



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

12 December 2012 *

(Competition — Agreements, decisions and concerted practices — Market for calcium carbide and magnesium for the steel and gas industries in the EEA, with the exception of Ireland, Spain, Portugal and the United Kingdom — Decision finding an infringement of Article 81 EC — Price-fixing and market-sharing — Fines — Obligation to state reasons — Proportionality — Equal treatment — 2006 Guidelines on the method of setting fines — Ability to pay)

In Case T-352/09,

Novácke chemické závody a.s., established in Nováky (Slovakia), represented initially by A. Černeiová, and subsequently by M. Bol'oš and L. Bányaiová, lawyers,

applicant,

supported by

Slovak Republic, represented by B. Ricziová, acting as Agent,

intervener,

v

European Commission, represented by F. Castillo de la Torre, N. von Lingen and A. Tokár, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2009) 5791 final of 22 July 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries), in so far as it concerns the applicant, and, in the alternative, cancellation or a reduction of the fine imposed on the applicant by that decision,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz, President, I. Labucka and D. Gratsias (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2012,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

- 1 By Decision C(2009) 5791 final of 22 July 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries) ('the contested decision'), the Commission of the European Communities found that the main suppliers of calcium carbide and magnesium for the steel and gas industries had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a single and continuous infringement from 7 April 2004 until 16 January 2007. The infringement consisted of market-sharing, quota-fixing, customer-allocation, price-fixing and the exchange of sensitive commercial information relating to prices, customers and sales volumes in the EEA, with the exception of Ireland, Spain, Portugal and the United Kingdom.
- 2 The procedure was initiated following an application for immunity, within the meaning of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), submitted by Akzo Nobel NV.
- 3 The applicant, Novácke chemické závody a.s., produces, inter alia, calcium carbide. In Article 1(e) of the contested decision, the Commission found that the applicant had taken part in the infringement throughout its duration and, in subparagraph (e) of the first paragraph of Article 2 of that decision, it imposed a fine of EUR 19.6 million on the applicant jointly and severally with 1. garantovaná a.s., its parent company at the time of the infringement.

Procedure and forms of order sought

- 4 By application lodged at the Court Registry on 14 September 2009, the applicant brought the present action.
- 5 By separate document, lodged at the Court Registry on the same day and registered under reference T-352/09 R, the applicant also submitted an application for interim relief pursuant to Articles 242 EC and 243 EC, and Article 104 et seq. of the Rules of Procedure of the General Court. By order of the President of the Court of 29 October 2009 in Case T-352/09 R *Novácke chemické závody v Commission*, not published in the ECR, that application for interim relief was dismissed.
- 6 By letter lodged at the Court Registry on 7 October 2009, the applicant informed the Court that it had been declared bankrupt. By a further letter, lodged at the Court Registry on 6 November 2009, it informed the Court of the appointment of a new representative by the bankruptcy administrator. It added that, in accordance with the provisions of Slovak law applicable in the event of bankruptcy of a party to judicial proceedings, the proceedings in the present case were to be stayed. The Court took the view that that letter contained, in essence, an application for the proceedings in the present case to be stayed, and invited the Commission to submit its observations on that application. In its observations lodged at the Court Registry on 7 December 2009, the Commission objected to the proposed stay of proceedings.
- 7 By order of the President of the Fifth Chamber of the General Court of 21 January 2010, the proceedings in the present case were stayed, pursuant to Article 77(d) of the Rules of Procedure, until 31 October 2010, in order to enable the applicant's bankruptcy administrator to decide whether he wished to pursue the proceedings in the present case on behalf of the applicant or to discontinue the action.

- 8 By letter lodged at the Court Registry on 16 March 2010, the Commission requested the resumption of the proceedings in the present case. By order of 11 May 2010, the President of the Fifth Chamber of the General Court decided that the proceedings in the present case were to be resumed, the applicant having filed no observations regarding that request within the prescribed period.
- 9 By document lodged at the Court Registry on 25 November 2009, the Slovak Republic applied for leave to intervene in the proceedings in support of the form of order sought by the applicant. By order of 24 June 2010, rectified by order of 26 July 2010, the President of the Fifth Chamber of the General Court allowed that intervention. The Slovak Republic lodged its statement in intervention on 14 September 2010.
- 10 The composition of the Chambers of the Court having been modified, the Judge-Rapporteur initially designated was attached to the Third Chamber, to which the present case was accordingly assigned. Owing to the partial renewal of the Court, the present case was assigned to a new Judge-Rapporteur sitting in that Chamber.
- 11 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, requested (i) the applicant and the Commission to produce certain documents; (ii) the applicant to reply to a question; and (iii) all the parties to reply to another question. The parties complied with those requests, save in regard to one document which the Commission had been asked to produce.
- 12 By order of 27 March 2012, the Court ordered the Commission, by way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, to produce the document which it had not submitted in the context of the measures of organisation of procedure mentioned in the preceding paragraph. The Commission complied with that measure of inquiry within the prescribed period.
- 13 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 25 April 2012.
- 14 At the hearing, the Slovak Republic requested permission to lodge a further document. Since the other parties had no objection, the Court gave permission for the document in question to be lodged, and set a time-limit for the other parties' submission of written observations in relation to that document. The oral procedure was closed on 15 May 2012, following the lodging of the other parties' observations on the document lodged by the Slovak Republic.
- 15 The applicant claims that the Court should:
 - annul the contested decision in so far as it concerns the applicant and, accordingly, cancel the fine imposed on the applicant;
 - in the alternative, cancel or significantly reduce the fine imposed on the applicant;
 - order the Commission to pay the costs.
- 16 The Slovak Republic supports the applicant's request for the cancellation or substantial reduction of the fine imposed on the applicant.
- 17 The Commission contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs.

Law

- 18 In support of its action, the applicant relies on three pleas in law, alleging, first, breach of the general principles of proportionality and equal treatment in the determination of the amount of the fine; second, infringement of essential procedural requirements, an error as to the facts and a manifest error of assessment, in that the Commission refused to take account of the applicant's inability to pay within the meaning of point 35 of its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines'); and, third, infringement of Article 3(1)(g) EC.

First plea in law, alleging breach of the general principles of proportionality and equal treatment in the determination of the amount of the fine

Guidelines

- 19 As is apparent from recital 285 to the contested decision, the fines imposed on the applicant and on the other participants in the cartel at issue were set in accordance with the Guidelines published by the Commission.
- 20 As is apparent from points 9 to 11 of the Guidelines, fines are set in accordance with a two-step methodology.
- 21 In the first place, the Commission determines a basic amount for each undertaking or association of undertakings. The Commission takes the value of the relevant undertaking's sales of goods or of services to which the infringement directly or indirectly relates in the relevant geographic area (point 13). The basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement (point 19). Periods longer than six months but shorter than one year are counted as a full year (point 24). The proportion of the value of sales taken into account may, as a general rule, be set at up to 30% of the value of sales (point 21).
- 22 Point 22 of the Guidelines states that '[i]n order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'.
- 23 Point 25 of the Guidelines provides, moreover, that, 'irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales ... in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements'.
- 24 In the second place, the Commission may adjust the basic amount of the fine set during the first stage either upwards or downwards. Accordingly, point 28 of the Guidelines provides for an increase in that amount where the Commission finds that there are aggravating circumstances, such as those referred to in point 28. Repeated infringement, that is the fact that an 'undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 [EC] or 82 [EC]', is among the aggravating circumstances mentioned in point 28 and justifies an increase of up to 100% in the basic amount of the fine (see the first indent of point 28 of the Guidelines). Having taken the role of leader in, or instigator of, the infringement also constitutes an aggravating circumstance, according to the third indent of point 28 of the Guidelines.

- 25 In addition, a specific increase in the amount of the fine for deterrence is provided for, in particular, in point 30 of the Guidelines, according to which '[the] Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates'.
- 26 On the other hand, point 29 of the Guidelines states that the basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as those referred to in point 29. According to the second indent of point 29, the Commission will find that mitigating circumstances exist where the undertaking provides evidence that the infringement has been committed as a result of negligence. In addition, according to the fourth indent of point 29, the Commission will find mitigating circumstances 'where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so'.
- 27 As is apparent from recital 339 to the contested decision, the undertakings' cooperation with the Commission was governed, from 14 February 2002, by the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'), which was replaced with effect from 8 December 2006 by a new Commission notice (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice'). Akzo Nobel contacted the Commission on the basis of an application for leniency on 20 November 2006, that is before the entry into force of the 2006 Leniency Notice; therefore the 2002 Leniency Notice is applicable in the present case, as are, by way of exception under point 37 of the 2006 Leniency Notice, points 31 to 35 of the 2006 Leniency Notice.
- 28 Last, point 35 of the Guidelines provides for account to be taken of an undertaking's inability to pay in a specific social and economic context, with a view to a possible reduction in the amount of the fine.

Contested decision

- 29 The value of each cartel participant's sales in the last full year of its participation in the infringement which the Commission used to set the fines is shown in a table in recital 288 to the contested decision. It is clear from this that the value of the applicant's sales of calcium carbide powder in 2006 was between EUR 5 million and EUR 10 million. The value of its sales of calcium carbide granulates was between EUR 20 million and EUR 25 million.
- 30 It is apparent from recital 294 to the contested decision that the Commission took the view that the infringement at issue was, by its very nature, among the most harmful restrictions of competition.
- 31 Furthermore, in recital 299 to the contested decision, the Commission found that the cartel in question related to customers within the EEA, except Spain, Portugal, the United Kingdom and Ireland.
- 32 In recital 301 to the contested decision, the Commission set the proportion of the value of sales to be taken into account at 17% for all the participants in the cartel, given the 'specific circumstances of this case', and taking into account the 'criteria discussed in recitals 294 and 299'.
- 33 The Commission took into account the considerations relating to the duration of the infringement set out in recitals 302 and 303 to the contested decision and indicated in a table in recital 304 the multiplier determined according to the number of years of participation in the infringement established in respect of each undertaking covered by that decision. In the applicant's case, the Commission set a multiplier of 2.5 for calcium carbide powder, and 3 for calcium carbide granulates.

- 34 In addition, in recital 306 to the contested decision the Commission set the percentage of the value of sales representing the additional amount to be included in the fine in accordance with point 25 of the Guidelines, in this case 17%, '[g]iven the specific circumstances of this case, taking into account the criteria discussed above relating to the nature of the infringement and [its] geographic scope'.
- 35 Recital 308 to the contested decision contains a table showing the basic amount of the fine calculated for each participant. In the applicant's case, the basic amount is EUR 19.6 million.
- 36 In recitals 309 to 312 to the contested decision, the Commission considered whether it was necessary to adjust the basic amount of the fine upwards on account of aggravating circumstances. It found that aggravating circumstances did exist in regard to two other participants in the cartel, Akzo Nobel and Degussa AG — the latter having become Evonik Degussa GmbH by the time of the adoption of the contested decision — on the ground that they were repeat offenders. No aggravating circumstance was raised or established in relation to the applicant.
- 37 In recitals 313 to 333 to the contested decision, the Commission considered whether it should find that there were mitigating circumstances in relation to one or more cartel participants. In particular, it examined in turn the arguments concerning limited participation in the cartel, put forward by all the participants (recitals 313 to 316); the arguments put forward by some participants concerning the non-implementation of cartel agreements and the fact that they did not derive any benefit from their participation in the cartel (recitals 317 to 320); the arguments of certain participants, including the applicant, concerning their effective cooperation with the Commission outside the scope of the 2006 Leniency Notice (recitals 321 to 327); and the arguments advanced by a number of participants concerning the difficult economic situation of the suppliers of calcium carbide and magnesium in the period before and during the infringement (recitals 328 to 331). In each case, the Commission concluded that it should not find that there were mitigating circumstances (recitals 314, 320, 327 and 331).
- 38 In recitals 335 to 360 to the contested decision, the Commission considered whether the 2002 Leniency Notice should be applied in relation to one or more participants in the cartel. It is apparent from recital 358 to the contested decision that the applicant had submitted an application to that effect on 6 February 2008 ('the application for leniency'). In the same recital, the Commission found that the application had been submitted more than a year after the inspections, and after the applicant had received requests for information pursuant to Article 18 of Regulation No 1/2003. The application had not provided significant added value, since the applicant had only reported facts concerning calcium carbide powder, in relation to which the Commission already had sufficient evidence in its possession at that time. The Commission thus concluded that the information provided by the applicant could no longer — by its very nature or by its level of detail — strengthen the Commission's ability to prove the facts. On those grounds, it found that the applicant was not entitled to a reduction in the amount of the fine.
- 39 By contrast, the Commission granted Akzo Nobel immunity from fines (recitals 335 and 336 to the contested decision), Donau Chemie AG a 35% reduction of the fine (recital 346), and Evonik Degussa a 20% reduction of the fine (recital 356). It refused the application submitted by Almamet GmbH for immunity or for a reduction of the fine (recital 349) and, moreover, found that SKW Stahl-Metallurgie GmbH, SKW Stahl-Metallurgie AG and Arques Industries AG were not entitled to the reduction in the amount of the fine that had been granted to Evonik Degussa, which had submitted its application for leniency in its own name only (recital 357).
- 40 The amounts of the fines to be imposed are set out in recital 361 to the contested decision. The amount stated in respect of the applicant is EUR 19.6 million.

- 41 Last, in recitals 362 to 378 to the contested decision, the Commission considered the requests made by a number of cartel participants to be allowed to benefit from the provisions of point 35 of the Guidelines. The Commission refused the applicant's request to that effect (recital 377) and those submitted by other cartel participants, but granted Almamet a 20% reduction in the amount of the fine (recital 372).

The complaints put forward by the applicant

- 42 The applicant claims that the determination of the amount of the fine that was imposed on it by the Commission is vitiated by a breach of the principles of proportionality and equal treatment. It puts forward five complaints, relating to (i) the deterrent effect of the fine; (ii) aggravating circumstances; (iii) mitigating circumstances; (iv) the reduction in the amount of the fine granted to Almamet; and (v) the fine in so far as it was calculated as a proportion of the worldwide turnover of the addressees of the contested decision. Those complaints will each be examined in turn, after certain preliminary considerations have been set out. At the hearing, the applicant raised a complaint concerning the value of sales to be taken into consideration in the calculation of the basic amount of the fine. According to the applicant, that complaint was included in the application. The Commission, however, claimed that that complaint was new and was not founded on any of the matters disclosed in the course of the proceedings, and was therefore inadmissible. That complaint will be examined last.

– Preliminary considerations

- 43 It must be borne in mind that the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181, paragraph 216 and the case-law cited).
- 44 However, as the applicant submits, whenever the Commission decides to impose fines in accordance with competition law, it is bound to comply with general principles of law, including the principles of equal treatment and proportionality, as interpreted by the Courts of the European Union (Case T-138/07 *Schindler Holding and Others v Commission* [2011] ECR II-4819, paragraph 105).
- 45 According to Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, the Commission is to have regard both to the gravity and to the duration of the infringement. It is apparent from the case-law that, in that context, the Commission must in particular ensure that its action has the necessary deterrent effect (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 106, and Case T-279/02 *Degussa v Commission* [2006] ECR II-897, paragraph 272).
- 46 The need to ensure that the fine has a sufficient deterrent effect, where it is not found to justify raising the general level of fines in the context of the implementation of a competition policy, requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality (*Degussa v Commission*, cited in paragraph 45 above, paragraph 283, and Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraph 379).
- 47 With regard to the Guidelines, it has consistently been held 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 imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (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 211; Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v Commission* [2008] ECR II-2567, paragraph 44; and Case T-446/05 *Amann & Söhne and Cousin Filterie v Commission* [2010] ECR II-1255, paragraph 146).

- 48 It follows from this, as the applicant moreover acknowledges, that, when setting the amount of the fine to be imposed on an undertaking in accordance with Article 23 of Regulation No 1/2003, it is not, in itself, a breach of the principles of proportionality and equal treatment to take the Guidelines into consideration; on the contrary, it may be necessary to do so, in particular in order to comply with the second of those principles. However, conversely, mere adherence to the methodology for the setting of fines laid down in the Guidelines does not mean that the Commission is relieved of the obligation to ensure that the fine imposed in a particular case accords with the principles of proportionality and equal treatment. Furthermore, in point 37 of the Guidelines, the Commission has reserved the right to depart from the methodology or from the limits specified in those guidelines where this is justified by the particularities of a case or the need to achieve deterrence.
- 49 Furthermore, it must be pointed out that the Court has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules (Case C-297/98 P *SCA Holding v Commission* [2000] ECR I-10101, paragraph 53).
- 50 First, it has the task of reviewing the legality of those decisions and, in that context, it must review compliance with the duty to state reasons (*SCA Holding v Commission*, cited in paragraph 49 above, paragraph 54). It is also required to carry out, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, an in-depth review of the law and of the facts (Case C-389/10 P *KME Germany and Others v Commission* [2011] ECR I-13125, paragraph 129).
- 51 Second, that review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU (*KME Germany and Others v Commission*, cited in paragraph 50 above, paragraph 130). More than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure in whole or in part, the Courts' unlimited jurisdiction authorises them to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances (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 692, and Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECR I-7415, paragraph 86). They can thus substitute their own appraisal for the Commission's and, consequently, cancel, reduce or increase the fine or penalty payment imposed (*KME Germany and Others v Commission*, cited in paragraph 50 above, paragraph 130).
- 52 The complaints raised by the applicant in the context of the present plea must be examined in the light of those general considerations.
- The first complaint, relating to the deterrent effect of the fine
- 53 The applicant submits that the Commission did not properly take account in the contested decision of the fact that the fine imposed on an undertaking that has participated in a cartel must constitute a specific deterrent for the undertaking concerned. The applicant emphasises that an individualised approach is required in that regard, since a fine of a certain amount may have a deterrent effect in relation to one undertaking but not another. It follows from this, according to the applicant, that the sum provided for in point 25 of the Guidelines must not be determined at the same level for all cartel participants. The need to use different deterrence multipliers for each participant has been confirmed by the Court in *Degussa v Commission*, cited in paragraph 45 above.

- 54 In addition the applicant observes that the Commission did not avail itself in the present case of its power, under point 30 of the Guidelines, to increase the fine to ensure that it has a sufficiently deterrent effect. According to the applicant, such an increase might have been envisaged in respect of the cartel participants with the largest worldwide turnovers, namely Akzo Nobel, Ecka Granulate GmbH & Co KG ('Ecka') and Evonik Degussa. Last, the repeat offenders, Akzo Nobel and Evonik Degussa, should have been penalised with higher fines than the fine that was imposed on the applicant, which played only a minor role in the infringement. It is not sufficient just to take repeated infringement into account as an aggravating circumstance under point 28 of the Guidelines.
- 55 As a preliminary point, it must be noted with regard to the effectiveness of the arguments summarised in the preceding paragraph that the unlimited jurisdiction conferred on the Courts of the European Union does indeed expressly include the power to increase the amount of the fine imposed, if appropriate. Thus, where there has been unequal treatment of a number of participants in an infringement owing to the fact that the gravity of the offending conduct of some participants was underestimated by comparison with that of others, the most appropriate way of restoring a fair balance would be to increase the amount of the fine imposed on the former (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paragraph 576).
- 56 However, such an increase can be applied only where the participants in the infringement whose fines are to be increased have challenged their fines before the General Court and have been given an opportunity to comment on such an increase (see, to that effect, *JFE Engineering and Others v Commission*, cited in paragraph 55 above, paragraphs 577 and 578). If those conditions are not fulfilled, the most appropriate means of remedying the unequal treatment observed is for the fine imposed on the other participants in the infringement to be reduced (see, to that effect, *JFE Engineering and Others v Commission*, cited in paragraph 55 above, paragraph 579). Accordingly, the arguments summarised in paragraph 54 above cannot automatically be rejected as being ineffective.
- 57 Next, it must be noted that the Commission is aware of the need to ensure not only that its actions in relation to infringements of competition law have a general deterrent effect, but also, in particular, that the fine it imposes on an undertaking that has committed such an infringement has a specific deterrent effect. This is confirmed by point 4 of the Guidelines which states inter alia that '[f]ines should have a sufficiently deterrent effect ... in order to sanction the undertakings concerned (specific deterrence)'.
- 58 Nevertheless, it must be borne in mind that the amount referred to in point 25 of the Guidelines is part of the basic amount of the fine which, as is apparent from point 19 of the Guidelines (see paragraph 21 above), must reflect the gravity of the infringement and not the relative gravity of the participation in the infringement of each of the undertakings concerned. According to the case-law, the latter issue has to be examined in the context of the possible application of aggravating or mitigating circumstances (see, to that effect, Case T-73/04 *Carbone-Lorraine v Commission* [2008] ECR II-2661, paragraph 100). Accordingly, and as the Commission correctly states, the Commission may determine the percentage of the value of sales referred to in point 25 of the Guidelines, as well as that referred to in point 21 of the Guidelines, at the same level for all cartel participants. The determination of the same percentage for all cartel participants does not, contrary to what the applicant appears to be claiming, mean that the same sum has been determined under point 25 of the Guidelines for all the cartel participants. In so far as that sum is a percentage of the value of each cartel participant's sales in relation to the infringement, it will be different for each participant, depending on the differences in the value of participants' sales.
- 59 The judgment in *Degussa v Commission*, cited in paragraph 45 above, on which the applicant relies cannot lead to a different conclusion. Admittedly, the Court found in paragraph 335 of that judgment that the Commission was not entitled, without infringing the principle of equal treatment, to increase the amount of the fine determined according to the gravity of the infringement by applying the same rate to two cartel participants with substantially different turnovers.

- 60 However, as is apparent from paragraphs 20, 21, 326 and 327 of that judgment, the amount of the fine imposed on the various participants in the cartel at issue in that case had been determined in accordance with a different methodology from that laid down in the Guidelines and applied by the Commission in the present case. In *Degussa v Commission*, cited in paragraph 45 above, the Commission had divided the cartel participants into different groups according to turnover, and had set the same basic amount of the fine for all the members of the same group. The applicant in that case had been placed in the same group as another undertaking which had a higher turnover, and, therefore, the same basic amount had been set for those two undertakings. Then, in order to ensure that the fine had a sufficiently deterrent effect, the Commission increased that amount by the same rate — 100% in that instance — for each of those two undertakings. It is that last aspect that was criticised by the Court (*Degussa v Commission*, cited in paragraph 45 above, paragraphs 328 to 335).
- 61 In the present case, however, as has already been stated, the basic amount of the fine is different for the various cartel participants, according to the difference in their turnover. Moreover, as the Commission correctly contended, it did not apply a specific increase in the basic amount in order to ensure that the fine had a sufficiently deterrent effect. It follows from this that the circumstances of the present case are not at all comparable to those in *Degussa v Commission*, cited in paragraph 45 above.
- 62 The applicant is also critical of the fact that the Commission did not, pursuant to point 30 of the Guidelines, increase the amount of the fine imposed on the cartel participants with the largest worldwide turnover. In that regard, it must be noted that, while it does indeed follow from point 30 of the Guidelines that an increase in the fine to be imposed on an undertaking which has a particularly large turnover beyond the sales of goods or services to which the infringement relates may prove necessary in order to ensure that that fine has a sufficiently deterrent effect, it does not follow conversely that a fine which does not represent a significant percentage of the worldwide turnover of the undertaking concerned will not have a sufficiently deterrent effect on that undertaking.
- 63 A fine determined in accordance with the methodology set out in the Guidelines represents, in principle, a substantial percentage of the value of sales which the undertaking being penalised has achieved in the sector affected by the infringement. Thus, as a result of the fine, the undertaking in question will see its profits in that sector diminish significantly; it may even record losses. Even if that undertaking's turnover in that sector represents only a small fraction of its worldwide turnover, it is not necessarily inconceivable that the decline in profits made in that sector, or even their transformation into losses, will have a deterrent effect, since a commercial undertaking generally operates in a given sector in order to generate a profit.
- 64 Accordingly point 30 of the Guidelines provides that the Commission has the power, but not the obligation, to increase the fine imposed on an undertaking which has a particularly large turnover beyond the sales of goods or services to which the infringement relates. However, beyond a vague reference to what it claims is the large worldwide turnover of certain cartel participants, a reference which merely reflects the arguments advanced in connection with the fifth complaint examined below, the applicant did not put forward any specific evidence that might have demonstrated that the Commission should have used that power in the present case. Consequently, the Commission cannot be criticised on that ground for any breach of the principles of equal treatment or proportionality.
- 65 As regards, finally, the consideration given to the fact that there was repeated infringement, it must be noted that, as the applicant itself recognises, repeated infringement is taken into consideration at the stage when the basic amount of the fine is adjusted for aggravating circumstances, in accordance with the first indent of point 28 of the Guidelines, and can lead to a significant increase in that amount, possibly even doubling it. By contrast, as has already been pointed out (see paragraph 58 above), the basic amount — which includes the percentage set under point 25 of the Guidelines — is determined taking into account the gravity of the infringement. The failure to take into account at that stage an

aggravating circumstance which will be taken into account at a later stage does not constitute any error of law (see, to that effect, order of the Court of 11 September 2008 in Case C-468/07 P *Coats Holdings and Coats v Commission*, not published in the ECR, paragraph 28).

66 It follows from all the foregoing considerations that the first complaint is unfounded and must be rejected.

– The second complaint, relating to aggravating circumstances

67 The applicant claims that, in the contested decision, the Commission did not consider which members of the cartel acted as leaders in the infringement and states that it was a passive member. The applicant acknowledges that it is not possible to identify one or more leaders in every cartel case. Nevertheless, in a complex cartel such as the cartel in this instance, the applicant regards it as hardly conceivable that the cartel could have operated without one or more undertakings having the idea and carrying out the necessary preparation. The applicant takes the view that the Commission did not make sufficient effort to identify those undertakings. It mentions, as examples of what the Commission ought to have considered, the question as to who organised the first meetings and invited the passive members of the cartel to them, or in which undertaking's premises those meetings took place. It follows from this, according to the applicant, that the Commission breached the principles of equal treatment and proportionality in so far as the passive members of the cartel were treated in the same way as the leaders and instigators.

68 The Commission contends that that complaint is irrelevant. It takes the view that even if it should have found that one or more other undertakings were the leaders of the infringement, such a finding would have no impact on the fine imposed on the applicant and, at best, could only result in an increase in the fines imposed on those other undertakings.

69 For the reasons set out in paragraphs 55 and 56 above, the present complaint cannot be rejected automatically as being ineffective. On the other hand, it must be rejected in any event as unfounded, and it is not necessary to examine whether the conditions for an increase in the amount of the fine set out in paragraph 56 above are satisfied in this instance.

70 In that regard, it must be stated at the outset that the applicant's assertion that it adopted a passive role in the cartel is not relevant to the present complaint, but must be examined in the analysis of the third complaint, relating to mitigating circumstances, particularly as the applicant reiterates and amplifies that assertion by its arguments in support of the third complaint.

71 Next, it must be noted that the questions mentioned by the applicant in its arguments were largely considered in the contested decision. As is apparent from recital 177 to that decision, the infringement at issue related to three products — calcium carbide powder, magnesium granulates and calcium carbide granulates — and two markets: the market for the first two products, which are substitutable and intended for the steel industry, and the market for the third product, intended for the gas industry. The Commission refers to separate agreements in relation to each of those products (see, respectively, recitals 54 to 91, 113 to 135 and 92 to 112 to the contested decision), but concludes, in recital 177, that those three agreements formed part of a single and continuous infringement.

72 With regard, in particular, to calcium carbide powder, the Commission stated in recital 56 to the contested decision that '[t]he first two meetings were organised at the premises of Almamet'. In support of that finding, it also referred, in footnote 106 in particular, to the application for leniency. The conduct of the first meeting is described in more detail in recitals 64 to 66 to the contested

decision. It may be inferred from that description that it was Almamet which had invited the other participants to the meeting, since not only did it take place at Almamet's premises, but also it was Almamet's representative who had opened the discussion (see recital 65 to the contested decision).

- 73 The second meeting in relation to the same product also took place at Almamet's premises, according to the contested decision (see recital 67). However, as recital 69 to the contested decision shows, at that second meeting the participants, including the applicant, decided to organise similar meetings on a regular basis and to take turns in organising them. The contested decision goes on to refer, in recitals 70 to 89, to nine other meetings organised by various cartel participants, two of which — the meetings of 7 April 2005 and 25 April 2006 — were held in Slovakia and organised by the applicant (see recitals 74 and 83 to the contested decision).
- 74 With regard to calcium carbide granulates, the Commission noted in recital 98 to the contested decision that the first meeting took place on 7 April 2004 in a hotel in Slovenia, and that it was organised by TDR-Metalurgija d.d. The applicant and Donau Chemie were the only two other undertakings to have participated in that meeting. In recital 99, the Commission refers to two other meetings in Bratislava (Slovakia) between the same three producers of calcium carbide granulates. It adds, however, that issues relating to that product were also discussed either in meetings relating to calcium carbide powder, or during special meetings in their aftermath (see recitals 101 and 108 to the contested decision).
- 75 Finally, the agreement relating to magnesium concerned only Almamet, Donau Chemie and Ecka. The other addressees of the contested decision, including the applicant, did not produce magnesium. It is apparent from recital 125 to the contested decision that the first meeting between the three undertakings concerned with magnesium took place towards the end of 2004 or at the beginning of 2005, but that the exact date could not be established. The contested decision refers to five other meetings relating to that product. With the exception of the meeting of 2 May 2006 organised by Ecka, which also bore the costs of that meeting (see recital 129), no information is given about which undertaking organised the meetings. However, recital 115 states that the three undertakings which participated in those meetings took turns in being responsible for their organisation and for the associated costs.
- 76 Those considerations all militate against the applicant's contention that, in essence, the infringement at issue by its very nature necessitated one or more leaders. It is apparent from the considerations in the contested decision mentioned in paragraphs 71 to 73 above that all cartel participants were on an equal footing. The fact that Almamet organised the first meeting relating to calcium carbide powder and that TDR-Metalurgija did the same in relation to calcium carbide granulates does not seem to have any particular significance. There is nothing in the contested decision to suggest that those two undertakings played a more important role in the cartel than the others.
- 77 It is, on the contrary, evident from recital 54 to the contested decision that, according to the Commission, the agreement relating to calcium carbide powder arose from the negative trend in the price of that product since the beginning of the 21st century, in conjunction with an increase in the cost of production and a fall in demand.
- 78 According to recital 104 to the contested decision, matters were similar on the market for calcium carbide granulates. That recital refers to an 'employee of Akzo Nobel' who is said to have claimed that all suppliers of the product in question 'were in apparent need of price increases'. As regards magnesium, also intended for the steel industry and substitutable for calcium carbide powder, the Commission acknowledges in recital 113 that the demand for that product was growing, but adds, without being contradicted by the applicant, that 'the suppliers also felt the increased market power of their customers' and were, in addition, under growing pressure following the arrival on the market of new Chinese competitors.

79 Against that background, it matters little who took the initiative to organise an initial meeting, since that initiative was merely reflecting the shared sentiments of a number of producers of the product concerned. Moreover, the applicant has neither explained its assertion that an infringement such as that at issue in the present case is hardly conceivable without one or more leaders, nor put forward specific evidence to support it. Furthermore, the only specific questions raised in the applicant's arguments have, regardless of their relevance to the finding of any aggravating circumstances, in any event been largely addressed in the contested decision, as has already been pointed out in paragraph 71 above.

80 It follows from this that this Court cannot accept the applicant's assertion that the Commission did not consider whether there may have been any aggravating circumstances with respect to certain other participants in the cartel and, by that omission, was in breach of the principle of equal treatment. Consequently, the second complaint is unfounded and must be rejected.

– The third complaint, relating to mitigating circumstances

81 The applicant claims that the Commission failed to acknowledge the existence of mitigating circumstances that would justify a reduction in the amount of the fine imposed on it, in accordance with point 29 of the Guidelines. In that context it refers, first, to the allegedly negligent nature of its participation in the cartel; second, to the passive and limited nature of that participation; and, third, to its alleged cooperation with the Commission — not taken into account by the latter — outside the scope of the '2002/2006 Leniency Notice' and beyond its legal obligations to cooperate.

82 In the first place, the applicant submits that, at the material time, the members of its management were people who were educated and had pursued a career under the conditions of the strictly regulated economy of the pre-1989 Communist regime. Thus, at least at the beginning of the cartel, the applicant's managers were not even aware that their anti-competitive conduct was unlawful. They had regarded the cartel meetings as ordinary business meetings and had been criticised by the other participants for their lack of caution. The applicant adds that it had never previously been investigated or penalised by any competition authority and believes that the negligent nature of its participation in the cartel should have been taken into account as a mitigating circumstance.

83 The Commission responds that the alleged infringement was committed more than 14 years after the end of the Communist regime in Czechoslovakia, and that the Slovak Republic had adopted legislation prohibiting similar agreements even before its accession to the European Union. The applicant counters, in its reply, that those arguments do not sufficiently take into account the consequences for its managers at the time of the infringement of the fact that they had spent a substantial, formative part of their careers in a system other than that of a market economy.

84 It is not necessary to go into the details of that debate between the parties, since it must be borne in mind that Article 23(2) of Regulation No 1/2003 permits the Commission to impose fines on undertakings that have infringed Article 81 EC both where that infringement has been committed intentionally and where it has been committed negligently.

85 According to settled case-law, for an infringement of the competition rules to be regarded as having been committed intentionally, rather than negligently, it is not necessary for the undertaking concerned to have been aware that it was infringing the competition rules; it is sufficient that it could not have been unaware that its conduct had as its object the restriction of competition in the common market (see Case 246/86 *Belasco and Others v Commission* [1989] ECR 2117, paragraph 41 and the case-law cited, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraph 205 and the case-law cited).

- 86 In the present case, the applicant does not deny that it participated in the infringement; on the contrary, in its arguments relating to the present complaint, it 'accepts and does not object to [its liability for the anti-competitive] behaviour of its previous management'. In view of the facts of the infringement at issue, as summarised in paragraph 1 above, it is obvious that the members of the applicant's management who participated on its behalf in various meetings organised in connection with the cartel, and who subsequently implemented the decisions taken at those meetings, could not have been unaware that their conduct had as its object the restriction of competition in the common market. That is in fact the direct and immediate consequence of market sharing, quotas, customer allocation and price fixing among a number of participants on the same markets, all of which fall within the scope of the object of the infringement penalised by the contested decision.
- 87 By contrast, as is apparent from the case-law cited in paragraph 85 above, it is irrelevant in that context that the members of the applicant's management were, as a result of their experience under the former Communist regime in Czechoslovakia or for any other reason, unaware that such conduct infringed the national competition rules or those laid down by EU law.
- 88 As the Commission correctly points out, the conclusion that the members of the applicant's management were aware of the anti-competitive object of their conduct is corroborated by the applicant's assertions in the application for leniency. The applicant explained in that application that the members of its management who participated in the cartel meetings had not mentioned the information relating to those meetings in the 'reports from foreign business trips' which they had drawn up, and a certain number of which had been obtained by the Commission during an inspection at the applicant's premises. In order to avoid leaving a written record, those members had provided that information orally to the General Director and Chairman of the Board of Directors of the applicant. This conduct on the part of the members of the applicant's management concerned cannot but indicate that they were aware of the anti-competitive, or even unlawful, nature of their participation in the meetings in question. It would be difficult otherwise to understand why they wanted to avoid leaving any written record.
- 89 It follows that the Commission cannot be accused of any error in failing to grant the applicant a reduction in the amount of the fine on the ground that the applicant had committed the infringement negligently.
- 90 In the second place, the applicant complains that the Commission failed to take into account as a mitigating circumstance the passive nature of its participation in the infringement. It submits in that regard that the members of its management who had represented it at the various meetings of the cartel did not speak any foreign language fluently and had to use the services of an interpreter. In addition, the other members of the cartel had remarked that the applicant's representative at the various meetings was passive and did not communicate with the other participants. The Commission itself acknowledged in the statement of objections that the applicant was the least active member of the cartel, since it never drew any charts or collected data from cartel members who were absent from a particular meeting, or disclosed such data to other members. The applicant adds that the cartel was much more important for Almamet, the dealer of its products, and, as a result, the applicant could have benefited from the cartel even without participating in it. Moreover it was Almamet which had invited the applicant to participate in the cartel. Before that invitation, the applicant had not been in regular contact with the other members of the cartel.
- 91 With regard to those arguments, it must be noted that it has consistently been held that where an infringement has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them, which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established. That conclusion follows logically from the principle that penalties must be appropriate to the offender and the offence, so that an undertaking may be

penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under the competition rules of EU law (see Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraphs 277 and 278 and the case-law cited).

- 92 In accordance with those principles, the Guidelines provide, in point 29, for the basic amount of a fine to be adjusted on the basis of certain mitigating circumstances, which are specific to each undertaking concerned. Point 29 lays down, in particular, a non-exhaustive list of the mitigating circumstances that may be taken into account. It must nevertheless be noted that the ‘exclusively passive or “follow-my-leader” role’ of an undertaking in an infringement does not appear in that non-exhaustive list, although it was expressly referred to as an attenuating circumstance in the first indent of Section 3 of the 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), which the Guidelines replaced.
- 93 In that regard, it must be pointed out that while, as has been stated in paragraph 47 above, the Commission may not depart from rules which it has imposed on itself, it is nevertheless free to modify those rules or to replace them. In a case that falls within the scope of the new rules, as in the case of the infringement at issue which falls, *ratione temporis*, within the scope of the Guidelines, as is apparent from point 38 thereof, the Commission cannot be criticised for having failed to take into account a mitigating circumstance not provided for by those new rules, solely on the ground that it was provided for under the earlier rules. The fact that the Commission considered in previous decisions that certain factors constituted mitigating circumstances for the purposes of determining the amount of the fine does not mean that it is obliged to make the same assessment in a subsequent decision (Case T-347/94 *Mayr-Melnhof v Commission* [1998] ECR II-1751, paragraph 368, and Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 337).
- 94 The fact remains that, as has already been pointed out in paragraph 92 above, the list in point 29 of the Guidelines of mitigating circumstances that may be taken into account by the Commission is not exhaustive. Consequently, the fact that the Guidelines do not include in the list of mitigating circumstances the passive role of an undertaking that has participated in an infringement does not preclude that aspect from being taken into consideration as a mitigating circumstance if it is capable of demonstrating that the relative gravity of that undertaking’s participation in the infringement is less significant.
- 95 It is not necessary to determine whether that last condition has been satisfied in the present case, as it must be concluded in any event that it does not in any way follow from the evidence and arguments invoked by the applicant that its role in the infringement at issue was passive or ‘follow-my-leader’.
- 96 In that regard it must be borne in mind that, as the Court held in Case T-220/00 *Cheil Jedang v Commission* [2003] ECR II-2473, paragraphs 167 and 168, on which the applicant itself relied in support of its arguments, such a passive role implies that the undertaking adopts a ‘low profile’, that is to say, does not actively participate in the creation of any anti-competitive agreements. The factors which may indicate that an undertaking has played a passive role in a cartel include where its participation in cartel meetings is significantly more sporadic than that of the ordinary members of the cartel, where it enters the market affected by the infringement at a late stage, regardless of the length of its involvement in the infringement, or where a representative of another undertaking which has participated in the infringement makes an express declaration to that effect.
- 97 In the present case, first, as the Commission correctly observes, the applicant participated in 10 of the 11 meetings relating to calcium carbide powder (see recitals 64 to 88 to the contested decision) and even organised two of them. It also participated in all the meetings relating to calcium carbide granulates mentioned in the contested decision (see recitals 98 and 99 to the contested decision).

- 98 Second, it is apparent from the contested decision that the applicant's contribution to the meetings at which it was present was comparable to that of the other participants. The abovementioned recitals to the contested decision state that the participants at the various meetings provided information about their sales volumes and that the market sharing table was subsequently updated. In addition, the prices to be applied were discussed and, from time to time, price increases were agreed (see, for example, recitals 67 and 68 to the contested decision). Nothing in those details suggests that the applicant's conduct was passive or, more generally, different from the conduct of the other participants. On the contrary, it is apparent from recital 73 that the applicant had stated in its internal report of the meeting of 24 January 2005 that it had managed to offset an increase in the price of coke by increasing calcium carbide prices. Furthermore, according to recital 110, the applicant agreed to compensate Donau Chemie for its volume losses in Austria by giving it extra volume in Germany. Those particulars are consistent with the proposition that the applicant's participation in the meetings was at least as active as that of the other members of the cartel.
- 99 Third, the applicant's assertion that it never disclosed at a meeting data provided by another cartel member not present at the meeting appears, from a reading of the contested decision, to be correct, but does not lead to the conclusion that the applicant's participation in the cartel was passive. It is evident from the contested decision that most of the members of the cartel were present at the meetings. The fact that a member was occasionally unable to participate in a particular meeting and sent its data to another member, who then presented it at the meeting in question (see, for example, recital 83 to the contested decision, according to which Akzo Nobel was unable to take part in the meeting on 25 April 2006, but had previously sent its figures to Donau Chemie), does not appear to have been particularly significant and is not, in itself, an indication of the more active participation of the member of the cartel who provided that service to an absent member.
- 100 Fourth, the applicant's assertion that the other members of the cartel had alluded to the passive behaviour of its representative at the meetings is not supported by any evidence.
- 101 With regard to the applicant's assertion that it was acknowledged in the statement of objections that the applicant was the least active member of the cartel, the Court asked the applicant, by way of a measure of organisation of procedure, to produce the extract from that statement to which it was referring. In reply to that request, the applicant stated, in essence, that the reference in the statement of objections to the fact that Almamet had taken the initiative in organising the meetings of the cartel; to the fact that the subsequent meetings were chaired by the representative of SKW Stahl-Metallurgie; and to the fact that the representative of Donau Chemie was often made responsible for updating and distributing the tables exchanged between the participants, whereas the applicant itself was not often specifically referred to in the description of the various meetings, constituted an indication of its passive role in the cartel.
- 102 It must be noted that the applicant does not rely on any express acknowledgement in the statement of objections of its allegedly passive role in the cartel. The applicant implicitly accepts that the assertion referred to in the previous paragraph cannot be found, as such, anywhere in the statement of objections but represents its own interpretation of it. That interpretation cannot, however, be accepted. As indicated in paragraph 99 above, the mere fact that certain cartel participants assumed certain administrative tasks during the various meetings of the cartel is not sufficient to establish that the others played a passive role, particularly as the applicant did not deny having itself organised two meetings of the part of the cartel relating to calcium carbide powder (see paragraph 73 above).
- 103 Fifth, the level of knowledge of foreign languages of the two members of the applicant's management who represented it at the meetings of the cartel is of no relevance. Irrespective of such knowledge, what is important is that, as has already been pointed out in paragraph 98 above, the applicant participated in those meetings as actively as the other members of the cartel; that is to say, it disclosed data relating to its sales, was aware of similar data from the other members of the cartel and entered into commitments concerning the sharing of relevant markets, quotas, customer allocation and

price setting. The fact — even if it were established — that, owing to a lack of linguistic skills, social interaction between the applicant's representatives and those of the other members of the cartel was restricted is, in that respect, immaterial.

104 Sixth, the fact that the applicant benefited from the cartel without participating in it, owing to Almamet's participation — even if it were established — is neither justification for its participation in the cartel nor a mitigating circumstance.

105 In any event, that assertion by the applicant is made in disregard of its own statements in the application for leniency, as the Commission correctly observes. It is apparent from that application that the applicant was proposing to increase the sale price of the products it supplied to Almamet. Almamet had replied, in essence, that such an increase would oblige it to increase the prices at which it sold to end customers and that they would not accept such an increase. Almamet had gone on to say that the only solution would be to organise a meeting of the producers and suppliers concerned, with a view to increasing prices. The applicant had replied that, regardless of how Almamet decided to deal with the problem, it had to accept an increase in the prices of products purchased from the applicant. The applicant's statements indicate that Almamet took the initiative in organising the first meeting relating to calcium carbide powder in response to the pressure exerted by the applicant, and that the applicant, which knew of that initiative, not only failed to discourage it or dissociate itself from it, but, on the contrary, maintained that pressure by insisting on a price increase. Those assertions do not confirm the contention that the applicant's participation was passive, but, on the contrary, undermine it considerably.

106 In the light of all the foregoing considerations, it must be held that the Commission was right not to take into account as a mitigating circumstance the allegedly passive nature of the applicant's participation in the infringement.

107 In the third place, the applicant takes the view that its effective cooperation with the Commission should have been taken into account by the Commission as a mitigating circumstance. It submits that it accepted its share of liability for the infringement, while expressing its disapproval of the excessive nature of the assessment of the relative gravity of its participation and of the fine imposed on it. In the applicant's view, its admissions concerning the participation of members of its management in the meetings of the cartel and the fact that it confirmed the very existence of a horizontal price-fixing cartel does not constitute the mere non-contestation of the facts established by the Commission, as suggested in recital 327 to the contested decision. It adds that it did not try to challenge each of the Commission's findings in relation to the infringement at issue, but instead intended to help the Commission in its investigation. It observes in that regard that a number of recitals to the contested decision refer to its statements as evidence. In particular the applicant mentions, by way of example, footnotes 100, 104, 106, 111, 118, 146 to 150, 158, 161, 174, 180, 182 to 185, 188, 190, 194 and 617 to the contested decision.

108 In the reply, the applicant states that its arguments are also confirmed by the Commission's defence which, according to the applicant, contains numerous references to the application for leniency. It maintains, moreover, that by punishing an undertaking for its cooperation instead of rewarding it, the Commission turns the purpose of the cooperation arrangements under 'the 2002/2006 Leniency Notice' on its head and is in breach of the principle of sound administration of justice and the privilege against self-incrimination. It takes the view that, in those circumstances, the Commission's arguments supported by the references to the application for leniency and the associated evidence must be rejected as irrelevant.

109 With regard to the applicant's arguments summarised in the preceding paragraph, it must be noted that, as the Commission correctly contends, the Commission's use in its written pleadings before the Court of the applicant's application for leniency cannot affect the validity of the contested decision, since it is subsequent to it, nor is it a useful indication of the added value of that application as

against the other evidence available to the Commission. Nevertheless the applicant's arguments raise the issue of the legitimacy of the use of the leniency application during the proceedings before this Court. That issue must therefore be examined first of all, in view of the numerous references to the leniency application in the Commission's arguments.

- 110 It must be observed in this connection that cooperation under the 2002 Leniency Notice is a matter entirely within the will of the undertaking concerned. It is not in any way coerced to provide evidence of the presumed cartel. The degree of cooperation which the undertaking wishes to offer in the administrative procedure is therefore governed entirely by its freedom of choice and is not in any circumstances imposed by that notice (see, to that effect, Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp v Commission* [2005] ECR I-6773, paragraph 52, and the Opinion of Advocate General Léger in that case at ECR I-6777, point 140).
- 111 Furthermore, point 31 of the 2006 Leniency Notice, which is applicable in the present case (see paragraph 27 above), states, in particular, that '[a]ny statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file and can thus be used in evidence'. It follows from this that, since the publication of the 2006 Leniency Notice, an undertaking which, like the applicant in the present case, decides to submit a statement with a view to obtaining a reduction in the amount of the fine is aware of the fact that although a reduction will be granted to it only if, in the Commission's opinion, the conditions for a reduction referred to in the notice are satisfied, the statement will in any event form part of the file and may be used in evidence, including against its author.
- 112 Having thus freely and in full knowledge of the facts chosen to submit such a statement, the undertaking concerned cannot reasonably invoke the case-law relating to the privilege against self-incrimination. It is apparent in particular from that case-law that the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraphs 34 and 35; 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, paragraphs 61 and 65; and *ThyssenKrupp v Commission*, cited in paragraph 110 above, paragraph 49). In the present case, since the applicant submitted the application for leniency voluntarily and without being obliged to do so, it cannot effectively rely on its right not to be compelled by the Commission to admit having participated in an infringement (see, to that effect, Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 35).
- 113 Consequently, the applicant cannot complain that the Commission relied on the application for leniency in its pleadings before this Court.
- 114 With regard, next, to the issue whether that application amounts to effective cooperation that may be taken into account as a mitigating circumstance, in accordance with the fourth indent of point 29 of the Guidelines, it must be noted that the application of that provision of the Guidelines cannot have the consequence of depriving the 2002 Leniency Notice of its practical effect. The 2002 Leniency Notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the European Union. It therefore follows from the wording and the structure of that notice that undertakings can, in principle, obtain a reduction of the fine for cooperation only where they satisfy the strict conditions laid down in the notice (Case T-343/08 *Arkema France v Commission* [2011] ECR II-2287, paragraph 169; Case T-39/06 *Transcatab v Commission* [2011] ECR II-6831, paragraph 329; and Case T-208/06 *Quinn Barlo and Others v Commission* [2011] ECR II-7953, paragraph 271).
- 115 Therefore, in order to maintain the practical effect of the 2002 Leniency Notice, it is only in exceptional situations that a reduction of the fine must be granted to an undertaking on the basis of the fourth indent of point 29 of the Guidelines. That is the case, in particular, where cooperation

provided by an undertaking, which goes beyond its legal obligation to cooperate, but does not give rise to the right to a reduction of the fine under the 2002 Leniency Notice, is of objective use to the Commission. It must be found to be of such use where the Commission relies in its final decision on evidence which an undertaking has submitted to it in the context of its cooperation, without which the Commission would not have been in a position to penalise the infringement concerned in whole or in part (*Arkema France v Commission*, cited in paragraph 114 above, paragraph 170; *Transcatab v Commission*, cited in paragraph 114 above, paragraph 330; and *Quinn Barlo and Others v Commission*, cited in paragraph 114 above, paragraph 270).

- 116 In the present case, as is apparent from recital 358 to the contested decision, the Commission considered that the information contained in the application for leniency did not provide significant added value with respect to the evidence already in its possession, and it therefore decided not to grant the applicant a reduction in the amount of the fine (see also paragraph 38 above).
- 117 It is for the applicant to identify the impugned elements of the contested decision and to adduce evidence — direct or circumstantial — to demonstrate that its objections are well founded (see, to that effect, *KME Germany and Others v Commission*, cited in paragraph 50 above, paragraph 132). As is apparent from the summary of the applicant's arguments in paragraph 107 above, the only specific argument invoked by the applicant to impugn the findings of the contested decision, as summarised in the preceding paragraph, relates to the fact that that decision refers at a number of points to the applicant's statements in, inter alia, the application for leniency.
- 118 It must be noted that, during the administrative procedure, the applicant and its parent company advanced a similar argument concerning the Commission's use of the information provided by the applicant. That argument was rejected by the Commission in recital 359 to the contested decision. The Commission explained that the relevant criterion was not whether it used the information provided by a cartel participant, but whether that information had any significant added value. The provision of additional information about that which is already known does not amount to significant added value. The Commission also stated, in the same recital, that the applicant had not mentioned in the information provided the fact that the anti-competitive behaviour extended to calcium carbide granulates, although its involvement, including for that part of the infringement, was clearly documented.
- 119 The argument that information provided by a participant in an infringement is not of objective use where it relates to facts that are known to the Commission and in respect of which the Commission already has sufficient evidence is consistent with the case-law mentioned in paragraph 115 above and must be approved.
- 120 The question then arises whether that was in fact the case with regard to the information provided by the applicant, in particular in the application for leniency. However, the applicant merely invokes the references to its statements as contained in the contested decision, without explaining what specific pieces of information or evidence it provided to the Commission which the Commission did not already have.
- 121 Furthermore, it must be noted that of the numerous footnotes to the contested decision referred to by the applicant in its arguments, only three refer exclusively to the applicant's statements. The other footnotes referred to also mention either documents which the Commission obtained during its inspections or the statements of Akzo Nobel and Evonik Degussa which, as has been mentioned in paragraph 39 above, enjoyed immunity and a reduction of the fine, respectively, specifically because of their cooperation. Those other footnotes therefore confirm the Commission's contention that the information provided by the applicant related to facts that were already known and sufficiently supported by evidence.

- ¹²² The three footnotes which mention only the applicant's statements are those numbered 111, 118 and 617. Footnote 111 refers to the application for leniency to support the assertion in the last sentence of recital 56 to the contested decision that, in general, at every meeting of the cartel, the participants agreed the date and location of the next meeting. Even if that information had only been brought to the Commission's attention by the applicant, it is obviously not a significant aspect of objective use, but an entirely secondary aspect.
- ¹²³ Footnote 118 refers to a submission by the applicant of 18 February 2008 in order to support the information in the fifth indent of recital 57 to the contested decision, which concerns the positions held by those who represented the applicant at the meetings relating to calcium carbide powder. Since those details related specifically to the applicant, it is understandable that the only document referred to in that respect is one that was provided by the applicant. In any event, details of the positions held by the applicant's representatives at the meetings in question were only of marginal use to the Commission, particularly as the applicant had not disputed and does not dispute having participated in those meetings or, more generally, in that part of the infringement.
- ¹²⁴ Finally, footnote 617 supplements the assertion in recital 294 to the contested decision that the infringement at issue was among the most harmful restrictions of competition, by referring to a similar assertion in the applicant's reply to the statement of objections. Thus, in that case, the reference to the applicant's written submissions during the administrative procedure does not even relate to a fact or evidence, but merely an assessment of the gravity of the infringement. Clearly, there can be no question of any element of objective use in this instance either.
- ¹²⁵ It follows from this that the Court cannot accept the applicant's assertion that the usefulness for the Commission's investigation of the applicant's statements is shown by the various references to them in the contested decision.
- ¹²⁶ It must also be noted that the applicant did not dispute the assertion, in recital 359 to the contested decision, that it had failed to mention in the application for leniency that the anti-competitive behaviour at issue extended to calcium carbide granulates. Recitals 92 to 112 to the contested decision, which concern the meetings relating to calcium carbide granulates, include only three references to the application for leniency (footnotes 241, 249 and 276), none of which appears to have been of objective use for the Commission's investigation of that aspect of the infringement. In particular, the reference to footnote 249 concerns information that is insignificant — the fact that the meeting of 7 April 2004 was preceded by a dinner the evening before — while footnotes 241 and 276 refer to the fact that, on two occasions, certain cartel participants, including the applicant, rejected a proposal by Donau Chemie to discuss the price of calcium carbide granulates (see recitals 95 and 108 to the contested decision respectively).
- ¹²⁷ It follows from this that the applicant, while not denying its participation in the part of the infringement that related to calcium carbide granulates, was careful not to reveal in the application for leniency facts and evidence that might have been useful for the Commission's investigation of that aspect of the infringement. That is an additional factor that also militates against any acknowledgement that the applicant's purported cooperation was objectively useful.
- ¹²⁸ It follows from the foregoing considerations that the applicant's argument that its allegedly effective cooperation with the Commission should have been taken into account as a mitigating circumstance cannot be accepted.
- ¹²⁹ Since the Court cannot accept any of the arguments on which the applicant has relied in order to demonstrate that mitigating circumstances should have been found, it must be held that the applicant's third complaint is unfounded and must be rejected.

– The fourth complaint, relating to the reduction in the amount of the fine granted to Almamet

- 130 In its application the applicant observed that, in the contested decision, the Commission, without giving any sound reason, granted a reduction of the fine to Almamet (see paragraph 41 above) because of its alleged inability to pay whereas a similar request by the applicant was refused, which, moreover, the applicant challenges by its second plea in law. The reduction granted to Almamet is said to be a severe breach of the principle of proportionality and equal treatment, particularly as Almamet was one of the initiators of the infringement.
- 131 The Commission stated before this Court that the reduction of the fine granted to Almamet was based on point 37 of the Guidelines and not on point 35. The applicant replied that that explanation made its argument alleging breach of the principles of proportionality and of equal treatment all the more compelling. According to the applicant, it is apparent from the explanations in recitals 369 to 371 to the contested decision that the risk of Almamet's bankruptcy was low, but that even that eventuality would not result in the total loss of value of Almamet's assets. In the applicant's view it had demonstrated that its financial situation was worse than Almamet's. Furthermore, the characteristics of Almamet listed in recital 372 to the contested decision to justify the reduction of its fine are comparable to the applicant's, so that the Commission would have been obliged to grant the applicant a similar reduction of the fine if it was not to commit a manifest breach of the principle of equal treatment.
- 132 It must be observed at the outset that it is clear from recitals 369 to 371 to the contested decision that the Commission came to the conclusion that Almamet's request, based on point 35 of the Guidelines, could not be approved.
- 133 Nevertheless, in recital 372 to the contested decision, the Commission noted that, '[w]ithout prejudice to the previous analysis', account was to be taken of the fact that Almamet was a very small independent trader that did not belong to a large group of companies. Almamet traded in high value materials with a rather low margin and had a 'relatively focused product portfolio'. The Commission added that '[t]he fact that the imposed fine would have a relatively high impact on the financial situation of this type of company' was also taken into account. The Commission concluded that, in the light of those 'special characteristics' of Almamet, it considered that a reduction of the fine by 20% was appropriate, as Almamet would in any case be sufficiently deterred by a fine of that level. The Commission referred, in footnote 685, to point 37 of the Guidelines. It also observed, in the last sentence of recital 372 to the contested decision, that, in the light of the adaptation of the fine to be imposed on Almamet, the 'conclusion [set out] in recital 371 that the imposed fine [was] unlikely to irretrievably jeopardise the economic viability of Almamet also remains valid'.
- 134 It follows from this that the applicant cannot invoke any inequality in its treatment in comparison with Almamet as regards consideration of their respective requests for a reduction of the fine on the basis of point 35 of the Guidelines, since both those requests were refused. As the Commission explained in its defence, in granting Almamet a reduction of 20%, it availed itself of the power reserved to it in point 37 of those guidelines to depart — wholly or partly — from the methodology for the determination of fines set out in those guidelines, in order to take account of the particularities of a given case. The reference in footnote 685 to point 37 confirms that conclusion, which is also confirmed by recital 361 to the contested decision, where the amount of the fine to be imposed on Almamet is stated as EUR 3.8 million 'before reduction under point 37' of the Guidelines.
- 135 It is apparent from the case-law mentioned in paragraph 47 above that the Commission may depart from its own guidelines only in a situation where the resulting difference in treatment of several participants in an infringement would be compatible with the principle of equal treatment. It has consistently been held that that principle requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified (see Case C-106/01 *Novartis Pharmaceuticals* [2004] ECR I-4403, paragraph 69 and the case-law cited).

- 136 In those circumstances, the applicant's present complaint can be construed only as a claim that the Commission should have departed from the Guidelines in the applicant's case also, in order to grant it the same reduction of the fine as that granted to Almamet. That complaint can succeed only if the apparently unequal treatment of Almamet, whose fine was reduced by 20%, and the applicant, which was granted no such reduction, is incompatible with the principle of equal treatment. It follows from the case-law cited in the preceding paragraph that, in order for that to be the case, those two companies would have had to have been in a comparable situation.
- 137 As has been stated above (paragraph 133), the contested decision listed certain 'special characteristics' of Almamet to justify the reduction of its fine. It must be observed that an undertaking which has such characteristics is, from the point of view of a possible reduction of the fine other than in the cases specifically referred to in the Guidelines, in a different situation from that of an undertaking which does not have those characteristics.
- 138 First of all, it must be borne in mind that Article 23(2) of Regulation No 1/2003 provides, *inter alia*, that for each undertaking participating in an infringement of Article 81 EC, the fine is not to exceed 10% of its total turnover in the preceding business year. According to the case-law, the ceiling in respect of turnover seeks to prevent fines imposed by the Commission from being disproportionate in relation to the size of the undertaking concerned (*Musique Diffusion française and Others v Commission*, cited in paragraph 45 above, paragraph 119, and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 24).
- 139 That ceiling is not however sufficient to prevent the fine imposed in the case of a trader trading in high value materials with a low margin, such as Almamet, from being possibly disproportionate. Owing to the high value of the materials concerned, such an undertaking may have a disproportionately high turnover in relation to its profits and assets, which alone will be used to pay the fine.
- 140 Second, since, applying the methodology of the Guidelines, the fine is to be determined taking into account as a starting point a proportion of the value of sales achieved by the undertaking in question on the market to which the infringement relates (see paragraph 21 above), the risk of a disproportionate fine — one that represents a very significant part of that undertaking's worldwide turnover — is particularly high in the case of an undertaking which, like Almamet, has a 'relatively focused product portfolio'.
- 141 Third, the fact that Almamet was a very small undertaking which did not belong to a large group is also relevant, in so far as it had to deal with the fine alone, since no other company was jointly and severally liable for payment of that fine or generally in a position to offer support in that respect.
- 142 The applicant has not disputed the fact that Almamet had the special characteristics listed in recital 372 to the contested decision to justify the reduction of the fine granted. In order to respond to the applicant's present complaint, it is appropriate, therefore, to consider only whether the applicant also had those characteristics.
- 143 The applicant maintains that that is the case, but it puts forward vague and general arguments in that regard, and does not offer a detailed comparison of its own situation and Almamet's, with regard to the characteristics of Almamet referred to in recital 372 to the contested decision. In addition, as the Commission correctly observes, the applicant itself admits that its product portfolio is not as concentrated as that of Almamet. Moreover, while it states that its products are sold with a very low margin, it has neither given details of that assertion nor supported it with any evidence. Furthermore, it must be noted that the applicant is a producer, not a trader like Almamet, and that, unlike Almamet, the applicant belonged to a group of companies at the time of the infringement, and received a fine that was imposed on it jointly and severally with its parent company.

- 144 Furthermore, the Commission also observes, correctly, that the applicant's worldwide turnover in the last full business year before the contested decision was EUR 205 million (recital 24 to the contested decision), whereas Almamet's was between EUR 45 million and EUR 50 million (recital 15). In other words, the two undertakings differed considerably in size. It is also apparent from the same recitals that approximately 50% of Almamet's worldwide turnover was achieved with the products to which the infringement related, whereas in the case of the applicant, that proportion was around 10%, which is considerably lower.
- 145 Contrary to the applicant's submission in its answer to a written question put by this Court, Almamet's considerably lower worldwide turnover was not the determining factor on which the Commission's decision to grant Almamet a reduction of its fine was based. As stated in paragraph 133 above, that decision is justified on the basis of certain specific characteristics of Almamet, which do not apply to the applicant. The difference in worldwide turnover and, consequently, in the size of those two undertakings is an additional factor on which the Commission relied before this Court in order to demonstrate that the two undertakings were not in the same situation. It must also be added that, contrary to what the applicant appears to be maintaining, it is not apparent from the contested decision that the financial difficulties with which Almamet was faced played a decisive part with regard to the Commission's decision to grant it a reduction in the amount of the fine under point 37 of the Guidelines.
- 146 The Commission also relied in its written submissions on the applicant's 2007 and 2008 annual reports and, at this Court's request in the context of a measure of organisation of procedure, it produced them. It is evident from those reports that, in 2007, calcium carbide and technical gases represented 30.63% of the applicant's sales and that the same products had contributed 28.95% of its exports. That information corroborates the conclusion that the applicant's product portfolio was significantly less concentrated than that of Almamet.
- 147 Finally, as regards the applicant's assertion that Almamet was one of the initiators of the infringement at issue, it is sufficient to note that, as is apparent from paragraphs 76 to 79 above, the Commission did not find such an aggravating circumstance in respect of Almamet or another participant in the infringement, and there is nothing in the applicant's arguments to support a finding that that conclusion is wrong.
- 148 Having regard to all the foregoing considerations, the fourth of the applicant's complaints must be rejected as unfounded.
- The fifth complaint, relating to the fine in so far as it was calculated as a proportion of the worldwide turnover of the addressees of the contested decision
- 149 In support of the fifth complaint put forward in connection with the first plea, the applicant recalls in its application, first, the case-law to the effect that the fixing of an appropriate fine for an infringement of the competition rules cannot be the result of a simple calculation based on the total turnover of the undertaking concerned (referring to *Musique Diffusion française and Others v Commission*, cited in paragraph 45 above, paragraph 121); and, second, the case-law to the effect that the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover (referring to *Dansk Rørindustri and Others v Commission*, cited in paragraph 47 above, paragraph 312). It also refers to points 6 and 27 of the Guidelines from which it is clear, according to the applicant, that the determination of the fine cannot be the product of an automatic and

arithmetical calculation method but must proceed in the context of an overall assessment which takes account of all the relevant circumstances and, therefore, ultimately in compliance with the principle of proportionality.

- 150 The applicant is of the view that, in the present case, the fines imposed on the participants in the infringement at issue reflect the relevant turnover and not other, more important factors, which leads to the 'unfair and absurd' result that it received by far the highest fine, both in absolute terms and as a proportion of worldwide turnover. The applicant refers in support of those assertions to a table showing a comparison of the fines imposed on the various participants in the infringement. The applicant submits that, while the Commission apparently adhered to the Guidelines in terms of the arithmetical calculation of the fine imposed on it, and the high level of that fine in comparison with the fines imposed on the other participants in the infringement reflects the fact that the products concerned make up its core sales business, it cannot be disputed that there has been a clear breach of the principle of proportionality.
- 151 The applicant relies in that regard on the fact that, as the table which it submits shows, even a 'giant company like Akzo Nobel' would have been penalised — if its application for leniency had not been accepted — with a smaller fine in absolute terms than the applicant's, representing only 0.113% of its worldwide turnover, despite the fact that it was one of the most active members of the cartel and a repeat offender. The applicant adds that the members of the cartel with much higher total turnovers than its own received fines that had only a symbolic impact on their budgets, whereas the fine that was imposed on the applicant, if paid, would force it to close down its business.
- 152 The applicant also emphasises in that context that the determination of the figure of 17% of the value of sales to be taken into account in the application of points 21 and 25 of the Guidelines may suggest some leniency in the Commission's approach, but that that is not the case so far as the applicant is concerned, since a higher percentage would have resulted in the applicant's case in the threshold of 10% of its worldwide turnover being exceeded. On the contrary, that apparent leniency merely underlines the disproportionate nature of the fine that was imposed on it, as compared with the fines imposed on other participants.
- 153 The applicant adds that 'the structure and amount of the penalties imposed' by the Commission in the contested decision give the erroneous impression that, of all the undertakings, its participation in the infringement was the most serious, that it had the largest turnover and that it had even been the leader of the cartel and its most active member. It queries what the fine imposed on it would have been if all those assumptions had been correct, given that the amount of the fine imposed on it is already very close to the threshold of 10% of its worldwide turnover.
- 154 With regard to the applicant's arguments, it must be noted that the applicant supplied two of the three products to which the infringement related, that is calcium carbide powder and calcium carbide granulates. As the table in recital 288 to the contested decision shows, the value of the applicant's sales of those products during the last full year of its participation in the infringement amounted to between EUR 5 million and EUR 10 million for the first of those two products, and between EUR 20 million and EUR 25 million for the second. With regard to calcium carbide powder, the value of the applicant's sales was comparable to that of three other participants in the cartel — Donau Chemie, Evonik Degussa and Holding Slovenske elektrarne d.o.o. — and was exceeded only by the value of two other participants' sales. With regard to calcium carbide granulates, the value of the applicant's sales was far higher than that of the sales of the other participants in the infringement. Only three other participants supplied that product and the value of their sales was between EUR 3 million and EUR 5 million in the case of Akzo Nobel, and between EUR 5 million and EUR 10 million in the case of Donau Chemie and of Holding Slovenske elektrarne. Furthermore, as the table in recital 304 to the contested decision shows, the multipliers — determined according to

the number of years of participation in the infringement — used for those two products in the applicant's case were among the highest of those used for participants in the infringement: 2.5 for calcium carbide powder and 3 for calcium carbide granulates (see paragraph 33 above).

- 155 Having regard to those points, which are not disputed by the applicant, it is not surprising that the fine imposed on it was the highest in absolute terms of those imposed by the contested decision. It must also be pointed out that the second highest fine — EUR 13.3 million — was imposed jointly and severally on SKW Stahl-Metallurgie GmbH, SKW Stahl-Metallurgie AG and Arques Industries, that is to say, on the group of undertakings with the highest value of calcium carbide sales of all the participants in the infringement. However, that group did not supply calcium carbide granulates but magnesium granulates, with a sales value of between EUR 5 million and EUR 10 million. The multiplier used in relation to magnesium granulates in the case of that group was set at 1.5, significantly less than the multiplier used in the applicant's case in relation to its sales of calcium carbide granulates. Those distinctions explain the difference between the amount of the fine imposed on that group and that imposed on the applicant.
- 156 As regards Akzo Nobel, if it had not obtained immunity from fines as a result of its cooperation with the Commission, it would have been subject to a fine of EUR 8.7 million, as is evident from recital 308 to the contested decision. The smaller amount of that fine as compared with that imposed on the applicant is attributable to the fact that although the value of Akzo Nobel's sales of calcium carbide powder — between EUR 10 million and EUR 15 million — was certainly higher than that of the applicant's sales of the same product, the value of Akzo Nobel's sales of calcium carbide granulates was, by contrast, significantly lower than that of the applicant's sales of that product (see paragraph 154 above). Furthermore, the duration of Akzo Nobel's participation in the infringement was shorter than the applicant's, and the multiplier applied in Akzo Nobel's case was only 2 in respect of each of the two products which it supplied.
- 157 Those considerations undermine the applicant's contention that the amount of its fine was disproportionate. They show that the high level of the fine imposed on the applicant is not the product of chance, but attributable to the fact that the applicant was by far the most important supplier of one of the three products to which the infringement related and an important supplier of another of those products, and that, moreover, it participated in the infringement for longer than any of the other participants. In other words, the high level of the fine imposed on the applicant is attributable to the relative gravity of its participation in the infringement, including with regard to duration, as compared with the other participants. It must be observed that, apart from the applicant's parent company, 1. garantovaná, the multipliers used in the applicant's case were used in the case of only one other company, Donau Chemie. However, although the value of Donau Chemie's sales of calcium carbide powder was comparable to the applicant's, the value of Donau Chemie's sales of calcium carbide granulates was considerably lower, that is between EUR 5 million and EUR 10 million. Furthermore, Donau Chemie was granted a 35% reduction of the fine for its cooperation with the Commission (see recital 346 to the contested decision), as a result of which it was fined EUR 5 million, instead of EUR 7.7 million (see recital 308 to the contested decision).
- 158 It follows from those considerations that the applicant's argument that the amount of the fine imposed on it was disproportionate is ultimately based only on a comparison of the fines imposed on the various participants in the infringement, translated into percentages of their respective worldwide turnover. However, there is nothing in the case-law from which it might be concluded that it is permissible to make such a comparison, as the applicant did, in determining whether or not the amount of the fine imposed was proportionate.
- 159 The case-law relied on by the applicant itself and recalled in paragraph 149 above clearly precludes such a comparison.

- 160 Moreover, it is also apparent from settled case-law that there is no requirement under Article 23(2) of Regulation No 1/2003 to the effect that, where fines are imposed on a number of undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than the fines imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified, for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than the amount of the fines imposed on other undertakings (Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567, paragraph 174, and Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky v Commission* [2010] ECR II-1443, paragraph 280).
- 161 With regard to the applicant's argument that the fine imposed on it was very close to the maximum ceiling of 10% of worldwide turnover (see paragraphs 152 and 153 above), it must be observed that the applicant misconstrues the nature of that ceiling. The sum corresponding to 10% of the worldwide turnover of a participant in an infringement of the competition rules is not, contrary to what the applicant seems to believe, a maximum fine, to be imposed only in respect of the most serious infringements. As is apparent from the case-law, it is, instead, a capping ceiling, the only possible consequence of which is that the amount of the fine calculated on the basis of the criteria of gravity and duration of the infringement will be reduced to the maximum permitted level. Its application implies that the undertaking concerned will not pay the fine which in principle would be payable if it were assessed on the basis of those criteria (*Dansk Rørindustri and Others v Commission*, cited in paragraph 47 above, paragraph 283).
- 162 The Court of Justice has thus held that that limit did not prohibit the Commission from referring, for the purpose of the calculation of the fine, to an intermediate amount in excess of that limit. Nor does it preclude intermediate calculations that take account of the gravity and duration of the infringement from being applied to an amount above it. Where it turns out, following the calculation, that the final amount of the fine must be reduced by the amount by which it exceeds the upper limit, the fact that certain factors such as the gravity and duration of the infringement are not actually reflected in the amount of the fine imposed is merely a consequence of the application of that upper limit to the final amount (*Dansk Rørindustri and Others v Commission*, cited in paragraph 47 above, paragraphs 278 and 279).
- 163 It follows from this that the mere fact that the fine imposed on the applicant is very close to 10% of its worldwide turnover, while that percentage is lower for other participants in the cartel, cannot constitute a breach of the principles of equal treatment or proportionality. That consequence is inherent in the interpretation of the 10% ceiling as a capping ceiling which is applied after any reduction of the fine on account of mitigating circumstances or the principle of proportionality (Case T-211/08 *Putters International v Commission* [2011] ECR II-3729, paragraph 74).
- 164 For the same reason, the mere fact that, owing to the application of that ceiling, the applicant would not be subject to a significantly higher fine even if the infringement were even more serious, does not demonstrate that the amount of the fine imposed on it by the contested decision is disproportionate. In any event, it must be noted generally that the question whether or not the amount of a fine imposed on an undertaking for an infringement of the competition rules is proportionate cannot be assessed on the basis of a comparison of the fine actually imposed and the fine which ought to have been imposed for a hypothetical infringement that is even more serious, since undertakings are supposed to observe the competition rules and not infringe them. It must be observed, moreover, that in order to support its contention that its infringement was not as serious as it might have been, the applicant reiterates assertions which, as is evident from paragraphs 86 to 89 and 97 to 106 above, must be rejected as unfounded.

165 It follows from this that the fifth complaint cannot be upheld.

– The sixth complaint, raised at the hearing, concerning the value of sales to be taken into account in the calculation of the basic amount of the fine

166 At the hearing the applicant claimed, *inter alia*, that it had been subject to discriminatory treatment as a result of the fact that when the Commission calculated the value of Almamet's sales to be taken into account in determining the basic amount of the fine to be imposed on it, the Commission had deducted the value of calcium carbide which Almamet purchased from the applicant and subsequently sold on to its own customers. According to the applicant, a similar deduction should have been applied to the value of its own sales, which would have resulted in a significant reduction in the amount of the fine imposed on it.

167 The Commission, as has already been noted (see paragraph 42 above), contended that that complaint was inadmissible, as it had been raised for the first time at the hearing and was not based on anything disclosed in the course of the procedure. Having been invited to submit its observations on that point, the applicant stated that the complaint summarised in the preceding paragraph had already been raised in paragraph 17 of its application. Formal notice of all those statements was taken in the minutes of the hearing.

168 It must be noted that it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application initiating proceedings must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that the introduction of a new plea in law in the course of proceedings is not allowed unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible (Case T-37/89 *Hanning v Parliament* [1990] ECR II-463, paragraph 38, and Case T-345/05 *Mote v Parliament* [2008] ECR II-2849, paragraph 85). The same applies to a complaint made in support of a plea in law (Case T-231/99 *Joynson v Commission* [2002] ECR II-2085, paragraph 156, and *Mote v Parliament*, cited above, paragraph 85).

169 In the present case, it does not appear, and the applicant does not claim, that the sixth complaint is based on matters of law or of fact which have come to light in the course of the procedure. The complaint relates to the manner in which the Commission calculated the basic amount of the fine it imposed on Almamet. However, the elements of that calculation are clearly described in the second indent of recital 288 to the contested decision and were therefore known to the applicant when it submitted its application.

170 In those circumstances, in order to rule on the admissibility of the sixth complaint, the Court must ascertain whether, as the applicant maintains, that complaint was already set out in the application.

171 That is not the case however. Paragraph 17 of the application, to which the applicant refers in that context, is irrelevant. That paragraph begins with a declaration that '[t]he calculation of the value of sales, the determination of the basic amount of [the] fine as a proportion [of] the value of sales and multiplication by the number of years made by the Commission is, in principle, not disputed herein'. The paragraph continues with the applicant's assertion summarised in paragraph 152 above. That assertion has no connection with the sixth complaint, as raised at the hearing.

172 Furthermore, only the fourth complaint, examined and rejected in paragraphs 130 to 148 above, relates to discrimination to the applicant's detriment as compared with the treatment of Almamet. However, that complaint relates to an issue that is entirely different from that of the calculation of the basic amount of the fine. The fourth complaint covers the reduction in the amount of the fine granted to Almamet on the basis of point 37 of the Guidelines, and the sixth complaint cannot be regarded as a

mere amplification of it. In addition, the applicant's assertion, as it appears in the application and is reproduced in the preceding paragraph, seemingly cannot but be construed as meaning that the applicant did not intend to rely in its application on a complaint relating to the basic amount of the fine and to its determination according to the value of sales relating to the infringement.

- 173 It follows from this that the sixth complaint must be declared inadmissible. Since all the complaints put forward in the context of the first plea have been rejected, that plea must accordingly be rejected.

Second plea in law, alleging breach of essential procedural requirements, an error as to the facts and a manifest error of assessment in that the Commission refused to take account of the applicant's inability to pay

Guidelines

- 174 Point 35 of the Guidelines on the method of setting fines is worded as follows:

'In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

Contested decision

- 175 The applicant submitted a request to the Commission for account to be taken in the determination of the fine of its inability to pay, which was refused for the reasons given in recital 377 to the contested decision. That recital is worded as follows:

'Having examined the information presented by NCHZ [(Novácke chemické závody)] ..., it is concluded that the information provided by NCHZ does not demonstrate that the fine imposed by this Decision would irretrievably jeopardise the economic viability of NCHZ and cause its assets to lose all their value. Therefore, the claim regarding the inability to pay raised by NCHZ is rejected.'

Findings of the Court

- 176 In challenging that refusal, the applicant sets out first of all certain general considerations relating to the objective and the interpretation of point 35 of the Guidelines. Next, it describes its economic situation before the imposition of the fine and states that it has for some time been 'on the verge of bankruptcy'. 2004 is said to have been a particularly critical year in that regard, as several creditors had regarded it as being insolvent. Despite the continuation of that critical situation, a new shareholder, who had joined the company in 2008, and a new management had taken steps to stabilise production and improve management efficiency. The latter had managed to reach agreement on certain terms with the applicant's commercial partners, enabling it to survive the difficult period it was experiencing, to revitalise and to be successful on the market. The applicant states that its financial problems are not connected with its competitiveness on the calcium carbide market, where it is a respected competitor, but with the burden left by the previous management in terms of environmental pollution and bad strategic investment decisions.
- 177 The applicant goes on to say that it had described its difficult financial situation in its reply to the statement of objections of 3 October 2008, to which it had attached an expert's report. That report had concluded, on the basis of an analysis, inter alia, of its financial statements, that the applicant was in an

adverse economic and financial situation and that it could survive as a going concern only if three conditions were satisfied, concerning, respectively, an increase in its share capital of at least 400 million Slovak crowns (SKK), a favourable outcome in litigation with a Slovak State entity, and the non-imposition by the Commission of a fine for the infringement at issue. If those conditions were not satisfied, the applicant's poor situation would be worsened considerably, according to the expert, and bankruptcy could follow relatively quickly.

- 178 Next, the applicant analyses the relevant provisions of Slovak bankruptcy legislation. It also describes the worsening of its financial situation after the adoption of the contested decision, owing to the 'nervousness' of its creditors and the withdrawal of credit facilities by banks and other financial institutions. According to the applicant it is apparent from that analysis that it would be obliged to file a petition initiating bankruptcy proceedings once the fine had been entered in its books and become due.
- 179 Such a petition was in fact submitted after the action was brought (see paragraph 6 above) and the parties disagree as to whether the imposition of the fine was the cause of the applicant's bankruptcy. The Commission disputes that contention, observing, in particular, that the petition for a declaration of bankruptcy was filed even before the fine had become due. It also criticises the applicant for not having asked to be able to pay the fine in instalments or trying to obtain a bank guarantee. The applicant responds to those points in its reply, contending that, prompted by the 'nervousness' and loss of confidence of its creditors and suppliers after the fine was imposed, the members of its management were obliged, under the Slovak legislation applicable, to file a petition for a declaration of bankruptcy. It also notes that a request for payment in instalments would probably not have been successful and that, even if it had, such a facility would not have been enough to prevent its bankruptcy. It adds that it was impossible for it to obtain a bank guarantee.
- 180 The applicant also submits that the effects of its bankruptcy will be detrimental in the social and regional contexts, of which account must be taken according to point 35 of the Guidelines. It states that it is one of the major employers in Slovakia and that it is of strategic importance for the economic life of the Slovak region of Upper Nitra, where its production facilities are located. Their closure would mean not only that its 2 000 employees would be made redundant, but also the closure or substantial reduction in operation of a number of other undertakings in the same region, including its suppliers.
- 181 Those claims by the applicant are supported by the Slovak Republic, which devoted the whole of its statement in intervention to a description of the adverse impact on the social situation in the district of Prievidza — which is part of the Upper Nitra region and which is where the applicant's facilities are located — of any cessation of the applicant's business. That eventuality would result in an increase in unemployment arising directly from the redundancy of the applicant's employees and, indirectly, from a chain reaction jeopardising jobs at the applicant's suppliers. The Slovak Republic emphasises that many of those unemployed would have no real prospect of finding a new job. At the hearing, the Slovak Republic lodged further documents updating the information submitted in its statement in intervention.
- 182 The applicant declares itself convinced that it has proved, by the arguments summarised above, that the conditions for the application of point 35 of the Guidelines are fulfilled in its own case. It therefore criticises the Commission for a breach of 'essential procedural requirements', in that the Commission did not explain either during the procedure or in the contested decision why the evidence submitted in support of the applicant's request for the application of point 35 of the Guidelines did not demonstrate that the fine irretrievably jeopardised its economic viability and caused its assets to lose all their value. It takes the view that the brief statement in recital 377 to the contested decision cannot be regarded as sufficient in that respect.

- 183 The applicant also takes the view that the Commission did not properly examine the evidence which the applicant had supplied in support of its request for the application of point 35 of the Guidelines and that, in any event, the Commission's assessment of that evidence is vitiated by a manifest error, in that it failed to establish that the applicant's bankruptcy was imminent and did not apply point 35 of the Guidelines. The applicant also invites the Court, in the exercise of its unlimited jurisdiction, to examine the evidence in question itself, if necessary by commissioning an expert's report, in order to assess to what extent the fine imposed on the applicant will trigger a declaration of bankruptcy and the closure of the undertaking, that measure being supplemented, if necessary, by examination of an expert on Slovak law, in particular on the law of bankruptcy.
- 184 It must also be noted that, as the Slovak Republic and the applicant have pointed out, the applicant had the benefit of the zákon o niektorých opatreniach týkajúcich sa strategických spoločností a o zmene a doplnení niektorých zákonov (Law on certain provisions relating to strategic undertakings) No 493/2009 Z.z. of 5 November 2009. That law provides that the bankruptcy administrator of an undertaking that is regarded as 'strategic' is legally required to ensure that it remains operational and the Slovak State could exercise a right of pre-emption in respect of the assets of such an undertaking. The applicant was designated a strategic undertaking within the meaning of that law by decision of the competent Slovak authority of 2 December 2009. According to the Slovak Republic, that is how the applicant was able to remain operational after its declaration of bankruptcy, and the collective redundancy of its staff avoided. However, it is apparent that those developments were subsequent to the contested decision and were not in any way foreseeable at the time of its adoption, and that they render the expert's report sought by the applicant devoid of purpose in so far as the declaration of bankruptcy has now intervened. They cannot, therefore, be taken into account in the examination of the present plea.
- 185 Before analysing the complaints put forward by the applicant in support of its second plea, it is appropriate to analyse the objective and the interpretation of point 35 of the Guidelines.
- 186 It has repeatedly been held that the Commission has not been required, in principle, to take into account when determining the amount of the fine the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to conferring an unfair competitive advantage on the undertakings least well adapted to market conditions (*Dansk Rørindustri and Others v Commission*, cited in paragraph 47 above, paragraph 327; Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913, paragraph 351; and *Tokai Carbon and Others v Commission*, cited in paragraph 43 above, paragraph 370).
- 187 Furthermore, it has consistently been held that the fact that a measure adopted by a European Union authority leads to the insolvency or liquidation of a given undertaking is not prohibited as such by EU law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value (*Tokai Carbon and Others v Commission*, cited in paragraph 43 above, paragraph 372; Case T-64/02 *Heubach v Commission* [2005] ECR II-5137, paragraph 163; and Case T-452/05 *BST v Commission* [2010] ECR II-1373, paragraph 96).
- 188 This Court cannot accept that, in adopting point 35 of the Guidelines, the Commission imposed on itself any obligation that runs counter to that case-law. This is evidenced by the fact that point 35 makes no reference to the bankruptcy of an undertaking but covers situations arising 'in a specific social and economic context' in which the imposition of a fine 'would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value'.
- 189 It follows from this that the mere fact that the imposition of a fine for infringements of the competition rules might give rise to the bankruptcy of the undertaking concerned is not sufficient as regards the application of point 35 of the Guidelines. It is apparent from the case-law cited in

paragraph 187 above that while bankruptcy adversely affects the financial interests of the owners or investors concerned, it does not necessarily mean that the undertaking in question will disappear. That undertaking may continue to exist as such, either — in the case of the recapitalisation of the company declared bankrupt — as a legal person operating that undertaking, or — in the case of the acquisition by another entity of all its assets and thus of the undertaking — as an entity carrying out an economic activity. Such an acquisition of the assets may take the form either of a voluntary purchase or of a forced sale of the assets of the bankrupt company with its continued operation.

- 190 Consequently, point 35 of the Guidelines must be construed, in particular with regard to the reference to the loss of all value of the assets of the undertaking concerned, as envisaging a situation in which the acquisition of the undertaking, or at least of its assets, referred to in the preceding paragraph appears unlikely or even impossible. If that were the case, the assets of the bankrupt undertaking would be offered for sale individually, and it is likely that many of them would not find a buyer or, at best, would be sold only at a heavily reduced price; accordingly it seems legitimate to refer, as does point 35 of the Guidelines, to the loss of all their value.
- 191 The explanations given by the Commission itself during the hearing support that conclusion. The Commission stated that it was not applying to the letter the condition laid down in point 35 of the Guidelines, according to which there had to be a risk of the assets of the undertaking concerned being caused to lose all their value, but that it was trying to determine whether those assets would continue to be used in the manufacture of goods. Formal notice of those statements was taken in the minutes of the hearing. It is evident that the Commission's interpretation of point 35 of the Guidelines is, in essence, the same as that set out in the preceding paragraph.
- 192 It should also be borne in mind that the application of point 35 of the Guidelines also requires, according to its wording, a 'specific social and economic context'. According to the case-law, the consequences which payment of a fine could have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned, constitute such a context (Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, paragraph 106).
- 193 If the conditions referred to in the preceding three paragraphs are satisfied, it can indeed be argued that the imposition of a fine which is likely to give rise to the disappearance of the undertaking concerned is contrary to the principle of proportionality which the Commission must observe whenever it decides to impose fines under competition law (see paragraph 44 above).
- 194 The arguments put forward by the applicant in connection with its second plea must be examined taking those general considerations into account.
- 195 In that regard, it must be noted at the outset that the applicant raises, by those arguments, both a procedural complaint, alleging breach of the obligation to state reasons (see paragraph 182 above), and substantive complaints, namely an error of law and a manifest error of assessment by the Commission (see paragraph 183 above). The applicant also invites the Court to exercise its unlimited jurisdiction in relation to fines, in order to cancel or reduce the fine imposed on the applicant.
- 196 It must be held that the applicant's request for point 35 of the Guidelines to be applied in its case and the arguments it advanced before this Court in challenging the refusal of that request are based on a misconception of the conditions governing the application of point 35.
- 197 When submitting its request for its alleged inability to pay to be taken into account, the applicant was certainly aware of the need to demonstrate the existence of a 'specific social and economic context', as referred to in the case-law cited above (see paragraph 192), and devoted part of its letter of 27 March 2009 containing that request to that issue. The applicant sets out in that letter, in essence, the same arguments as those advanced before this Court by the applicant and by the Slovak Republic (see

paragraphs 180 and 181 above). Those arguments, which, moreover, are not in any way disputed by the Commission, demonstrate to the requisite legal standard the existence of a specific context as required by point 35 of the Guidelines, so that that requirement for the application of point 35 must be regarded as having been fulfilled.

198 By contrast, when submitting its request for its alleged inability to pay to be taken into account, the applicant appears to have proceeded on the erroneous assumption that it was sufficient to demonstrate that the imposition of a fine would cause its bankruptcy. Thus, the expert's report annexed to the applicant's reply to the statement of objections and referred to in paragraph 177 above is devoted to the 'continuation of the economic existence of the NCHZ company'.

199 It must be observed in that respect that the applicant somewhat distorts the language of that report when it states that the report concluded that three conditions would have to be satisfied in order for it to be able to 'survive as a going concern'. It is clear from the wording of the report that those conditions relate to the continuation of the applicant's economic existence as a commercial company. The report goes on to state that if those conditions are not met, 'we can expect a significant deepening of the company recession with a tendency of reaching the state of a relatively early bankruptcy'. The report does not, however, address the consequences of any bankruptcy on the continued operation of the applicant's business, and it does not comment, in particular, on the likelihood of a transfer, whether voluntary or not, of all its assets to another company and its continued operation.

200 Nor did the applicant address that issue in its letter of 27 March 2009, referred to in paragraph 197 above, in which, apart from the reference to the specific social and economic context of the case, it merely provided further information to demonstrate its 'critical financial standing'. The issue was not addressed in the application either. It was only at the stage of the reply that the applicant put forward specific arguments in response to the Commission's contention that the evidence provided did not establish, *inter alia*, that the applicant's assets would lose all their value.

201 As has already been noted (see paragraphs 189 and 190 above), it is not sufficient, for the purposes of the application of point 35 of the Guidelines, to demonstrate that the undertaking concerned will be declared bankrupt if a fine is imposed. According to the actual wording of point 35, there must be 'objective evidence that imposition of the fine ... would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value', which is not automatically the case where the company operating the business in question becomes bankrupt. The applicant cannot therefore seek to have point 35 of the Guidelines applied unless it provides objective evidence of that eventuality, which is a prerequisite for the application of point 35.

202 That misconception on the part of the applicant of the conditions governing the application of point 35 of the Guidelines must be taken into account in the assessment of the complaints which it puts forward in connection with the present plea.

203 With regard to the alleged breach by the Commission of the obligation to state the reasons for its decision, it must be borne in mind that, according to settled case-law, the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case T-48/02 *Brouwerij Haacht v Commission* [2005] ECR II-5259, paragraph 45 and the case-law cited).

- 204 As regards, in particular, the scope of the obligation to state reasons for the calculation of a fine imposed for infringement of the competition rules, it is also settled case-law that the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration, as well as the factors it took into consideration for that purpose, under the directions contained in its own guidelines (see *Brouwerij Haacht v Commission*, cited in paragraph 203 above, paragraph 46 and the case-law cited).
- 205 Taking that case-law into account, it must be noted that the Commission's statement of reasons in the contested decision for its refusal of the applicant's request pursuant to point 35 of the Guidelines is quite succinct, confining itself to the simple assertion that the information provided by the applicant does not demonstrate that the fine imposed would irretrievably jeopardise its economic viability and cause its assets to lose all their value.
- 206 If, as the applicant wrongly believes, the likelihood of its being declared bankrupt following the imposition of a fine were sufficient to demonstrate that the condition for the application of point 35 of the Guidelines — that its economic viability would be jeopardised and its assets caused to lose all their value — had been fulfilled, it might indeed be concluded that recital 377 to the contested decision, concerning the refusal of the applicant's request for point 35 of the Guidelines to be applied, is vitiated by an inadequate statement of reasons.
- 207 It is apparent from the case-law that the context in which a decision was taken, which is characterised, in particular, by exchanges between the author of the decision and the party concerned, may make the requirements imposed by the duty to state reasons more stringent in certain circumstances (Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraphs 44 and 45, and Case T-16/02 *Audi v OHIM (TDI)* [2003] ECR II-5167, paragraph 89). The applicant submitted detailed information, including an expert's report, demonstrating that, in its view, if a fine were to be imposed a declaration of its bankruptcy would be highly probable or even unavoidable. Therefore, if the Commission intended to reach a different conclusion, it was required to provide at least a brief summary of the evidence and findings substantiating its conclusion.
- 208 That is particularly the case given that the Commission states in the defence that it carefully considered the applicant's financial situation, inter alia by carrying out an analysis on the basis of the 'Altman Z-score' model, and that it calculated, on the basis of the data provided by the applicant, the indicator of likelihood of bankruptcy provided for by that model. The value of that indicator for the applicant was above the cut-off mark that indicates a high probability of bankruptcy. A debate between the parties then ensued concerning the accuracy of the calculation of that indicator, which was also calculated in the expert's report submitted by the applicant — albeit incorrectly, according to the Commission — and more generally concerning the Commission's appraisal of the expert's report submitted by the applicant during the administrative procedure. In that context, the applicant also submitted a new expert's report on its financial situation.
- 209 However, the applicant's contention, set out in paragraph 206 above, is incorrect. As has already been noted (see paragraph 201 above), for the purposes of the application of point 35 of the Guidelines, the applicant cannot merely assert that the imposition of a fine would prompt the declaration of its bankruptcy; it also has to explain and prove how that eventuality would jeopardise its economic viability as an undertaking and would cause its assets to lose all their value.
- 210 That last issue was not explicitly addressed in the applicant's request for point 35 of the Guidelines to be applied (see paragraphs 198 to 200 above). There was, therefore, no exchange between the applicant and the Commission in relation to that issue, so that the case-law mentioned in paragraph 207 above does not apply. That being the case, the Commission was entitled, without thereby infringing the obligation to state reasons, to confine itself to the finding in recital 377 to the contested decision that the prerequisite for the application of point 35 of the Guidelines — that the viability of the undertaking

concerned is jeopardised and its assets caused to lose all their value — had not been satisfied. Consequently, the applicant's complaint alleging infringement of the obligation to state reasons must be rejected.

- 211 In any event, it is apparent from the case-law cited in paragraphs 49 to 51 above that the Court is required in this instance not only to review the legality of the contested decision, both in regard to form and to substance, but also to exercise its unlimited jurisdiction, which means that it may substitute its own appraisal for that of the Commission.
- 212 The exercise by the Courts of the European Union of their unlimited jurisdiction may justify the production and taking into consideration of additional information which did not have to be referred to as such under the obligation to state reasons (Case C-248/98 P *KNP BT v Commission* [2000] ECR I-9641, paragraph 40; *SCA Holding v Commission*, cited in paragraph 49 above, paragraph 55; and *Cheil Jedang v Commission*, cited in paragraph 96 above, paragraph 215). In the light, where appropriate, of such additional information not mentioned in the Commission's decision, the Courts of the European Union may in particular conclude, in the exercise of their unlimited jurisdiction, that the amount of the fine imposed is appropriate (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4949, paragraphs 71 and 72), even if the Commission's decision is vitiated by an inadequate statement of reasons (see, to that effect, judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer v Commission*, not published in the ECR, paragraph 190).
- 213 In the present case, the applicant challenges the substance of the Commission's appraisal which led it to refuse the request for the applicant's inability to pay to be taken into account. The applicant does not merely claim that there has been an error of law or a manifest error of assessment; it also asks the Court to exercise its unlimited jurisdiction. For its part, the Commission, in the defence, requests the Court in the exercise of its unlimited jurisdiction to leave the fine unchanged, should it consider the statement of reasons for the contested decision to be inadequate.
- 214 In those circumstances, even if the contested decision were vitiated by an inadequate statement of reasons inasmuch as it refused the applicant's aforementioned request, it is necessary, before any cancellation on that ground, to examine the applicant's arguments challenging the substance of the refusal of that request, in order to determine not only whether that refusal is vitiated by the substantive errors alleged by the applicant, but also whether it is appropriate, in the exercise of the Court's unlimited jurisdiction, to cancel the fine or to reduce it, as requested by the applicant, or to leave it unchanged, as requested by the Commission.
- 215 In that respect it must be noted, first of all, that both the expert's report which the applicant annexed to its reply to the statement of objections, and the letter of 27 March 2009 not only do not expressly address the issue of the viability of the applicant's business and the possible loss of all value of its assets as a result of the imposition of the fine (see paragraphs 199 and 200 above), but do not contain anything to suggest that such an eventuality might arise.
- 216 Second, the arguments put forward by the applicant in its application do not plead in favour of such an eventuality either, but, on the contrary, suggest that even in the event of bankruptcy the undertaking was likely to carry on following the applicant's recapitalisation or the acquisition of all its assets by another entity with its continued operation. In spite of the fact that the applicant found itself, according to its own statements, 'for some time on the verge of bankruptcy', a new shareholder had joined the company in 2008, which shows that there were investors interested in acquiring shares in the applicant. That may be attributable to the fact that, as the applicant itself states, it was a respected competitor on the calcium carbide market and the financial problems with which it was faced were not connected with its competitiveness on that market.

- 217 Third, the wording of a declaration by the applicant's Board of Directors of 17 September 2009, addressed to its 'business partners' and annexed to the Commission's defence, confirm that impression. It is stated there that the purpose of the petition for the applicant to be declared bankrupt was the protection of its assets with the aim of maintaining production. The Board of Directors declares that the applicant is in a position to hold its market position, which is said to be a 'sign of vitality and inner strength', and refers to a 'process of [the] company's revitalisation' which will 'not ... threaten [its] operational and payment ability'.
- 218 Fourth, the arguments put forward by the applicant in its reply to demonstrate that its liquidation was inevitable and that its assets would lose all their value is not convincing either. In that context, the applicant responds first of all to an argument advanced by the Commission in its defence, to the effect that it had already made a provision of approximately EUR 11 million to cover the fine. That argument is irrelevant however, in so far as it does not concern the possible continuation of the undertaking after its declaration of bankruptcy, but the question whether that bankruptcy was an unavoidable consequence of the imposition of the fine.
- 219 The applicant also deals with two other issues in that part of its case. First, it responds to the Commission's contentions concerning the possible acquisition of its assets by another undertaking. Second, it responds to the Commission's argument that it had not applied for rescue proceedings.
- 220 With regard to the first of the two issues mentioned in the preceding paragraph, the applicant states that it is 'difficult to prove that something will never happen', but that, in any event, it was not aware of 'any interest' from any undertaking 'in buying its assets (including liabilities)'. That reply, however, is based on a false premiss. The sale of all the assets of a bankrupt company with a view to its continued operation, as referred to in paragraph 189 above, does not mean, contrary to the view taken by the applicant, that that company's liabilities are also transferred to the purchaser. The debts included in the liabilities will be satisfied out of the proceeds of the sale. It is likely that that satisfaction will be only partial, otherwise the company would not have been declared bankrupt. The fact remains that, as a general rule, the sale of all the assets of a bankrupt company with a view to its continued operation may lead to a better outcome than the individual sale of each asset, since a sale of all the assets of a bankrupt company ensures that intangible elements such as its goodwill can be realised and, moreover, allows a purchaser interested in becoming active in the relevant industry to avoid the effort, costs and complications involved in the creation of an entirely new undertaking.
- 221 That being the case, the applicant might reasonably be expected to explain why the purchase of its undertaking by another entity was ruled out in the circumstances of the present case, particularly as it had itself stated that it was a respected competitor on the market. However, the applicant merely remarks that the continuation of its business depends on the opinion of a 'committee of creditors' and that if they had come to the conclusion 'that it [was] more profitable to sell the assets than to keep the company's business running, the production facilities [would] be closed down and ... restarting the business would be exceptionally burdensome both in a financial and technical sense', so that it could 'be reasonably expected that at least some parts of the assets or some parts of the production facilities would attract no interest at all and thus lose all their current value'.
- 222 The applicant also produces an expert's report which concludes that the applicant's production operation could be shut down within 10 to 18 weeks without any risk to the safety of its employees, but that the substances which will remain in its facilities will have a 'major impact' on the environment, that the dismantling of those facilities would have to be carried out by experts, the duration and cost of which is difficult to estimate.
- 223 It must be observed that the applicant's arguments, summarised in the two preceding paragraphs, are incomplete or even contradictory. The arguments it puts forward and the expert's report it produced give the impression that the sale of all its assets with a view to its continued operation would be the

preferred solution, including for its creditors. Yet the applicant does not explain on what grounds the committee of creditors could conclude, notwithstanding those factors, that it would be more profitable to sell the applicant's assets and shut down production.

- 224 With regard to the rescue proceedings, it must be noted that the Commission reproduced in the defence an argument that had already been raised in the proceedings for interim measures. It is evident, however, from the order in *Novácke chemické závody v Commission*, cited in paragraph 5 above (paragraphs 25 and 49), that the rescue proceedings had to be initiated before the declaration of bankruptcy. It follows from this that that argument concerns the question how a declaration of bankruptcy might be avoided and not the consequences of such a declaration. Accordingly, it has no relevance either (see also paragraph 218 above). In any event, the applicant merely states in response to that argument that some of its creditors could not approve a rescue plan unless it was in conformity with the rules on State aid, without explaining why any such conformity was ruled out. Moreover, it repeats the vague and unsubstantiated assertions that 'there was no relevant interest' by a third party in buying its shares or its business.
- 225 In the light of all the foregoing considerations, it must be held that the applicant has been unable to demonstrate that the Commission's refusal to take account in the contested decision of the applicant's inability to pay within the meaning of point 35 of the Guidelines was vitiated by an error.
- 226 The applicant's answer to the Court's question to the parties in the context of a measure of organisation of procedure, inviting them to supplement their arguments in relation to the present plea, in particular as regards the prospects of a sale of all of the applicant's assets and its continued operation, reinforces that conclusion.
- 227 The applicant confirmed that, on 16 January 2012, in the context of the bankruptcy proceedings, all of its assets had been sold free of liabilities, except for those taken on after its declaration of bankruptcy, for EUR 2.2 million, which it described as 'negligible'. According to the applicant, the fact that that price represents only a fraction of the fine imposed on it confirms the total loss of value of its assets.
- 228 Regardless of whether all of the applicant's assets could have been sold at a higher price than was actually achieved, it must be observed, with regard to that price, that there is certainly no question of a total loss of value of those assets. Far from demonstrating that the sale of all its assets and the continued operation of the business was unlikely or even impossible, the applicant has, on the contrary, confirmed that such a sale had actually taken place.
- 229 It must therefore be concluded that the Commission was entitled to take the view that the preconditions for any application of point 35 of the Guidelines were not satisfied in the applicant's case. Moreover, it must be held in any event, in the exercise of the Court's unlimited jurisdiction, that the arguments advanced by the applicant in the present plea do not justify the cancellation or reduction of the fine imposed on it but, on the contrary, justify leaving the fine unchanged. Accordingly, the second plea must be rejected.

Third plea in law, alleging infringement of Article 3(1)(g) EC

- 230 By its third plea, the applicant submits that, by imposing an excessive fine on it, the contested decision might cause the distortion or elimination of competition on the calcium carbide market and thus infringe Article 3(1)(g) EC. Invoking Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraphs 23 and 24, the applicant maintains that it follows from Article 3(1)(g) EC that application of provisions of competition law that result in the distortion or elimination of competition is prohibited, even if that is not directly provided for by EU law. It takes the view that

that provision is binding not only on undertakings but also on the EU institutions, and that therefore if such an institution adopts a measure which distorts or eliminates competition, it is in breach of that provision, even if it is not in breach of any other rule of EU law.

231 In the context of the present plea the applicant repeats the assertion already made in connection with the second plea, that the fine imposed on it will result in the declaration of its bankruptcy and its departure from the market in question. It also states, by reference to specific data taken from the contested decision, and in reliance on the Herfindahl-Hirschman index used by the competition authorities, including the Commission, to evaluate the concentration level of a particular market, that the markets for calcium carbide powder and calcium carbide granulates at issue in the present case were already highly concentrated. It therefore submits that, since it is one of the most important competitors on those markets, its elimination will result in an increased likelihood of coordination between the other competitors, in spite of the penalties imposed on them. Its market shares would probably be divided among the other cartel participants, which would lead to increased concentration and, ultimately, to the elimination of competition on those markets.

232 The applicant refers, in particular, to the possibility that its market shares will be taken over by Akzo Nobel, and maintains that the Herfindahl-Hirschman index would, in that situation, show a very significant increase, which underlines, according to the applicant, the ‘absurd and unfair result’ to which the ‘mechanical and incompetent application of the competition law rules’ might lead. Akzo Nobel, an ‘economic giant’, which has significant market shares on the markets at issue, which has already been penalised for its participation in other cartels and which was an active member of the cartel at issue, would ultimately benefit from the contested decision, since not only would it have obtained immunity from fines but it would also acquire the applicant’s customers. According to the applicant, such an outcome is clearly at odds not only with the objectives of competition law but also with the principles of basic fairness.

233 Those arguments cannot succeed.

234 In the first place, the argument relating to an infringement of Article 3(1)(g) EC must be rejected.

235 Admittedly, as the Court of Justice held in *Europemballage and Continental Can v Commission*, cited in paragraph 230 above (paragraphs 23 and 24), invoked by the applicant, Article 3(1)(g) EC sets out an objective which is applied in several provisions of the EC Treaty and commands their interpretation. In providing for the institution of a system ensuring that competition in the common market is not distorted, Article 3(1)(g) EC requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the EC Treaty would be pointless. Thus, the restrictions of competition which the EC Treaty allows under certain conditions because of the need to harmonise the various objectives of the Treaty are limited by that requirement, and to go beyond that limit would involve the risk that the weakening of competition would adversely affect the aims of the common market.

236 Nevertheless, those considerations — in themselves correct — are irrelevant to the imposition of a penalty on an undertaking that has infringed the competition rules by its participation in an agreement between undertakings or in a concerted practice which has as its object or effect the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC. In its arguments, the applicant completely disregards the fact that, following the cartel that was penalised by the contested decision, competition on the markets at issue in the present case had been distorted or even eliminated. The contested decision is designed precisely to redress that situation, including by the imposition of appropriate fines.

237 It must be noted that the imposition by the Commission of fines when it finds an infringement of the competition rules constitutes a means, specifically, of achieving the aim stated in Article 3(1)(g) EC and clearly cannot be regarded as an infringement of that provision. Nevertheless, in compliance with the

principle of proportionality which must guide the Commission's actions in that respect (see paragraphs 44 and 46 above), excessive penalties which are not necessary for the attainment of the objective pursued must be avoided. The arguments put forward by the applicant in connection with the present plea must therefore be examined only from the point of view of any breach of the principle of proportionality.

- 238 In the second place, for the purpose of their examination from that aspect, it must be noted that the consistent case-law cited in paragraph 186 above, according to which the Commission is not required, when determining the amount of the fine, to take account of an undertaking's financial losses, does not mean that it is prohibited from so doing (*Carbone-Lorraine v Commission*, cited in paragraph 58 above, paragraph 314). The need to comply with the principle of proportionality may in fact preclude the imposition of a fine that would go beyond what would constitute an appropriate penalty for the infringement identified and might jeopardise the very existence of the undertaking concerned, particularly where the disappearance of an undertaking from the relevant market will necessarily have a damaging effect on competition.
- 239 That said, there is nothing in the applicant's arguments from which it might be concluded that the fine imposed on it falls within the scenario referred to in the preceding paragraph and that the determination of the amount is, therefore, contrary to the principle of proportionality.
- 240 On the one hand, the applicant's arguments are based on the premiss that the imposition of that fine will lead to its departure from the relevant markets, a premiss which has proved to be false for the reasons set out in the examination of the second plea (see paragraphs 215 to 228 above).
- 241 On the other hand, even assuming that the applicant leaves the relevant markets, there is nothing in its arguments from which it might be concluded that, in that situation, competition on those markets would be eliminated or significantly reduced.
- 242 It is clear from recital 44 to the contested decision, with which the applicant has not in any way taken issue, that calcium carbide is explosive and therefore relatively difficult to transport. Consequently, the establishment of a dominant position or a monopoly on that market presents a further difficulty in so far as a producer would have to have a number of production sites dispersed throughout the relevant territory, in order to be able to dominate the market.
- 243 To support its proposition that its departure from the relevant markets would prompt a restriction or even the elimination of competition on those markets, the applicant also mentions the possibility of its customers being taken over by Akzo Nobel. However, it does not in any way explain why it is likely that its customers would be taken over by Akzo Nobel rather than by another operator on the same markets.
- 244 Furthermore, it is apparent from the table in recital 46 to the contested decision that Akzo Nobel's market share was between 20% and 25% of the calcium carbide powder market and between 5% and 10% of the calcium carbide granulates market. Consequently, if Akzo Nobel were to take over the applicant's customers, it would not in any event acquire a monopoly on those two markets. It must also be noted that, according to footnote 80, to which recital 44 to the contested decision refers, Akzo Nobel was not the main supplier 'on the continental market', in which the applicant was involved. In fact, a large part of Akzo Nobel's market share seems to stem from the fact that, according to the same footnote, it was the only producer based 'in the Nordic area'. Those factors, which the applicant does not dispute, militate against any assumption that the applicant's customers would be taken over by Akzo Nobel in the event of the applicant's withdrawal from those markets, as well as against the possibility of Akzo Nobel acquiring a dominant position on those markets if it succeeds in taking over the applicant's customers.

²⁴⁵ Having regard to all the foregoing considerations, it must be concluded that the third plea is unfounded and must be rejected. Moreover, the Court, in the exercise of its unlimited jurisdiction as regards the amount of the fine imposed on the applicant, considers that the amount is in any event appropriate to the circumstances of the case, owing to the gravity and duration of the infringement established by the Commission and the applicant's economic resources. Accordingly, the action must be dismissed in its entirety.

Costs

²⁴⁶ Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In addition, under the first subparagraph of Article 87(4), the Member States which intervened in the proceedings are to bear their own costs.

²⁴⁷ Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission. The Slovak Republic is to bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Novácke chemické závody a.s. to bear its own costs and to pay those incurred by the European Commission;**
- 3. Orders the Slovak Republic to bear its own costs.**

Czúcz

Labucka

Gratsias

Delivered in open court in Luxembourg on 12 December 2012.

[Signatures]

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