and to allocate sales volumes of that product in the United States and elsewhere. Those undertakings and ADM were fined pursuant to agreements entered into with the Department of Justice.

9 On 18 February 1998 the Commission sent requests for information under Article 11 of Council Regulation No 17 to the main producers, importers, exporters and purchasers of sodium gluconate in Europe. That request was not sent to ADM.

10 Following those requests, Fujisawa stated that it wanted to cooperate with the Commission on the basis of the Commission notice concerning the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice').

11 On 10 November 1998 the Commission sent a request for information to ADM, which declared that it intended to cooperate.

12 In the light of the information supplied to it and other evidence, the Commission concluded that the undertakings against whom the complaint had been made had taken part in a cartel which involved the allocation of sales quotas, the fixing of minimum prices in the sodium gluconate market and the creation of monitoring systems, the details of which were determined at regular multilateral and bilateral meetings held by the members of the cartel. Consequently, on 17 May 2000 the Commission sent a statement of objections to ADM and to the other undertakings concerned in respect of the infringement of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3). None of those undertakings either requested an oral hearing or substantially contested the facts as set out in the statement of objections.

The duration of the cartel

13 The Commission held that the duration of the cartel was from February 1987 until June 1995, taking all the participants into account. In that regard, the Commission identified the meeting of 3 to 5 June 1995 held in Anaheim (United States) ('the meeting of 3 to 5 June 1995') as the last attempt to continue the cartel under investigation. In doing so, the Commission disregarded the claim that ADM ended its participation in the cartel with effect from 4 October 1994, when a meeting of the members of the cartel was held in London (United Kingdom) ('the meeting of 4 October 1994').

The fines

14 In order to set the fines, the Commission applied the methods set out in the 1998 Guidelines and in the Leniency Notice.

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

16 As regards the gravity of the infringement, first, the Commission, in recital 371 of the contested decision, described the infringement as very serious, taking into account its nature, its actual impact on the sodium gluconate market in the European Economic Area and the geographical extent of the market concerned.

17 Next, the Commission held, in recitals 378 to 385 of the contested decision, that it was necessary to take account of the actual economic capacity to cause damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, on the basis of the worldwide turnover achieved in 1995, the last year of the infringement, by the undertakings concerned from sales of sodium gluconate, as reported by the undertakings concerned following the Commission's requests for information, the Commission calculated the respective market shares of those undertakings and 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 of above 20%, namely Fujisawa (35.54%), JBL (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 to 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, at EUR 2.5 million each for Akzo and Avebe, which jointly owned Glucona).

18 Further, in order to ensure that the fine had a sufficiently 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 when their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission, in recital 388 of the contested decision, adjusted the starting amounts. 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 amounts for ADM and Akzo and therefore increased the starting amount, so that it was set at EUR 12.5 million as regards ADM and EUR 6.25 million as regards Akzo.

19 In recitals 389 to 392 of the contested decision, the Commission stated that in order to take account of the duration of the infringement by each undertaking, the starting amount should be increased by 10% per year, in other words an increase of 80% for Akzo, Avebe, Fujisawa and Roquette, 70% for JBL and 35% for ADM.

20 Accordingly, in recital 396 of the contested decision, the Commission set the basic amount of the fines at EUR 11.25 million for Akzo, EUR 16.88 million for ADM, EUR 4.5 million for Avebe, EUR 18 million for Fujisawa and Roquette, and EUR 17 million for JBL.

21 Second, as is stated in recital 403 of the contested decision, owing to aggravating circumstances the basic amount of the fine imposed on JBL was increased by 50%, on the ground that that undertaking had acted as ringleader of the cartel.

22 Third, in recitals 404 to 410 of the contested decision, the Commission examined and rejected the arguments of certain undertakings, including ADM, that there were attenuating circumstances which should have applied in their case.

23 Fourth, as stated in recital 418 of the contested decision, under Section B of the Leniency Notice, the Commission allowed Fujisawa a 'very substantial reduction' (namely 80%) of the fine which would have been imposed if it had not cooperated. In addition, the Commission held, in recital 423 of that decision, that ADM did not meet the conditions laid down in Section C of the Leniency Notice and did not qualify for a 'substantial reduction' of the amount of its fine. Finally, under Section D of that notice, the Commission allowed, in recitals 426 and 427 of that decision, ADM and Roquette a 'significant reduction' (namely 40%) of the fine, and allowed Akzo, Avebe and JBL a 20% reduction.

The operative part of the contested decision

24 Under Article 1(1) of the contested decision, the six undertakings to whom it was addressed 'have infringed Article 81(1) EC … by participating in a continuing agreement and/or concerted practice in the sodium gluconate sector'.

25 Article 1(2) of the decision states that the duration of the infringement was from February 1987 to June 1995 in the case of Akzo, Avebe, Fujisawa and Roquette, from May 1988 to June 1995 in the case of JBL and from June 1991 to June 1995 in the case of ADM.

26 Article 3 of the operative part of the contested decision is worded as follows:

'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) [JBL]	EUR 20.4 million
(f) [Roquette]	EUR 10.8 million'

Procedure before the Court of First Instance and the judgment under appeal

27 On 21 December 2001 ADM brought an action before the Court of First Instance against the contested decision.

28 By its action ADM sought the annulment of Article 1 of the Decision in so far as pertaining to it, or at least to the extent that it finds that ADM was party to an infringement after 4 October 1994, of Article 3 of the Decision insofar as pertaining to it, and, in the alternative, annulment or substantial reduction of the fine imposed on it.

29 In support of its action ADM put forward four pleas in law with various arguments.

30 First, ADM pleaded that the 1998 Guidelines had been wrongly applied to the present case. In particular, ADM stated that the Commission had not put forward any Community competition policy considerations which justified a significant increase in the level of fines by means of the application of the 1998 Guidelines.

31 The Court of First Instance rejected that plea in law by holding, first, in paragraph 44 of the judgment under appeal, that the Commission cannot be deprived of its discretion to raise the level of fines to ensure the implementation of Community competition policy and, secondly, in paragraphs 47 and 48 of that judgment, that the increase by the Commission in the level of fines was not manifestly disproportionate to the objective of ensuring that implementation, and that it must have been reasonably foreseeable for ADM that the Commission could at any time review the general level of fines when implementing another competition policy.

32 Second, ADM challenged the assessment of the infringement's gravity and argued, more specifically, that the Commission had not adequately taken into account the limited turnover achieved by it from sales of sodium gluconate.

33 After stating, in paragraphs 76 and 77 of the judgment under appeal, that turnover is one factor among others to be assessed in order to set the fine, the Court of First Instance held, in paragraph 86 of that judgment, that the Commission had in fact taken account of the turnover of the parties to the cartel from sales of sodium gluconate in order to apply a differential treatment to the undertakings concerned.

34 Third, ADM claimed, in the context of the same plea in law relating to the assessment of the infringement's gravity, that the Commission had contravened the principle of equal treatment, since it had imposed a fine of a considerably lower amount in the case which gave rise to 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, 'the Zinc phosphate decision'), in circumstances comparable to those of the infringement in the present case.

35 In that regard, the Court of First Instance stated, in paragraphs 107 to 111 of the judgment under appeal, that the Commission's practice in previous decisions does not itself serve as a legal framework for fines imposed in competition matters and, consequently, the appellant's argument was irrelevant. Furthermore, the Court added, in paragraph 113 of that judgment, that the circumstances of the case which gave rise to the contested decision and those of the case which gave rise to the Zinc phosphate decision were, prima facie, different, so that the Court held that, in any event, and in the exercise of its unlimited jurisdiction, the basic amount set by the Commission for the infringement committed by ADM should stand.

36 Fourth, and again in the context of the same plea in law relating to the assessment of the infringement's gravity, ADM claimed that the Commission had erred in law by excluding sodium gluconate substitutes from the relevant market.

37 Finding, in paragraph 237 of the judgment under appeal, that ADM had failed to demonstrate that the impact of the sodium gluconate cartel on the wider chelating agent market was non-existent or at least negligible, the Court of First Instance rejected that argument.

38 Fifth, in the context of the plea in law that there were errors of assessment in relation to the infringement's duration, ADM challenged the Commission's analysis of its conduct at the meeting of 4 October 1994.

39 In paragraph 247 of the judgment under appeal, the Court of First Instance held that ADM had not distanced itself publicly from the cartel at that meeting, and upheld the Commission's assessment that ADM's conduct could be described as strategic. In paragraphs 248 to 250 of that judgment, the Court pointed out that the statements of other members of the cartel supported that position.

40 Sixth, in the context of the same plea in law that there were errors of assessment in relation to the infringement's duration, ADM argued that the Commission was wrong to consider that the meeting of 3 to 5 June 1995 proved that the cartel had continued to that date.

41 The Court of First Instance's reasoning for the rejection of that claim was based on five factors, which included the observation, in paragraph 263 of the judgment under appeal, that a note written by Roquette at that meeting supported the Commission's position.

42 Seventh, in the context of a plea in law that there were errors of assessment by the Commission in relation to attenuating circumstances, ADM claimed that the Commission had been wrong not to give it the benefit of a reduced fine, since it had ended its unlawful conduct as soon as the United States antitrust authorities intervened.

43 The Court of First Instance, in paragraphs 277 to 280 of the judgment under appeal, interpreted Section 3 of the 1998 Guidelines, and concluded, in paragraph 283 of that judgment, that ADM's conduct was not capable of constituting an attenuating circumstance; the Court therefore rejected that plea in law and dismissed the action in its entirety.

Forms of order sought by the parties before the Court of Justice

44 ADM claims that the Court should:

— set aside the judgment under appeal in so far as the Court of First Instance dismissed the action for annulment of the contested decision;

— annul Article 3 of the contested decision so far as pertaining to it;

— alternatively, modify Article 3 to reduce or to annul the fine imposed on ADM;

— alternatively, 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; and

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

45 The Commission contends that the Court should:

— dismiss the appeal, and

— order ADM to pay the costs.

The appeal

46 In support of its appeal, ADM relies essentially on the following four grounds of appeal:

— an error in law in the application of the principles on setting the amount of the fine in that the Court of First Instance applied an incorrect principle to determine that amount;

— an error in law in the assessment of the cartel's effect on the relevant market;

— an error in law in the fixing of the date of termination of the cartel; and

— alternatively, an error in law in relation to taking account of attenuating circumstances.

The first ground of appeal: an error in law in the application of the principles relating to setting the amount of the fine

Arguments of the parties

47 The first ground relied on by ADM has three parts.

— The first part of the first ground, alleging failure to state reasons

48 ADM submits that the Court of First Instance failed to explain why the amount of the fine imposed, which under the Commission's earlier practice would have been much lower than it is after retroactive application of the 1998 Guidelines, was increased so significantly. While acknowledging that the Commission has a discretion in setting the amount of the fines which it imposes, ADM claims nonetheless that the Commission exceeds its discretion when it does not demonstrate, in the light of Community competition policy considerations, that an increase in the level of the fine is necessary. Neither the Commission nor the Court of First Instance put forward any such justification, even though such a demonstration is required in accordance with settled case-law (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 108 and 109, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 227) and in light of the requirement in the first paragraph of the 1998 Guidelines that the policy underpinning fines should be coherent and non-discriminatory.

49 The Commission contends that the Court of First Instance responded in the judgment under appeal to ADM's arguments on the application, in the present case, of the 1998 Guidelines to set the amount of the fine and, accordingly, explained the resulting increase. The Commission states that any additional statement of reasons is redundant, since the very aim of the 1998 Guidelines is to make transparent the rules for setting fines.

— The second part of the first ground, alleging failure to have regard to the criteria established by *Musique Diffusion française and Others* v *Commission*

50 ADM submits that the Court of First Instance erred in law, by finding, in particular in paragraph 47 of the judgment under appeal, that the Commission satisfied the criteria established by *Musique Diffusion française and Others* v *Commission*, and that thus there was justification for the use of its discretion in increasing the fine. Neither the Commission nor the Court of First Instance put forward any reasons for any increase in the fine beyond the amount which would stem from application of the Commission notice titled 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' (OJ 2006 C 210, p. 2) ('the 2006 Guidelines').

51 Primarily, the Commission considers that the second part of the first ground is inadmissible, since it does no more than challenge in a general and vague manner the amount of the fine upheld by the Court of First Instance and, therefore, is a request for re-examination. In any event it is merely a rerun of the first part of the first ground. The Commission also observes that it is clear from consistent case-law, latterly confirmed in Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraphs 20 and 21), that the Commission may at any time adjust the level of fines to the needs of Community competition policy.

— The third part of the first ground, alleging an infringement of the legal principles applicable to the setting of fines

52 ADM claims that the Court of First Instance, in the judgment under appeal, permitted the Commission not to take into account the relevant product turnover as a starting point for setting the amount of the fine. Accordingly, in paragraphs 84 to 87 of that judgment, that turnover is used only to apply differential weightings for setting the fine. However, the 2006 Guidelines make clear, contrary to what was decided by the Court of First Instance, that turnover is the starting point for setting the amount of the fine. On that basis, the amount of the fine would certainly be lower than that resulting from the incorrect method chosen by the Commission and upheld by the Court of First Instance.

53 The Commission, referring to Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 196, states that the Court of First Instance alone has jurisdiction to review the manner in which the Commission has assessed the gravity of unlawful conduct in each particular case. In that regard, it considers that the Court of First Instance took account of all the relevant factors in the present case and responded to all of ADM's arguments. Furthermore, it is clear from the contested decision and from the judgment under appeal that the turnover from sales of sodium gluconate served as a basis for setting the amount of the fine.

— The fourth part of the first ground, alleging an infringement of the principle of equal treatment

54 ADM submits that the cartel of which it was a member should have been treated in the same way as the cartel at issue in the Zinc phosphate decision. Contrary to what was held by the Court of First Instance, there were no relevant objective differences between

that case and that leading to the contested decision which justified fines of different amounts. First, the judgments referred to by the Court of First Instance in that context are irrelevant because they were delivered prior to publication of the 1998 Guidelines. Second, the factors on which the Court of First Instance relied to uphold, in the exercise of its unlimited jurisdiction, the amount of the fine imposed, were the same as those in question in the Zinc phosphate decision.

55 The Commission contends, first, that the Court of First Instance put forward objective factors which distinguish the present case from that which led to the Zinc phosphate decision. Second, ADM has not challenged the case-law according to which the Commission's practice in previous decisions does not serve as a legal framework for fines imposed in competition matters. Third, it is clear from the judgment under appeal that ADM did not prove that there was any discrimination in the determination of the amount of the fine. Consequently, the Court of Justice cannot substitute its own assessment of that amount for that of the Court of First Instance, as is clear from Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 152.

Findings of the Court

56 By the first two parts of the first ground, which should be dealt with together, ADM complains that the Court of First Instance did not respond to its argument that the Commission failed, in the contested decision and in its written pleadings submitted in the course of the procedure at first instance, to provide any justification or put forward any evidence to demonstrate that implementation of Community competition policy required the imposition on ADM of a fine, by retroactive application of the 1998 Guidelines, of a much greater amount than the fines ostensibly prevailing under the Commission's practice in previous cases. In doing so, the Court of First Instance committed an error in law by omitting to require such a justification, even though, in accordance with *Musique Diffusion française and Others* v *Commission*, it was necessary.

57 It must first be stated that, in paragraphs 43 to 49 of the judgment under appeal, the Court of First Instance responded to the plea in law alleging an infringement of the principles of legal certainty and non-retroactivity of penalties on the ground that the amount of the fine imposed on ADM pursuant to the 1998 Guidelines was greater than that of the Commission's previous fines.

58 The Court of First Instance rejected that plea in law by stating, in paragraph 48 of the judgment under appeal, that ADM should reasonably have been able to foresee an increase in the level of fines, assuming such an increase had been established, at the time when the infringements at issue were committed.

59 It is clear from the case-law referred to by the Court of First Instance in paragraph 46 of the judgment under appeal that undertakings involved in an administrative procedure in which fines may be imposed 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. That is true not only where the Commission raises the level of the amount of fines by imposing fines in individual decisions but also where that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the 1998 Guidelines (*Dansk Rørindustri and Others* v *Commission*, paragraphs 229 and 230).

60 In the present case, the Commission applied the 1998 Guidelines to set the amount of the fine imposed on ADM. On the one hand, the 1998 Guidelines lay down rules of conduct from which the Commission cannot depart without being found to be in breach of general principles of law, such as equal treatment and the protection of legitimate expectations. On the other hand, they ensure legal certainty for the undertakings concerned by defining the method which the Commission has imposed on itself in order to set the amount of fines imposed under Article 15(2) of Regulation No 17 (see, to that effect, the judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, paragraph 53).

61 As stated in paragraph 43 of the judgment under appeal, the main innovation in the 1998 Guidelines consists in taking as a starting point for the calculation a basic amount, determined on the basis of brackets of figures laid down for that purpose by the 1998 Guidelines; those brackets reflect the various degrees of gravity of 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 (*Dansk Rørindustri and Others* v *Commission*, paragraph 225).

62 In assessing the infringement's gravity, the Commission must take into account various factors to enable it to set the amount of the fine, including considerations linked to the need to raise the level of fines.

63 That is what follows both from Article 15(2) of Regulation No 17, which adopts, as criteria for setting the amount of the fine, only the gravity and the duration of the infringement and, essentially, from *Musique Diffusion française and Others* v *Commission*, which is relied on by the appellant, where the Court stated, in paragraph 106, 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.

64 In the present case, in paragraph 47 of the judgment under appeal, in response to the appellant's argument that the alleged increase in the level of fines by the Commission was disproportionate in relation to the objective of ensuring the implementation of competition policy, the Court of First Instance rejected that argument, without prejudice, however, to its assessment of the gravity of the infringement in paragraph 99 et seq. of that judgment.

65 Accordingly, in paragraph 103, in particular, of the judgment under appeal, the Court of First Instance, analysing the gravity of the infringement as determined by the Commission, recalled the reasons why the Commission had set the fine imposed on the appellant at such an amount, referring in that regard to recitals 6, 8 and 9 of the contested decision.

66 The Court of First Instance thereby followed the approach adopted by the Court of Justice in *Musique Diffusion française and Others* v *Commission*, which was again adopted, as regards more specifically the application of the 1998 Guidelines, in *Dansk Rørindustri and Others* v *Commission*. In the latter judgment, the Court, without requiring the Commission to submit specific justification beyond what is required under the 1998 Guidelines, held, in paragraph 232 of that judgment, that the application of the 1998 Guidelines to infringements committed before their adoption was not a breach of either the principle of non-retroactivity or of the principle of legal certainty.

67 It follows that there are no grounds for claiming that the Court of First Instance either failed to state reasons or incorrectly applied the Court's case-law.

68 Consequently, the first two parts of the first ground of appeal cannot succeed.

69 By the third part of the first ground, ADM essentially complains that the Court of First Instance did not require the Commission to take into account the turnover from sales of sodium gluconate as the appropriate basis for setting the fine.

70 First, since the Court of First Instance stated, in paragraph 78 of the judgment under appeal, that the relevant product turnover 'may' constitute an appropriate starting point for assessing the damage to competition on the relevant product market within the European Community, the appellant cannot complain that the Court of First Instance contradicts itself in not in fact adopting that criterion as the appropriate basis.

71 Secondly, it should be noted as a preliminary remark that, according to the case-law of the Court, in setting the amount of fines, regard must be had to the duration of the infringements and to all the factors capable of affecting the assessment of the gravity of those infringements (see *Musique Diffusion française and Others* v *Commission*, paragraph 129, and *Dansk Rørindustri and Others* v *Commission*, paragraph 240).

72 In that regard, the gravity of infringements of Community competition law must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (*Dalmine* v *Commission*, paragraph 129 and case-law cited).

73 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel, the profit which they were able to derive from it, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the Community (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 129, and *Dalmine* v *Commission*, paragraph 130).

74 In that context, it is permissible, for the determination of the fine, to take into account both the undertaking's overall turnover, which is an indication, however approximate and imperfect, of the size of the undertaking and its economic strength, and that part of the turnover which derives from the goods which are the subject of the infringement and which therefore is capable of giving an indication of the scale of the infringement. It is important not to confer on one or the other of those figures an importance which is disproportionate in relation to other factors to be assessed and, consequently, the fixing of an appropriate fine cannot be the result of a simple calculation based on the turnover from sales of the product concerned (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 100).

75 Furthermore, Community law contains no general principle that the penalty must be proportionate to the undertaking's turnover from sales of the product in respect of which the infringement was committed (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 101).

76 It follows that, contrary to what is claimed by ADM, the Court of First Instance was correct to state, in paragraph 78 of the judgment under appeal, that the turnover from sales of sodium gluconate was not the only criterion on which the Commission had to assess the gravity of the infringement. In any event, it is not necessarily the starting point for the setting of fines.

77 That is also clear from the 1998 Guidelines, as stated in paragraph 61 of this judgment. Accordingly, if the approach advocated by the appellant were to be applied, that would inevitably lead to a breach of the rules laid down by the 1998 Guidelines, the applicability of which to the infringement committed by the appellant has been correctly recognised by the Court of First Instance.

78 Consequently, the appellant cannot complain that the Court of First Instance has infringed the legal principles governing the setting of fines by not taking into account the turnover from the product at issue as the starting point for determining the amount of the fine imposed on it.

79 Thirdly, referring in particular to recitals 378 to 382 of the contested decision, the Court of First Instance recalled, in paragraphs 86 and 87 of the judgment under appeal, how the Commission had taken account of the turnover realised from sales of sodium gluconate in order to determine the amount of the fine. The Court held, in that context, that the Commission had not exceeded its wide discretion and further held, in paragraph 114 of that judgment, that 'the basic amount set by the Commission for the

infringement committed by ADM in this instance [was] appropriate in the light of all the factors referred to by the Commission in the [contested decision] and in the light of the assessment of some of those factors in this judgment'.

80 It is settled case-law that it is not for the Court of Justice, in the context of an appeal, to call in question the assessment of the facts by the Court of First Instance, which alone has jurisdiction to review how in each particular case the Commission has appraised the gravity of unlawful conduct (see, to that effect, *Technische Unie* v *Commission*, paragraph 196).

81 It follows that the third part of the first ground of appeal must also fail.

82 As regards the fourth part of that ground, the Court of First Instance recalled, in paragraphs 108 to 110 of the judgment under appeal, the settled case-law that the Commission's practice in previous decisions does not serve as a legal framework for fines imposed in competition matters, since the Commission enjoys a wide discretion in the area of setting fines and is not bound by assessments which it has made in the past (*Dansk Rørindustri and Others* v *Commission*, paragraphs 209 to 213).

83 The Court of First Instance correctly concluded, in paragraph 111 of the judgment under appeal, that the simple reference by ADM to the Zinc phosphate decision is in itself ineffective, since the Commission was not required to assess the present case in the same manner.

84 In its appeal, ADM offers no argument capable of challenging that determining factor in the grounds of the judgment under appeal.

85 ADM merely calls into question the factors which distinguish the present case from that which led to the Zinc phosphate decision, as stated by the Court of First Instance in paragraph 113 of the judgment under appeal, but does not explain why, in the actual circumstances of the present case, it was not appropriate to follow the settled case-law referred to by the Court of First Instance in paragraphs 108 and 109 of that judgment.

86 Accordingly, the fourth part of the first ground must be rejected and, consequently, the first ground of appeal must be rejected entirely as, in part, unfounded and, in part, inadmissible.

The second ground of appeal, alleging an error in law in the assessment of the effect of the cartel on the relevant market

Arguments of the parties

87 The second ground of appeal has three parts.

— The first part of the second ground, alleging an infringement of principle that the Commission must follow self-imposed rules

88 ADM claims that the Court of First Instance did not examine its argument that the Commission had not defined the relevant market in order to assess the impact of the cartel, even though, under the 1998 Guidelines, that definition is an essential prerequisite. If the Commission had defined the market correctly, namely by taking into account substitutable products on the chelating agents market, it would have concluded that there may have been no impact on the prices charged.

89 According to the Commission, ADM's approach rests on a misunderstanding of the objective to be achieved by defining the relevant market. In the present case, the Court of First Instance stated, in paragraph 226 of the judgment under appeal, that the Commission defined the relevant market prior to its analysis of the gravity of the infringement committed by ADM. Consequently, the appellant is asking the Court, on appeal, to express an opinion on points of fact which it had been unable to prove at first instance.

— The second part of the second ground, alleging an infringement of the duty to state reasons

90 ADM claims that, by rejecting without any explanation ADM's arguments that there is evidence of the cartel's lack of impact on the relevant market, the Court of First Instance failed to fulfil its duty to state reasons. In that regard, the evidence put forward by ADM at first instance demonstrated unequivocally that the movements in the price of sodium gluconate following the cartel were caused by other factors.

91 According to the Commission, it is clear from the judgment under appeal, in particular paragraphs 232 to 236, that the Court of First Instance examined all the evidence provided by ADM, before concluding that that evidence was not sufficient to support ADM's position.

92 Additionally, the Commission states that ADM's request is equivalent to inviting the Court to review the evidence submitted at first instance; such a review lies outside its jurisdiction in an appeal.

— The third part of the second ground, alleging that the Court of First Instance unlawfully reversed the burden of proof

93 ADM essentially complains that the judgment under appeal was wrong to impose upon it the burden of proving that, even in the absence of the cartel, prices would have been the same as those put forward by the Commission. First, it is clear from the 1998 Guidelines that it is for the Commission to prove that prices would have been lower in the absence of the cartel. Second, the Court of First Instance itself acknowledged, in paragraphs 177 and 184 of the judgment under appeal, that it was impossible to determine an exact price for the product concerned in the absence of the cartel.

94 The Commission submits that the Court of First Instance ruled that its demonstration of the impact of the infringement on the sodium gluconate market was sufficient in law. In doing so, the Court of First Instance found that ADM had not demonstrated that another definition of the relevant market would have led to a different conclusion as regards the impact of the cartel. This third part of the second ground amounts in fact to a request for a reappraisal of the facts by the Court of Justice on appeal and is, consequently, inadmissible.

Findings of the Court

95 As regards the second ground of appeal, the three parts of which should be dealt with together, it must be recalled, at the outset, that, when the fine is set in accordance with the 1998 Guidelines, the actual impact of the cartel on the relevant market is one factor which may be taken into account in order to assess the gravity of the infringement committed.

96 First, the Court of First Instance found, in paragraph 226 of the judgment under appeal, that in recitals 34 to 41 of the contested decision the Commission defined the product market concerned as being that of sodium gluconate in its solid and liquid forms and its basic product, gluconic acid. The Court of First Instance also set out there the reasons why the Commission had not accepted the wider market claimed by ADM.

97 Second, the Court of First Instance correctly stated, in paragraphs 229 to 231 of the judgment under appeal, that the mere assertion by ADM that the Commission had adopted an incorrect definition of the relevant market was not in itself sufficient to demonstrate that, by using the definition of the market advocated by ADM, the infringement at issue would not have had any impact on that market.

98 Third, after giving an account, in paragraph 232 of the judgment under appeal, of the method used by the Commission to demonstrate the impact of the infringement at issue on the market defined by the Commission, the Court of First Instance held, in paragraphs 233 to 237 of that judgment, that the appellant had merely asserted that the Commission had erred in its definition of the relevant market, but had not explained to what extent its chosen definition of the market would have precluded the infringement at issue having any actual impact.

99 It follows from the foregoing that ADM cannot complain that the Court of First Instance wrongly permitted the Commission to assess the impact of the infringement at issue without having first defined the relevant market. As is clear from paragraph 226 of the judgment under appeal, the Commission in fact made such a definition.

100 Furthermore, the Court of First Instance, in its assessment of the facts against which there is no appeal, considered that the analysis of the impact of the infringement at issue on the relevant market was compelling in the light of the evidence put forward in that regard by the Commission. Thus, referring to recital 354 of the contested decision, the Court of First Instance stated that, in support of its analysis, the Commission had, inter alia, correlated the prices of sodium gluconate and the commencement of the cartel, estimated the product price levels which would have applied in the absence of the cartel at issue and deduced, finally, that the infringement committed by the appellant had an impact on the sodium gluconate market.

101 Nor are there grounds for complaining that the Court of First Instance reversed the burden of proving the definition of the relevant market and failed to state reasons for its assessment.

102 First, in paragraph 237 of the judgment under appeal, the Court of First Instance merely found that the appellant had failed to demonstrate that the impact of the cartel at issue on the wider market advocated by it was non-existent or at least negligible. Accordingly, the appellant was correctly required to provide evidence sufficient to refute the Commission's analysis, as referred to in paragraphs 196 and 197 of the judgment under appeal, which served to demonstrate the correlation between the movement of prices on the sodium gluconate market and the commencement of the cartel.

103 The need for the appellant to provide such evidence is greater in light of the fact that, first, ADM stated at first instance that the prices of those products which, in its opinion, should have been taken into consideration with sodium gluconate as part of the relevant market suffered fluctuations similar to sodium gluconate prices and, secondly, as stated by the Advocate General in point 154 of her Opinion, ADM claims that the cartel had no impact on the relevant market even though it was a member of the cartel for several years.

104 Secondly, the Court of First Instance thereby responded to ADM's argument in relation to the cartel's alleged lack of impact on the sodium gluconate market by holding that the evidence presented by ADM was not sufficient to refute the Commission's analysis, and thus fulfilled its obligation to state reasons.

105 In that regard, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, to that effect, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 29).

106 In the present case, the appellant, when referring in its appeal to evidence put forward at first instance which the Court of First Instance ruled to be insufficient, effectively asks the Court of Justice to re-examine that evidence, but does not plead that the Court of First Instance distorted the clear sense of the evidence; the Court of Justice, however, has no jurisdiction to conduct such a re-examination.

107 Consequently, given that this Court has held, in particular in paragraph 102 of this judgment, that the Court of First Instance did not reverse the burden of proof and given that the appellant has not claimed that there was any distortion of the evidence, the second ground of appeal must be rejected in its entirety as, in part, unfounded and, in part, inadmissible.

The third ground of appeal, alleging an error in law in determining the date of termination of the cartel

Arguments of the parties

108 This ground has four parts.

— The first part of the third ground, alleging an infringement of Article 81 EC because of misapplication of the rules on termination of the cartel

109 ADM essentially disputes the analysis by the Court of First Instance, in paragraph 247 of the judgment under appeal, of its intentions at the meeting of 4 October 1994. By inferring that ADM's conduct at that meeting was not intended to make known its withdrawal from the cartel but rather was strategic and designed to have its wishes prevail within the cartel, the Court of First Instance concluded that ADM wanted to continue its role in the cartel. ADM cannot however be accused of a mere intention to continue the cartel, inasmuch as it had publicly stated its wish to end its participation in the cartel, and Article 81 EC does not allow subjective factors to be used as the basis for identifying a breach of its provisions but merely prohibits overt acts.

110 According to the Commission, the relevant test of a public dissociation from a cartel is whether the members of the cartel understood the conduct of the undertaking as terminating its participation in such an agreement. In that regard, it is for that undertaking to discharge the burden of proving such an understanding. However, while ADM proved that it had left the meeting of 4 October 1994 before the end of that meeting, ADM did not demonstrate that the other participants understood that conduct to represent its withdrawal from the cartel. That is what was shown, on any view, by the evidence set out by the Court of First Instance in paragraph 249 of the judgment under appeal.

— The second part of the third ground, alleging distortion of the clear sense of the evidence

111 According to ADM, the Court of First Instance was wrong not to conclude, in paragraphs 248 to 250 of the judgment under appeal, on the basis of statements from JBL and Roquette, that ADM had ceased to participate in the cartel after the meeting of 4 October 1994. In so doing, the Court of First Instance distorted the evidence.

112 According to the Commission, it is clear from the evidence referred to by ADM that Roquette left the cartel on 4 October 1994. That however does not mean that the cartel ended on that date and even less that ADM had ended its participation.

— The third part of the third ground, alleging that the Court of First Instance infringed Article 81 EC by holding that the conduct at the meeting of 3 to 5 June 1995 was anti-competitive

113 Starting from the premiss that it had ceased to participate in the cartel after the meeting of 4 October 1994, ADM submits that the Court of First Instance infringed Article 81 EC by deciding that the cartel had continued thereafter and that the meeting of 3 to 5 June

1995 confirmed that conclusion. However, the Court of First Instance did not require the Commission to demonstrate that the discussions which took place at that meeting had had an anti-competitive effect.

114 According to the Commission, since ADM had not ceased to participate in the cartel on 4 October 1994, the Court of First Instance was correct to consider that the meeting of 3 to 5 June 1995 was not the start of a fresh cartel.

— The fourth part of the third ground, alleging distortion of an item of evidence

115 By holding, in particular in paragraph 263 of the judgment under appeal, that the note attributed to Roquette, and on which the Court of First Instance based its assessment that the cartel had continued, had been written by Roquette at the meeting of 3 to 5 June 1995, the Court of First Instance distorted that item of evidence in two respects. First, that note was written by the United States antitrust authorities, and second, that note was not written at the meeting of 3 to 5 June 1995.

116 The Commission states that is clear from recital 233 of the contested decision that the note referred to by the Court of First Instance in paragraph 263 of the judgment under appeal was supplied by Roquette. In any event, that item of evidence was not in itself decisive in the reasoning of the Court of First Instance.

Findings of the Court

117 It must be stated at the outset that in an appeal the Court's examination is restricted to any errors in law by the Court of First Instance and to any distortion by it of the clear sense of the evidence.

118 Accordingly, in the first part of the third ground, ADM challenges the fact that the Court of First Instance did not interpret its leaving the meeting of 4 October 1994 as the end of its participation in the cartel at issue. Thereby, ADM argues, the Court of First Instance misapplied the test of public distancing by introducing, wrongly, a subjective component, namely ADM's intentions.

119 In accordance with settled case-law, to prove to the requisite standard that an undertaking participated in a cartel, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded, without manifestly opposing them. Where participation in such meetings has been established, it is for that undertaking 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 (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 81).

120 Consequently, it is indeed the understanding which the other participants in a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement. Accordingly, the Court of First Instance was fully entitled, in paragraph 247 of the judgment under appeal, to rule that the mere fact that the appellant had left the meeting of 4 October 1994 could not, in itself, be regarded as a public distancing from the cartel at issue and that it was for ADM to provide evidence that the members of the cartel considered that ADM was ending its participation.

121 In that regard, in the second part of the third ground, ADM claims that the Court of First Instance distorted the clear sense of the evidence by ruling, in paragraph 248 of the judgment under appeal, that none of the documents relied on by the appellant were sufficient proof that the other members of the cartel at issue had understood its conduct at the meeting of 4 October 1994 as a public distancing from the terms of that cartel.

122 To prove that it had ended its participation in the cartel after the meeting of 4 October 1994, ADM relied, inter alia, on documents from other participants at that meeting, namely a letter of 21 May 1999 sent by JBL to the Commission, a letter of 12 May 1998 sent by Fujisawa to the Commission and a letter of 30 April 1999 sent by JBL to the Commission. In the present case, the appellant does not challenge the content of those documents as established by the Court of First Instance, but its interpretation of them in paragraphs 249 to 251 of the judgment under appeal.

123 As regards JBL's letters of 30 April and 21 May 1999, the Court of First Instance stated, in paragraphs 249 and 251 of the judgment under appeal, that they contained no description of ADM's conduct at the meeting of 4 October 1994 and merely indicated that Roquette would no longer observe the anti-competitive agreements.

124 The Court of First Instance accordingly made an entirely legitimate interpretation of those documents in holding that they did not represent sufficient proof by ADM that it had withdrawn from the cartel after the meeting of 4 October 1994.

125 Quite to the contrary, the Court of First Instance held, on the basis of the evidence referred to in paragraphs 250 and 251 of the judgment under appeal and not disputed by ADM, namely Fujisawa's letter of 12 May 1998 stating that the cartel had ended only in 1995 and JBL's letter of 30 April 1999 stating that at the meeting of 4 October 1994 the appellant had requested a reallocation of sales quotas, that ADM had failed to prove

that it had ended its participation in the cartel at that meeting, and in so doing the Court did not distort the clear sense of the evidence before it.

126 As regards the fourth part of the third ground, it must be recalled that there were five factors on which the Court of First Instance based its decision that the cartel at issue had persisted until the meeting of 3 to 5 June 1995.

127 In paragraphs 258 to 262 of the judgment under appeal, the Court of First Instance stated, without objection by ADM, that all the members of the cartel were present at the last-mentioned meeting and that the participants discussed sales volumes of sodium gluconate in 1994 while attempting to set up a new information exchange system relating to those volumes in order to determine the total size of the sodium gluconate market.

128 Next, in paragraph 263 of the judgment under appeal, the Court of First Instance relied on a document which it attributed to Roquette and which confirmed that at the meeting of 3 to 5 June 1995 the participants had intended to continue their anti-competitive practices.

129 Furthermore, in paragraph 264 of the judgment under appeal, the Court of First Instance rejected the evidence submitted by ADM which, it claimed, was such as to undermine the position maintained by the Commission as to the nature of the meeting of 3 to 5 June 1995.

130 Lastly, in paragraph 266 of the judgment under appeal, the Court of First Instance held that the argument that that meeting coincided with a general industry meeting was irrelevant.

131 Consequently, and in light of the fact that the Court of First Instance was fully entitled to rule that the Commission could have taken the view that ADM had not ended its participation in the cartel at the meeting of 4 October 1994, the Court did not err in law by upholding the Commission's argument that the meeting of 3 to 5 June 1995 was a continuation of the cartel at issue.

132 To make that ruling, the Court of First Instance relied on facts and evidence which the Court of Justice cannot re-examine in an appeal except when there has been distortion.

133 In this case, in the fourth part of the third ground, ADM claims that, in paragraph 263 of the judgment under appeal, the Court of First Instance distorted the note supplied to the Commission by Roquette, by finding that it was written by Roquette at the meeting of 3 to 5 June 1995.

134 It is clear, however, as submitted by the appellant and as is accepted also by the Commission, that that document was not written by Roquette, but merely supplied by it, and that it was written after that meeting.

135 In that respect, the Court of First Instance distorted that item of evidence.

136 However, as the Advocate General states in points 214 and 215 of her Opinion, such a distortion does not invalidate the judgment under appeal.

137 As is stated in paragraphs 126 to 130 of this judgment, the reasoning behind the Court of First Instance's ruling that the meeting of 3 to 5 June 1995 constituted an attempt to continue the cartel at issue relied on five factors, the note attributed to Roquette being one of them.

138 In addition, the Court of First Instance itself qualified the probative value of that document by holding, in paragraph 263 of the judgment under appeal, that the note gave only an imprecise idea of the content of the discussions held at the meeting of 3 to 5 June 1995 and considering it as merely confirming the position maintained by the Commission.

139 The fourth part of the third ground is, accordingly, inoperative.

140 As regards, lastly, the third part of the third ground, it must be recalled, as stated by the Court of First Instance in paragraph 265 of the judgment under appeal, that, for the purposes of applying Article 81(1) EC to an agreement or concerted practice, there is no need to take account of the actual effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market. The Court of First Instance did not therefore commit any error in law in that regard.

141 Consequently, it follows from the foregoing that the third ground of appeal must be rejected in its entirety as, in part, unfounded and, in part, inadmissible.

The fourth ground of appeal, submitted in the alternative and alleging an error in law as to the account taken of attenuating circumstances

Arguments of the parties

142 According to ADM, by holding, in paragraph 287 of the judgment under appeal, that the Commission was not under an obligation to grant it the benefit of attenuating circumstances provided for by the 1998 Guidelines in the event of termination of the cartel, the Court of First Instance misinterpreted the 1998 Guidelines. Furthermore, and contrary to the ruling of the Court of First Instance, the application of attenuating circumstances cannot be affected by the fact that the cartel at issue was secret.

143 The Commission considers that the Court of First Instance was correct not to hold that ending the infringement automatically implies a reduction of the fine. The Commission has in that regard a discretion in relation to, inter alia, the conduct of the undertaking in question. In the present case, ADM did not make any critical contribution to the administrative procedure and so could not have the benefit of attenuating circumstances.

Findings of the Court

144 It must be recalled that Section 3 of the 1998 Guidelines states, essentially, that the basic amount of the fine set by the Commission is to be reduced when, for example, the undertaking which is the subject of the complaint terminates the infringement as soon as the Commission intervenes.

145 In that regard, the Court of First Instance held, in paragraph 280 of the judgment under appeal, that that provision should be interpreted as meaning that solely the particular circumstances of the specific case in which the infringement actually terminates as soon as the Commission intervenes can warrant that termination being taken into account as an attenuating circumstance.

146 Consequently, the Court of First Instance rejected the appellant's argument that termination of the cartel must automatically imply a reduction of the basic amount of the fine under Section 3 of the 1998 Guidelines, and stated, in paragraph 279 of the judgment under appeal, that such an interpretation of that provision would undermine the effectiveness of Article 81(1) EC.

147 It cannot be claimed that the Court of First Instance committed an error in law.

148 It is clear that recognition of entitlement to such a reduction of the basic amount of the fine is necessarily linked to the circumstances of the particular case, which may lead the Commission not to allow an undertaking which is party to an unlawful agreement the benefit of it.

149 To recognise an attenuating circumstance in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if their conduct were discovered they could expect, by then curtailing the infringement, their fine to be reduced. Such a recognition would deprive the fine imposed of any deterrent effect and would undermine the effectiveness of Article 81(1) EC.

150 Consequently, the Court of First Instance was correct to rule that, since the appellant had participated in a secret cartel which it did not dispute, it could not expect to be entitled to a reduction of the basic amount of the fine imposed on it on the ground that it had ended its unlawful conduct as soon as the United States antitrust authorities intervened.

151 Consequently, the fourth ground of appeal must be rejected as unfounded.

152 It follows from the foregoing that the appeal must be dismissed in its entirety, since the grounds put forward in its support are in part inadmissible and in part unfounded.

Costs

153 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against ADM and the latter has been unsuccessful, ADM must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Archer Daniels Midland Co. to pay the costs.

[Signatures]