JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

28 April 2010 *

In Case T-446/05,

Amann & Söhne GmbH & Co. KG, established in Bönnigheim (Germany),

Cousin Filterie SAS, established in Wervicq-Sud (France),

represented by A. Röhling, M. Dietrich and C. Horstkotte, lawyers,

applicants,

* Language of the case: German.

v

European Commission, represented by F. Castillo de la Torre and K. Mojzesowicz, acting as Agents, and by G. Eickstädt, lawyer,

defendant,

APPLICATION for annulment of Commission Decision C(2005) 3452 of 14 September 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.337 – PO/Thread), as amended by Commission Decision C(2005) 3765 of 13 October 2005, and, in the alternative, for reduction of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V.M. Ciucă, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2008, gives the following

Judgment

Background to the dispute

A — *Subject-matter of the dispute*

1 By Decision C(2005) 3452 of 14 September 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.337 – PO/Thread) ('the contested decision'), as amended by Commission Decision C(2005) 3765 of 13 October 2005 and a summary of which was published in the *Official Journal of the European Union* of 26 January 2008 (OJ 2008 C 21, p. 10), the Commission of the European Communities found that the applicants – Amann & Söhne GmbH & Co. KG ('Amann') and Cousin Filterie SAS ('Cousin') – had participated in a set of agreements and concerted practices on the market in thread for automotive customers ('automotive thread') in the European Economic Area (EEA) during the period from May/June 1998 to 15 May 2000 and that Amann had also participated in a set of agreements and concerted practices on the market in thread for industrial customers other than automotive customers in Benelux, and in Denmark, Finland, Norway and Sweden (collectively, 'the Nordic countries') during the period from January 1990 to September 2001.

2 The Commission imposed a fine of EUR 4.888 million on Amann and Cousin, which were considered to be jointly and severally liable, for their participation in the EEA automotive thread cartel and a fine of EUR 13.09 million on Amann for its participation in the industrial thread cartel in Benelux and the Nordic countries.

B — *Administrative procedure*

3 On 7 and 8 November 2001, the Commission carried out inspections pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) at the premises of a number of sewing thread manufacturers. Those inspections were carried out as a result of information supplied in August 2000 by The English Needle & Tackle Company (contested decision, recital 78).

4 On 26 November 2001, Coats Viyella plc ('Coats') filed an application for leniency under the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), together with documents intended to show the existence of the following cartels: (i) a cartel on the market in thread for automotive customers in the European Economic Area (EEA); (ii) a cartel on the UK industrial thread market; and (iii) a cartel on the market for industrial thread, other than for automotive customers, in Benelux and the Nordic countries ('the industrial thread cartel in Benelux and the Nordic countries') (contested decision, recital 82).

5 In March and August 2003, on the basis of the documents taken in the course of the inspections and those provided by Coats, the Commission sent the undertakings concerned requests for information pursuant to Article 11 of Regulation No 17 (contested decision, recital 83).

6 On 18 March 2004, the Commission issued a statement of objections which it sent to a number of undertakings on account of their participation in one or more of the cartels referred to in paragraph 4 above, including the cartel on the industrial thread market in Benelux and the Nordic countries.

7 All the undertakings to which the statement of objections was addressed submitted written observations (contested decision, recital 90).

8 A hearing took place on 19 and 20 July 2004 (contested decision, recital 92).

9 On 24 September 2004, the parties were granted access to the non-confidential version of the responses to the statement of objections, as well as to the comments made by the parties at the hearing, and were given a deadline by which to submit further comments (contested decision, recital 93).

10 On 14 September 2005, the Commission adopted the contested decision.

C — *The contested decision*

1. *The relevant markets*

(a) Product markets

11 In the contested decision, the Commission states that the thread sector can be divided into two categories: (i) the thread used in industry to sew or embroider various kinds of apparel or other items such as leather goods, textile coatings for motor

vehicles and mattresses and (ii) domestic thread used by individuals for sewing or mending and for leisure activities (contested decision, recital 9).

12 It is apparent from the contested decision that the industrial thread business can be divided into three categories according to the use to which the thread is put: (i) sewing thread for the clothing industry, which is used for various types of garment; (ii) embroidery thread, which is used in computerised, industrial embroidery machines to embellish clothing, sports shoes and household textiles; and (iii) special thread, which is used in various sectors such as footwear, leather goods and the motor industry (contested decision, recital 11).

13 It is also apparent from the contested decision that industrial thread can also be divided into different categories according to the fibre type and the thread construction (contested decision, recital 12).

14 In the contested decision, the Commission considers that industrial thread can be regarded from a supply point of view as a single product market since there is no strict correspondence between end-use and fibre type and/or thread construction. The Commission states that, according to Coats, some apparel customers use speciality threads and some embroidery customers use apparel thread. It adds that Coats pointed out that apparel thread, embroidery thread and the various types of speciality thread may have common or easily interchangeable production processes (contested decision, recital 13).

15 Nevertheless, the Commission draws a distinction in the contested decision between thread intended for the motor industry and thread intended for industries other than the motor industry. It considers that, although the production processes for the two types of thread are similar or easily interchangeable, the demand in the motor industry comes from large customers which impose higher specification standards for certain products which they use – such as the thread used for seat belts – and which require product uniformity in the various countries in which they have need of those products for their industry (contested decision, recital 14).

16 In the present case, the product market concerned by the infringements complained of with regard to both Amann and Cousin is the automotive thread market and, with regard to Amann, the industrial thread market.

(b) Geographic markets

17 The Commission states in the contested decision that, because of the higher specification standards mentioned above, which require uniformity within the EEA, the automotive thread market must be distinguished from the industrial thread market. It therefore considers that the automotive thread market covers the whole EEA. The Commission finds that only a few suppliers are able to make a standardised offer for such products for the whole EEA. The reasons for this are that purchasers need uniform threads to facilitate their production in different countries; that those threads must achieve higher quality standards (for example, the thread used to manufacture seat belts); and that, owing to product quality and liability issues, it is essential to be able to trace the production of such threads (contested decision, recitals 21 and 22).

18 With regard to industrial thread, on the other hand, the Commission finds that, according to the information provided by the parties, the relevant geographic market is regional. It adds that the region can cover a number of EEA countries, such as Benelux or the Nordic countries, or a single country such as the United Kingdom (contested decision, recital 17).

19 It is apparent from the contested decision that the geographic market concerned by the infringement which Amann is alleged to have committed with regard to industrial thread is Benelux and the Nordic countries, whereas the geographic market concerned by the infringement which both applicants are alleged to have committed with regard to automotive thread is the EEA.

2. *Size and structure of the relevant markets*

20 The Commission states in the contested decision that the sales of industrial thread in Benelux and the Nordic countries amounted to approximately EUR 50 million in 2000 and approximately EUR 40 million in 2004, and that the sales of automotive thread amounted to approximately EUR 20 million in 1999 (contested decision, recitals 28 and 35).

21 It is also apparent from the contested decision that, at the end of the 1990s, the main industrial thread suppliers in Benelux and the Nordic countries included Amann, Barbour Threads Ltd ('Barbour') before it was acquired by Coats, Belgian Sewing Thread NV ('BST'), Coats, Gütermann AG and Zwicky & Co. AG ('Zwicky') and the main suppliers of automotive thread included Amann and Cousin, Coats, Oxley Threads Ltd ('Oxley'), Gütermann and Zwicky.

3. *Description of the unlawful conduct*

22 The Commission states in the contested decision that the conduct complained of with regard to both Amann and Cousin, concerning the cartel on the EEA automotive thread market, took place from May/June 1998 to May 2000.

23 The main objective of the members of the cartel on the EEA automotive thread market was the maintenance of high prices (contested decision, recital 214).

24 To that end, five meetings were held at which the participants first fixed two types of target price for the core products sold to European automotive customers: one

for existing customers and the other for new customers. Information was then exchanged on prices to individual customers and on minimum target prices. Lastly, the participants agreed to avoid undercutting, to the advantage of the incumbent supplier (contested decision, recital 215).

25 The Commission finds that the conduct concerning the cartel on the industrial thread market in Benelux and the Nordic countries took place between 1990 and 2001.

26 With regard to the cartel on the industrial thread market in Benelux and the Nordic countries, the Commission states that the undertakings concerned met at least once a year and that the meetings were split into two sessions, one for the Benelux market and the other for the market in the Nordic countries, the main objective of the meetings being the maintenance of high prices on each of those two markets.

27 The participants exchanged price lists and information on rebates, on the implementation of increases in list prices, on reductions in rebates and on increases in the special prices charged to certain customers. Agreements were also made concerning future price lists, maximum rates of rebate, reductions in rebates and increases in the special prices charged to certain customers, as well as agreements to avoid undercutting, to the advantage of the incumbent supplier, and to arrange customer allocation (contested decision, recitals 99 to 125).

4. *Enacting terms of the contested decision*

28 By Article 1(3) of the contested decision, the Commission found that six undertakings, including Amann and Cousin, had infringed Article 81(1) EC and Article 53(1) of

the EEA Agreement by participating in agreements and concerted practices affecting the EEA automotive thread market for the period – in the case of both applicants – from May/June 1998 to May 2000. Similarly, by Article 1(1) of the contested decision, the Commission found that eight undertakings, including Amann, had infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating in agreements and concerted practices affecting the industrial thread market in Benelux and the Nordic countries for the period – in the case of Amann – from January 1990 to September 2001.

29 Under the first paragraph of Article 2 of the contested decision, the following fines were imposed:

(a) in respect of the EEA automotive thread cartel:

— Amann and Cousin, considered jointly and severally liable: EUR 4.888 million;

— Coats: EUR 0.65 million;

— Oxley: EUR 1.271 million;

— Barbour and Hicking Pentecost plc, considered jointly and severally liable: EUR 0.715 million;

(b) in respect of the industrial thread cartel in Benelux and the Nordic countries, inter alia:

— Coats: EUR 15.05 million;

— Amann: EUR 13.09 million;

— BST: EUR 0.979 million;

— Gütermann: EUR 4.021 million;

— Zwicky: EUR 0.174 million.

Procedure and forms of order sought

30 By application lodged at the Registry of the General Court on 22 December 2005, Amann and Cousin brought the present action.

31 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was accordingly assigned.

32 Amann and Cousin claim that the General Court should:

— annul the contested decision in so far as it relates to them;

— in the alternative, reduce the fine to an appropriate amount;

— order the Commission to pay the costs.

33 The Commission contends that the General Court should:

— dismiss the action;

— order Amann and Cousin to pay the costs.

Law

34 First of all, Amann and Cousin put forward a plea to the effect that the contested decision should be annulled for infringement of the first sentence of Article 7(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

35 Secondly, Amann and Cousin put forward a series of pleas to the effect that the fine should be cancelled. In the first place, they complain that the Commission imposed on them a fine which exceeded the upper limit of 10% of their turnover. In the second place, they raise seven pleas, alleging respectively: (i) breach of the principles of equal treatment and proportionality in the imposition of the fine; (ii) incorrect determination of the starting amount for the fine for the industrial thread cartel; (iii) miscalculation of the duration of the infringement on the industrial thread market; (iv) failure to take account of certain mitigating circumstances concerning the infringement on the industrial thread market; (v) miscalculation of the starting amount and the basic amount of the fine for the infringement on the automotive thread market; (vi) failure to take account of the fact that the automotive thread cartel was not implemented; and (vii) breach of the right to be heard and the rights of the defence.

A — *The plea, put forward by Amann and Cousin, to the effect that the contested decision should be annulled for infringement of the first sentence of Article 7(1) of Regulation No 1/2003*

1. *Arguments of the parties*

36 Amann and Cousin claim that the imputed infringements constitute a single infringement within the meaning of the first sentence of Article 7(1) of Regulation No 1/2003, on the grounds that (i) the automotive thread market and the industrial thread market are not distinct product markets or geographic markets, (ii) there is a subjective

factor common to those cartels and (iii) the criteria by reference to which the Commission found that the infringement is not a single infringement are not valid.

37 With regard, first, to the existence of a single product market, Amann and Cousin deny that they expressly confirmed that thread for the garment industry and automotive thread belonged to two separate markets. Amann's reply to the request for information, in which it described the automotive thread market as global, did not in any way imply recognition of the allegedly autonomous character of that market. Furthermore, after providing estimates for six different thread segments, Amann was unable to do so for the automotive thread segment.

38 Nor, according to Amann and Cousin, do the statements made by other traders, such as Coats and Gütermann, support the inference that the automotive thread market is distinct from the industrial thread market.

39 The point of view put forward by Amann and Cousin, namely that the market is a single market, is confirmed – they maintain – by the way in which all the undertakings present the products. This is especially true of the segmentation made by Gütermann, Amann and Coats. It can be seen from this that the same thread can be used in a number of branches.

40 Nor does the fact that the large customers in the automotive sector insist on stricter specification standards justify the distinction made between the industrial thread market and the automotive thread market. As a general rule, threads are produced in accordance with the requirements of the automotive industry and supplied to other industrial sectors in accordance with that quality standard. From an economic point of view, moreover, the production of two types of thread of different qualities is untenable. Thus, the technical characteristics of automotive thread are essentially the same as those of industrial thread. In consequence, automotive thread and industrial

thread are interchangeable and they are marketed, furthermore, by reference to products rather than to customers.

41 Secondly, Amann and Cousin claim that the Commission failed to consider whether the various activities complained of were linked by a common subjective element and whether those activities thus constituted a single infringement. The Commission itself found that the infringements were all designed to distort the normal movement of prices on the relevant market.

42 The argument that the infringements found to exist constitute a single infringement is borne out by the fact that they concern price agreements and that the decisions adopted for the regions concerned are practically identical. Amann and Cousin add that, in most Member States, the subjective element is the decisive criterion for identifying a single infringement.

43 Amann and Cousin also argue that, given the average size of most of the undertakings involved, their managers and members were bound to be aware of the various infringements. Amann and Cousin state that, in their case, the subjective element arises also by virtue of the lack of any internal division of responsibility as between the marketing of industrial thread and the marketing of automotive thread.

44 In addition, they argue essentially that the Commission's way of proceeding was inconsistent, in that the Commission assumed from the outset that the successive infringements committed in the context of each cartel amounted to a single infringement, but did not proceed in the same way with regard to the relationship between the cartels themselves. In that regard, recitals 266 to 270 of the contested decision contain a number of contradictions which show that the Commission's argument postulating the existence of separate infringements is unsustainable.

45 Thirdly, Amann and Cousin challenge the criteria applied by the Commission for the purposes of determining whether or not there was a single infringement.

46 First of all, they claim that those criteria are not valid. They argue that, on the one hand, the Commission is itself undecided as to how to use the criteria for the purposes of determining the existence of a single infringement, since it purports to prove the existence of two distinct infringements by referring to different participants, a different modus operandi and the lack of overall coordination and then goes on to rely on the difference between the markets concerned, while stating later that the agreements concerning Benelux and the Nordic countries must be considered together because they are linked by an identical pattern of organisation, an identical modus operandi and identical participants. Accordingly, Amann and Cousin conclude that the criterion of overall coordination no longer plays any role as regards recognising the existence of a single infringement in Benelux and the Nordic countries.

47 On the other hand, Amann and Cousin maintain that the criterion used to delimit the product markets, in the case of related products, is irrelevant. Use of that criterion – except in obvious cases in which the products are in no way part of the same market – is tantamount to giving the Commission an almost unfettered discretion as regards penalties for infringements of competition law. The criterion relating to the fact that the participants are not identical is also irrelevant. Amann and Cousin state that the question of who represents the participating undertakings is unimportant, since participation can be attributed to the undertaking concerned.

48 Secondly, Amann and Cousin claim that the application of those criteria should, in any event, have led the Commission to conclude that the infringement was a single infringement.

49 On the one hand, they invoke the fact that the Commission cannot validly cite the lack of coordination between the cartels as proof of the existence of separate

infringements, since the Commission itself pointed out – relying in that regard on statements made by Coats – that, since the product markets are more or less delimited by country, there was no need for coordination between the various regions concerned. Similarly, the Commission's attempt to draw a distinction between coordination of geographic markets and coordination of distinct product markets is irrelevant since, in the case of different geographic markets, coordination between distinct product markets makes no sense. For that reason, Amann and Cousin argue that, in assessing the conduct at issue, it must be accepted that the meetings devoted to different regions were part of an overall plan approved by their respective managements and confirmed by documents mentioning frequent contacts between representatives of Coats and Amann for the purpose of dealing with questions of 'higher strategy' in Europe. Such documents show that there was a common subjective element. In that regard, Amann and Cousin criticise the Commission for not considering whether Coats had also had contacts of that kind with other competitors.

50 On the other hand, there is no decisive difference in terms of participants in the agreements or patterns of organisation. Amann and Cousin state that, according to case-law, a single infringement in the legal sense of the term cannot be ruled out merely because each undertaking participates in the infringement in forms specific to it, which means that an undertaking could thus have participated in a single collusive arrangement without having participated in all the constituent elements of that arrangement.

51 In the light of those considerations, Amann and Cousin state that only three of the undertakings participated in a single agreement, all the others being involved in at least two agreements, which means that there was an overlapping in terms of participants, a fact which militates in favour of the existence of a single infringement. In addition, a comparison between the meetings relating to the cartel on the industrial thread market and those relating to the cartel on the automotive thread market in no way supports the proposition that the infringements were distinct. In both cases, the meetings were held irregularly.

52 The Commission disputes those arguments.

2. *Findings of the Court*

(a) The distinction between product markets and geographic markets

53 It is apparent from the contested decision that the Commission considered that, by reason of its specific character, the automotive thread market had to be distinguished from the industrial thread market, both in terms of products and from the geographic point of view (see paragraphs 12 to 16 and 17 to 19 above).

54 First of all, it should be pointed out that, inasmuch as it involves complex economic appraisals on the part of the Commission, the definition of the relevant market is amenable to only limited review by the Community judicature (see, to that effect, Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 64, and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 26). However, this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and whether that evidence is capable of substantiating the conclusions drawn from it (Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 482).

55 It should also be borne in mind that the market to be taken into consideration comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 37). More specifically, the Court of Justice has held that the concept of the product market implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 28).

56 Interchangeability is to be assessed in the light of evidence such as the characteristics of the products, the competitive conditions and the structure of supply and demand on the market (*Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 55 above, paragraph 37).

57 Although, from an economic point of view, demand substitutability constitutes the most immediate and effective assessment criterion in relation to the suppliers of a given product (Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraph 99), supply-side substitutability may also be taken into account in defining the relevant market with regard to operations in which that substitutability has effects equivalent to demand substitutability in terms of immediacy and effectiveness. Thus, the criterion of supply-side substitutability implies that producers are able, by a mere adaptation, to present themselves on that market with sufficient weight to constitute a serious counterbalance to producers already on the market (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 829).

58 The products themselves may be regarded as constituting a distinct market if they are individualised by particular characteristics of production which make them specifically suitable for the particular purpose for which they are used or if they are individualised by their use (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 33).

59 Lastly, it should be borne in mind that the Commission adopted a Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5; 'the Market Definition Notice') in which it specified the criteria to be assessed in defining a relevant product market and delimiting the relevant geographic market. The relevant product market is defined in the Market Definition Notice as comprising 'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. The geographic market is defined as comprising 'the

area in which the undertakings concerned are involved in the supply ... of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'. The relevant market by reference to which a given competition issue should be assessed is therefore established through a combination of the product and geographic markets.

60 In the light of those considerations, it is necessary to examine the soundness of the Commission's conclusions in recitals 14 and 22 of the contested decision regarding the existence of two distinct product and geographic markets, namely, the automotive thread market in the EEA and the industrial thread market in Benelux and the Nordic countries. In order to reach that conclusion, the Commission assessed the substitutability of the products, both on the demand side and on the supply side.

61 First, as regards substitutability on the demand side, the contested decision sets out a series of factors to demonstrate that there is no demand substitutability.

62 In the first place, it is clear from recitals 14 and 22 of the contested decision that demand for automotive thread comes from large customers and that such customers are much fewer in number than the other undertakings which are customers on the industrial thread market. Amann and Cousin do not deny this. They confirmed at the hearing that the customers in the automotive sector were the most powerful because of the very large quantities which they purchase.

63 In the second place, it is apparent from recitals 14 and 22 of the contested decision that the customers in the automotive sector buy thread for factories located in different countries and that they therefore need a uniform product in each of those countries. That need for uniformity – which Amann and Cousin do not deny – can be easily explained from an economic point of view. It is reasonable to accept that the adaptation of production machinery to the type of thread used entails costs. Accordingly,

the motor industry tries to reduce those costs by buying, in great quantities, a very specific type of thread and by adapting, in a single operation, its production machines in the various countries to that thread.

64 In the third place, it follows from recitals 14 and 22 of the contested decision that automotive threads must meet the particularly high standards which prevail in that sector and that traceability is a key factor for reasons relating to product quality and liability issues. That finding was confirmed by Amann and Cousin both in the application initiating proceedings and at the hearing.

65 Indeed, Amann and Cousin admitted that, in general, it is the customers who decide what thread is necessary for their production and who therefore choose the product which meets their needs as users. With specific regard to customers in the automotive sector, Amann and Cousin admitted that such customers insist that the thread meet at least ISO standard 9002. Amann and Cousin even stated at the hearing that particular characteristics – known as 'TS 950' – exist for the motor industry and that they take account of those factors in their production.

66 Amann and Cousin also described the process for the certification of threads by automotive customers. First of all, Amann and Cousin develop a type of thread which meets at least ISO standard 9002. That thread is then tested by the motor manufacturer which wishes to use it for production and, lastly, the thread is certified by the motor manufacturer if the test is successful.

67 In the light of those considerations, it must be accepted that other industrial threads cannot be substituted for the specific thread chosen by the motor industry. The fact that that type of thread is sold to customers other than those in the motor industry is irrelevant in that regard. Unlike other potential purchasers of that product,

undertakings in the automotive sector buy only thread which has specific intrinsic characteristics and which has been certified by those undertakings by reason of those special characteristics. Amann and Cousin cannot reasonably claim, therefore, that demand substitutability exists.

68 The statements made by Coats in reply to the Commission's request for information also confirm the lack of demand substitutability. Coats pointed out that some customers in the clothing sector use embroidery thread, just as some customers in the embroidery sector use thread intended for the clothing industry. On the other hand, no reference was made to similar demand substitutability on the part of customers in the automotive sector.

69 Secondly, although the Commission considered that, from the supply point of view, industrial thread could be regarded as a single product market because of the lack of a strict correspondence between final use and the fibre type and/or the thread construction and because of the similarity or interchangeability of the processes by which that thread is produced, it none the less concluded that that was not the position in the case of automotive thread.

70 To reach that conclusion, the Commission based its considerations on the specific characteristics of automotive thread, the need to guarantee a standardised offer and the capacity to fulfil orders from the large customers in that sector. It also relied on the fact that the geographic market for automotive thread covers the whole territory of the EEA, unlike that for industrial thread, which is merely regional. In the light of those factors, the Commission formed the view that only a few undertakings could meet that sort of demand (see recital 22 of the contested decision).

71 First of all, according to paragraph 20 of the Market Definition Notice, there is supply-side substitutability where suppliers are able to switch production to the relevant

products and to market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. In paragraph 21 of the Market Definition Notice, the Commission points out that such substitutability typically arises where companies market a range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market. At first glance, industrial thread corresponds to the type of product referred to in paragraph 21 of the Market Definition Notice.

72 Lastly, in paragraphs 22 and 23 of the Market Definition Notice, the Commission confirms, with practical examples, that the suppliers concerned must be able to offer and sell the various qualities of product immediately and without a substantial increase in costs and that there must be no particular distribution difficulties.

73 It must be determined, in the light of those considerations, whether the Commission correctly applied the criterion of supply-side substitutability.

74 First of all, as was pointed out above in paragraph 63 et seq., automotive thread producers have to adapt their production machinery so that the thread produced meets specific standards.

75 Secondly, the reasoning put forward by Amann and Cousin regarding the low cost of producing automotive thread is unconvincing. It is true that they claim that, as a general rule, threads are produced in accordance with the requirements of the motor industry and supplied at that standard to customers in other industrial sectors, but they also argue that the costs of adapting the production line would be far too high if a product had to be manufactured solely for the automotive sector and the

production line had then to be adjusted for the manufacture of products for other industrial sectors.

76 The fact remains that, although – for reasons related to rationalisation of production – a company already present on the automotive thread market produces essentially thread which meets the higher standard, irrespective of the intended use of the product, it does so only because it is present on the automotive market, by reason of the high cost of manufacturing in conformity with the specific standards applying to automotive thread. In other words, a company which is mainly engaged in producing thread for clothing or embroidery will have no interest in manufacturing a special thread for the automotive industry solely on the ground that it might sell that thread to customers from the motor industry.

77 Thus, the assertion made by Amann and Cousin that the costs of manufacturing automotive thread are so low that it is always produced to a higher specification standard has not been established with regard to producers of industrial thread.

78 Thirdly, Amann and Cousin did not call into question during the administrative procedure the distinct geographic difference between the two markets. In reply to the Commission's request for information, Amann even described the market for automotive thread as global. Coats also pointed out that because of the specific characteristics of that market it is limited to 'regional' and 'global' suppliers, terms which must be understood, in the context of the reply, as meaning 'covering the whole territory of the EEA' and 'covering the whole world'.

79 Thus, for there to be supply-side substitutability, most thread producers must be capable of producing a large quantity of specific and uniform thread for each customer in the automotive sector and of distributing it quickly across the whole territory of the EEA. In the light of the preceding considerations, such a line of reasoning is hardly sustainable.

80 Consequently, the Commission did not commit a manifest error of assessment in concluding that there were two distinct product and geographic markets from the point of view of supply.

81 It should be stated in that regard that the Commission correctly assessed and interpreted the replies provided by Amann and Cousin, and by the other undertakings concerned, on the basis of which it reached the conclusion that there were two distinct product markets.

82 First of all, the Commission asked Amann and Cousin whether sewing thread for clothing for industrial use, embroidery thread for industrial use, special thread for industrial use and thread for domestic use constituted different product markets in the thread sector. The Commission also presented a table intended to determine the relevant geographic markets for each of the above categories of thread, with a specific category entitled 'Automotive thread'. It stated that the 'Automotive thread' category was included in special thread for industrial use, but that it wished to hear the opinion of Amann and Cousin on the relevant geographic market for that type of thread.

83 In reply to the abovementioned request for information, Amann stated that the detailed breakdown carried out by the Commission was correct on the ground that 'there are product specifications and specific customer requirements which, in the clothing industry, in particular, are clearly distinct from those of the other two sectors at the level of the range of shades etc.'. Cousin, for its part, also expressed its complete agreement with the breakdown carried out by the Commission. It stated, however, that it was very difficult to assess markets, especially with regard to special threads, given the very great diversity of uses concerned, and mentioned that it had identified more than 80 trades.

84 Thus, it is true that Amann and Cousin expressly admitted that the market for special thread constitutes a distinct product market, but – contrary to the assertions made

by the Commission in its written pleadings – did not expressly admit that the market for automotive thread, included in the market for special thread, was itself a distinct product market.

85 Gütermann, too, confirmed the breakdown proposed by the Commission, but did not make any express statement on the automotive thread market. Coats stated in reply to the question concerning the product markets that it did not think that the differences between the products were sufficient to support the conclusion that there were three distinct markets, even though it recognised the specific characteristics of the automotive thread market, as stated in paragraph 78 above. Only Oxley directly confirmed and justified the distinct character of the automotive thread market.

86 Although the interpretation of those factors concerning the existence of a distinct market for automotive thread does not seem to be as clear as the Commission is inclined to claim, the fact remains that its conclusions are not vitiated by a manifest error of assessment or any distortion of the facts.

87 Moreover, those conclusions are confirmed by other evidence, such as the internet sites of the undertakings, which, in general, contain a distinct heading for automotive thread. Similarly, those undertakings are proprietors of thread brands specifically created for that sector.

88 It follows from all the above that the Commission did not commit a manifest error of assessment in considering that, in the present case, the market for automotive thread and the market for industrial thread were different.

(b) The alleged existence of an 'overall plan'

89 It should first be recalled that the concept of a single infringement covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim designed to distort competition or, yet again, in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, which are aware that they are participating in the common object) (see, to that effect, Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 257).

90 It should also be pointed out that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or more elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. Where the various actions form part of an 'overall plan' because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 258).

91 In addition, according to settled case-law, the concept of a single infringement can be applied to the legal characterisation of anti-competitive conduct consisting in agreements, in concerted practices and in decisions of associations of undertakings (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 696 to 698; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 186; and Joined Cases T-101/05 and T-111/05 *BASF* v *Commission* [2007] ECR II-4949, paragraph 159).

92 It must also be made clear that the concept of a single objective cannot be determined by a general reference to the distortion of competition on the market concerned by

the infringement, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes an element consubstantial with any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of part of its meaning, since it would have the consequence that different instances of conduct which relate to a particular economic sector and are prohibited under Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement. Thus, for the purposes of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they display a link of complementarity in that each of them is intended to deal with one or more consequences of the normal pattern of competition and whether, through interaction, they contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of a global plan having a single objective. In that regard, it will be necessary to take into account any circumstance capable of establishing or of casting doubt on that link, such as the period of implementation, the content (including the methods used) and, correlatively, the objective of the various agreements and concerted practices in question (see, to that effect, *BASF* v *Commission*, paragraph 91 above, paragraphs 179 to 181).

93 For objective reasons, therefore, the Commission may initiate separate procedures, find a number of separate infringements and impose a number of separate fines (see, to that effect, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* (not published in the ECR) ('*Tokai II*'), paragraph 124).

94 Lastly, it should also be pointed out that, as a general rule, the characterisation of certain unlawful actions as constituting one and the same infringement affects the penalty that may be imposed. A finding that multiple infringements exist may entail the imposition of a number of separate fines, each time within the limits laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 (*BASF* v *Commission*, paragraph 91 above, paragraph 158).

95 The existence of an 'overall plan' must be assessed in the light of those considerations.

96 It should be observed, first of all, that Amann and Cousin primarily maintain that, in the present case, the common subjective element lies in the fact that all the infringements were intended to distort the normal movement of prices. That objective of price distortion is inherent in any price cartel and cannot, of itself, prove the existence of a common subjective element. Contrary to assertions made by Amann and Cousin, the Commission did not assume from the outset in the contested decision that there was a connection between the infringements. In recital 269 of that decision, the Commission merely referred to the single anti-competitive object and the single economic aim – namely, distortion of the normal movement of prices, which is inherent in this type of cartel – although it emphasised that that object and aim were pursued in each of the three different infringements.

97 Next, in order to refute the existence of a single infringement other than by reference to the fact that the market for automotive thread and the market for industrial thread are distinct, as was pointed out moreover in paragraphs 53 to 88 above, the Commission essentially relied on the fact that most of the participants in the cartels were different in each case and that there was no overall coordination between the cartels. Amann and Cousin were unable to call those criteria into question and have accordingly failed to prove the existence of a 'close connection' between the various instances of anti-competitive conduct.

98 With regard, first, to the criterion concerning the fact that the participants were not the same, the Commission listed – in recitals 96 and 216 of the contested decision – the participants in the cartel on the automotive thread market and those in the cartel on the industrial thread market. The Commission went on, in point (a) of recital 265 of the contested decision, to state that most undertakings took part in only one cartel, as they were not active on the markets covered by the other cartel.

99 It should be noted that, of the 10 undertakings which took part in one or other of the cartels, or in both, only three took part in both cartels. Ackermann Nähgarne GmbH & Co., Bieze Stork BV, BST, Cousin, Gütermann, Zwicky and Oxley were involved in only one of the cartels. Only Coats, Barbour (until it was acquired by Coats) and Amann took part in both cartels. The mere fact that those three undertakings

participated in both cartels is not, in itself, evidence of a common strategy (see, to that effect, *Tokai II*, paragraph 93 above, paragraph 120). It must also be emphasised that, apart from Barbour, the representatives of the undertakings present at the meetings held in the framework of the cartel on the automotive thread market were not the same as those who took part in the meetings held in the framework of the cartel on the industrial thread market during the period when the two cartels overlapped (1998 to 2000).

100 Consequently, the finding made by the Commission in point (a) of recital 265 of the contested decision is not vitiated by a manifest error of assessment.

101 Nor, secondly, can the subject-matter of the cartels be taken as indicative of the existence of an overall plan. It is apparent from the contested decision that the subject-matter of the cartel on the automotive thread market is quite distinct from the subject-matter of the cartel on the industrial thread market.

102 With regard to the cartel on the automotive thread market, recitals 215, 220, 223, 224, 226, 228 to 230, 233 to 236 and 238 of the contested decision show, on the one hand, that the information exchanged between the cartel members concerned the prices to be charged to certain customers and, on the other hand, that the agreements arrived at involved the fixing of minimum target prices for the core products sold to customers in the automotive sector, the fixing of two types of minimum target prices, one for existing customers and the other for new customers, and the fixing of minimum target prices for certain customers covered by the exchange of information. The cartel members also agreed to avoid undercutting each other's prices, to the advantage of the incumbent supplier.

103 With regard to the cartel on the industrial thread market, it is apparent from recitals 99 to 153 of the contested decision that, on the one hand, the information exchanged concerned price lists and rebates, the implementation of increases in list prices, reductions in rebates and increases in the special prices charged to certain customers and, on the other hand, the parties agreed on future price lists, maximum rates of

rebate, reductions in rebates and increases in the special prices charged to certain customers, and agreed to avoid undercutting each other's prices, to the advantage of the incumbent supplier.

104 The abovementioned recitals of the contested decision confirm that there is a clear difference between the subject-matter of the two cartels. The existence of any resemblance between the two cartels, such as the agreements to avoid undercutting, to the advantage of the incumbent supplier, cannot of themselves cast doubt on that finding.

105 Thirdly, the way in which each of the two cartels functioned was, to a great extent, different. As the Commission pointed out in recital 218 of the contested decision, the cartel on the automotive thread market was rather flexibly organised, through small irregular meetings supplemented by frequent bilateral contacts. Recitals 96 to 99 and 149 to 153 of the contested decision show that the cartel on the industrial thread market in Benelux and the Nordic countries took the practical form of meetings held at least once a year and split into two sessions, that is to say, a session during which the Nordic markets were discussed and a session during which the Benelux markets were discussed. It also appears from those recitals that bilateral contacts took place periodically.

106 In the light of those factors, the Commission did not commit a manifest error of assessment in concluding, in recitals 265 to 267 of the contested decision, that the cartel on the automotive thread market and the cartel on the industrial thread market in Benelux and the Nordic countries fell to be distinguished one from the other and that, in consequence, they constituted two distinct infringements.

107 It should be pointed out in that regard that, unlike the cartel on the automotive thread market, the cartel on the industrial thread market in Benelux and the cartel on the industrial thread market in the Nordic countries were regarded as a single infringement on the ground that the products were identical, the cartel members were the

same, the cartel subject-matter and modus operandi were similar, the meetings were held on the same day and the participating undertakings were represented at those meetings by the same persons.

108 Furthermore, the argument based on the lack of an internal division of responsibility within Amann and Cousin between the marketing of industrial thread and the marketing of automotive thread is irrelevant, as is the argument based on the fact that the managers and members of the participating undertakings were bound to be aware of the various cartels. Those arguments in no way prove the existence of a subjective common element.

109 It is also necessary to reject the argument put forward by Amann and Cousin concerning the existence of overall coordination, an inference drawn from the frequent contacts between a representative of Coats and the manager of Amann. It is apparent from the documents before the Court that no statement was made which could be interpreted as indicating overall coordination. At the hearing, Amann and Cousin admitted that they were unable to submit any document to the Court specifically disclosing a desire for overall coordination as between Amann and Coats.

110 Lastly, Amann and Cousin are incorrect in claiming that the criterion used to delimit the product markets cannot constitute a valid criterion for assessment inasmuch as it would give the Commission an unfettered discretion, in regard to related products, to conclude that there were two separate infringements. In the first place, the Commission's discretion is not unlimited since it remains subject to review by the Court, as stated in paragraph 54 above. In the second place, the criterion concerning product markets was, in the present case, merely one of a number of criteria on which the conclusion that there were two separate infringements was based.

111 In the light of all the above considerations, the plea alleging infringement of the first sentence of Article 7(1) of Regulation No 1/2003 must be rejected as unfounded.

B — *The pleas to the effect that the fine should be reduced*

1. *The plea, put forward by Amann and Cousin, alleging failure to respect the upper limit for penalties, laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003*

(a) Arguments of the parties

112 The plea put forward by Amann and Cousin comprises three complaints.

113 By their first complaint, Amann and Cousin claim that the two infringements are in reality only a single infringement and that, consequently, only one fine can be imposed on them, the amount of which must not exceed the upper limit of 10% of their total turnover. However, the total resulting from that addition exceeds the upper limit and Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 have therefore been infringed.

114 Amann and Cousin argue in that regard that the Community constitutional law principle *nulla poena sine lege* has been infringed. Essentially, they criticise the fact that, by dividing the markets on which parallel infringements had been found to exist, the Commission can arrogate to itself an unlimited discretion to set fines which exceed the upper limit of 10% of total turnover. They maintain that the principle of legality implies not only that the courts may not impose penalties for which there is no legal basis, but also that the legislature must draft penal measures in a precise and clear manner. The requirement of clarity thus applies not only to the constituent elements of a rule, but also to the legal consequences of that rule. Those requirements also apply to the abovementioned provisions laying down fines for infringements of the rules on competition.

115 When asked to clarify their arguments at the hearing, Amann and Cousin stated that those arguments were to be understood as also challenging the legality of the rule itself and that, consequently, they were raising a plea of illegality in respect of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003.

116 Moreover, Amann and Cousin dispute the Commission's argument regarding its obligation to comply with the *non bis in idem* principle, inasmuch as that principle provides no guarantee that the identification of a single infringement, or of multiple infringements, is correct. They argue essentially that the problem arises at an earlier stage, that is to say, at the very point at which it is determined that there has been one infringement or several infringements.

117 By their second complaint, Amann and Cousin claim that the Commission can impose a single fine for multiple infringements where those infringements concern the same types of conduct on different markets and where the participants are, to a great extent, the same undertakings. Those two conditions are fulfilled in the present case.

118 Amann and Cousin state that the Commission departed from its previous practice without giving the slightest reason for doing so. They maintain that, if the Commission waives its power to impose a single fine for multiple infringements, it is required, in accordance with the general principles of European administrative law, to give reasons for not exercising that power. In the present case, therefore, the Commission infringed Article 253 EC.

119 Amann and Cousin go on to compare the contested decision with Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 – Vitamins) (OJ 2003 L 6, p. 1; 'the Vitamins decision'). In the Vitamins decision, the Commission grouped the fines for the various infringements into a single overall fine and, as a consequence, considered it necessary to respect the upper limit of 10% of total turnover.

However, as in the Vitamins decision, the cartels in the present case share the same material and 'spatio-temporal' context.

120 By their third complaint, Amann and Cousin claim that the deterrent effect which the Commission sought to achieve had already been achieved by the fine imposed for the infringement on the industrial thread market. Accordingly, the Commission should have taken account of that when setting the fine penalising the automotive thread cartel.

121 The Commission disputes those arguments.

(b) Findings of the Court

122 The present plea put forward by Amann and Cousin comprises, essentially, three complaints alleging: (i) breach of the principle *nulla poena sine lege*; (ii) breach of the obligation to impose a single fine for multiple infringements; and (iii) failure to have regard for the legal objectives of the penalty.

The complaint alleging breach of the principle *nulla poena sine lege*, and the plea of illegality in respect of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003

123 The plea of illegality raised by Amann and Cousin in respect of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 must first be considered at

three levels. First of all, they claim, essentially, that the very concept of an infringement, as referred to in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, is unclear. Secondly, they argue that the concept of a single, continuous infringement is also not clearly defined and that the Commission can therefore exercise an arbitrary influence on the setting of the amount of the fine by dividing the markets on which parallel infringements have been found to exist. Thirdly, they claim that the penalties provided for in those provisions are also unclear.

124 At the outset, it should be borne in mind that, according to the case-law of the Court of Justice, the principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a fundamental principle of Community law and requires, inter alia, that any Community legislation, in particular if it imposes penalties or permits their imposition, must be clear and precise, so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly (see, to that effect, Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraph 17; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 66).

125 That principle, which forms part of the constitutional traditions common to the Member States and which has been enshrined in various international treaties – notably in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') – must be observed with regard both to penal provisions and to specific administrative instruments imposing administrative penalties or permitting their imposition (see, to that effect, Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15). It applies not only to the rules which establish the constitutive elements of an offence, but also to the provisions which define the consequences of infringing those rules (see, to that effect, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25, and *Degussa* v *Commission*, paragraph 124 above, paragraph 67).

126 In that connection, it should be pointed out that, under Article 7(1) of the ECHR:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

127 According to the European Court of Human Rights, it follows from that provision that offences and the relevant penalties must be clearly defined by law. That requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of that provision, what acts and omissions will make him criminally liable (see Eur. Court H. R., *Coëme and Others v. Belgium*, judgment of 22 June 2000, *Reports of Judgments and Decisions* 2000-VII, p. 1, § 145) (*Degussa* v *Commission*, paragraph 124 above, paragraph 69).

128 It is clear from the case-law of the European Court of Human Rights that, in order to satisfy the requirements of Article 7(1) of the ECHR, it is not necessary for the wording of the provisions pursuant to which those penalties are imposed to be so precise that the consequences which may flow from an infringement of those provisions are foreseeable with absolute certainty (*Degussa* v *Commission*, paragraph 124 above, paragraph 71).

129 According to the case-law of the European Court of Human Rights, the existence of vague terms in the provision does not necessarily entail an infringement of Article 7 of the ECHR, and the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, regard being had to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see Eur. Court H. R., *Margareta and Roger Andersson v. Sweden*,

judgment of 25 February 1992, Series A no. 226, § 75). In that connection, apart from the text of the law itself, the European Court of Human Rights takes account of whether the indeterminate concepts used have been defined by consistent and published case-law (see Eur. Court H. R., *G. v. France*, judgment of 27 September 1995, Series A no. 325-B, § 25) (*Degussa* v *Commission*, paragraph 124 above, paragraph 72).

130 As regards the validity of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 in the light of the principle that penalties must have a proper legal basis, as recognised by the Community judicature in accordance with the guidance provided by the ECHR and the constitutional traditions of the Member States, it should be pointed out that, contrary to the assertions made by Amann and Cousin, the Commission does not have unlimited discretion in finding that the rules on competition have been infringed, or in determining whether the various unlawful acts constitute a single continuous infringement or a number of separate infringements, or in setting fines for those infringements.

131 First of all, the only infringements of the competition rules in respect of which the Commission may impose fines pursuant to Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 are infringements of Article 81 EC or Article 82 EC. However, Amann and Cousin are wrong to claim that the Commission has an unlimited discretion in finding that such infringements have occurred. On the one hand, it should be borne in mind that the question whether or not the conditions for the application of Article 81 EC or Article 82 EC are satisfied is, in principle, amenable to full review by the Community judicature (see, to that effect and by analogy, Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 34 and the case-law cited, and Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraph 144). On the other hand, although it is true that where such a finding involves complex economic or technical appraisals, the case-law recognises that the Commission has a certain discretion, that discretion is never unlimited. The existence of such a discretion does not mean that the Court must refrain from reviewing the Commission's interpretation

of economic or technical data. The Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, *Microsoft* v *Commission*, paragraph 54 above, paragraph 88 and the case-law cited).

132 Moreover, Amann and Cousin do not allege that the definition of one of the types of infringement covered by Article 81 EC – namely, 'agreements between undertakings … which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which … directly or indirectly fix purchase or selling prices or any other trading conditions …' – did not enable them to realise that the cartels on the industrial thread market in Benelux and the Nordic countries and on the automotive thread market in the EEA constituted infringements within the meaning of Article 81 EC for which they would therefore be liable.

133 Secondly, with regard to the alleged lack of criteria for determining whether there is a single and continuous infringement or a number of separate infringements, it must be admitted that such criteria do not appear as such in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, or in Article 81 EC. Nevertheless, the concept of a single and continuous infringement has been used and defined by settled, published case-law. Criteria such as the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, which are aware that they are participating in the common object), which are designed to determine whether the infringements committed are part of an 'overall plan' and, accordingly, part of a single infringement have been clarified for years in the case-law, such as that set out in paragraph 89 above.

134 For objective reasons, therefore, the Commission may initiate separate procedures, find separate infringements and impose a number of separate fines (see, to that effect, *Tokai II*, paragraph 93 above, paragraph 124).

135 In that regard, it is clear from the analysis of the plea seeking annulment of the contested decision (paragraph 53 et seq. above) that the criteria applied by the Commission when it concluded that two separate infringements had been committed are consistently used criteria which flow from the case-law.

136 Although it is true that certain criteria leave the Commission a broad discretion, the fact remains that review of that discretion, carried out by the Community judicature, has indeed made it possible, through consistent and published case-law, to clarify certain concepts. That is the case, in particular, with regard to the definition of product markets and geographic markets, which was applied by the Commission in the present case and which required it to make complex economic appraisals. As was stated in the context of the consideration of the first plea (paragraph 53 et seq. above), the Commission is required, when exercising its power of appraisal, to adhere to the criteria laid down in the case-law, such as supply-side substitutability and demand substitutability.

137 In addition, in the interests of transparency and with a view to enhancing legal certainty for the undertakings concerned, the Commission published the Market Definition Notice, setting out the criteria which the Commission applies for the purpose of defining the relevant market in each particular case. In that regard, in adopting such rules of conduct and, by publishing them, announcing that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and must not depart from those rules on pain of being penalised, where appropriate, for breach of the fundamental principles of law, such as equal treatment or the protection of legitimate expectations. In addition, even though the Market Definition Notice does not constitute the legal basis for the contested decision, it determines, generally and abstractly, the criteria which the Commission has bound itself to apply in order to determine whether there is one market or a number of markets, for the purposes of determining whether there has been one infringement or multiple infringements and, as a consequence, ensures legal certainty for the undertakings (see, to that effect, 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, paragraphs 211 and 213). It follows that the Market Definition Notice contributed to clarifying the limits, already implicit in the conferring provisions, of

the exercise of the Commission's discretion under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003.

138 In that connection, it emerges from paragraphs 4 and 5 of the Market Definition Notice that 'the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy' and that '[i]ncreased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, ... the establishment of certain agreements'.

139 Thus, in the light of the factors noted above, it is possible for a prudent trader – if need be, by taking legal advice – to foresee in a sufficiently precise manner the method that the Commission will apply in order to determine, in relation to a given line of conduct on the part of an undertaking, whether there is a single and continuous infringement or a number of separate infringements.

140 Thirdly, with regard to the claim that the penalties provided for in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 are unclear, it must be stated that, contrary to the assertions made by Amann and Cousin, the Commission does not have unlimited discretion in setting fines for infringements of the competition rules (see, by analogy, *Degussa* v *Commission*, paragraph 124 above, paragraph 74).

141 Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 limit the Commission's discretion. First, those provisions lay down an objective yardstick in providing that, for each undertaking or association of undertakings, the fine imposed may not exceed 10% of its turnover. Thus, the fine which may be imposed is subject to a quantifiable and absolute upper limit calculated by reference to each undertaking in

respect of each infringement, so that the maximum amount of the fine which may be imposed on a given undertaking is determinable in advance. Secondly, Article 15(2) of Regulation No 17 and Article 23(3) of Regulation No 1/2003, which completes Article 23(2) of that regulation, require the Commission to fix fines in each individual case having 'regard … both to the gravity and to the duration of the infringement' (see, by analogy, *Degussa* v *Commission*, paragraph 124 above, paragraph 75).

142 While it is true that the objective yardstick of the upper limit for the fine and the subjective criteria of the gravity and the duration of the infringement leave the Commission a broad discretion, the fact remains that they are criteria which enable the Commission to take account of the degree of illegality of the conduct in question when adopting penalties. It must therefore be held, at this stage, that Article 15(2) of Regulation No 17 and Article 23(2) and (3) of Regulation No 1/2003, while leaving the Commission a certain discretion, lay down the criteria and limits by which the Commission is bound in the exercise of its power with regard to fines (see, by analogy, *Degussa* v *Commission*, paragraph 124 above, paragraph 76).

143 In addition, it should be pointed out that, in setting fines pursuant to Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission is required to comply with the fundamental principles of law, and especially with the principles of equal treatment and proportionality, as developed by the case-law of the Court of Justice and the General Court (see, by analogy, *Degussa* v *Commission*, paragraph 124 above, paragraph 77, and Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 41).

144 It should be added that, under Article 229 EC and Article 31 of Regulation No 1/2003, the Court of Justice and the General Court have unlimited jurisdiction in actions challenging decisions whereby the Commission has fixed fines and may, accordingly, not only annul the decisions taken by the Commission but also cancel, reduce or increase the fine imposed. Thus, the Commission's administrative practice is open to

full review by the Community judicature (see, by analogy, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 143 above, paragraph 41). That review is carried out by the Community judicature in accordance with the criteria referred to in Article 15(2) of Regulation No 17 and Article 23(2) and (3) of Regulation No 1/2003 and has in fact made it possible, through a consistent and published body of case-law, to define any indeterminate concepts in Article 15(2) of Regulation No 17 which have been carried over in Article 23(2) and (3) of Regulation No 1/2003 (see, to that effect and by analogy, *Degussa* v *Commission*, paragraph 124 above, paragraph 79).

145 Moreover, on the basis of the criteria used in Article 15(2) of Regulation No 17, and, more recently, in Article 23(2) and (3) of Regulation No 1/2003, which have been defined in the case-law of the Court of Justice and the General Court, the Commission itself has developed a well-known and accessible administrative practice. Although the Commission's decision-making practice does not in itself serve as a legal framework for fines in competition matters (see Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 87 and the case-law cited), the fact remains that, by virtue of the principle of equal treatment, the Commission must not treat comparable situations differently and must not treat different situations in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

146 Furthermore, it should be borne in mind that, in the interests of transparency and with a view to enhancing legal certainty for the undertakings concerned, the Commission has published Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'), setting out the calculation method which it imposes on itself in each particular case. The considerations set out in paragraph 137 above concerning the Market Definition Notice also apply to the Guidelines. In adopting such rules of conduct and, by publishing them, announcing that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion

and must not depart from those rules, on pain of being penalised itself, where appropriate, for breach of the fundamental principles of law, such as equal treatment or the protection of legitimate expectations. Similarly, even though the Guidelines do not constitute the legal basis for the contested decision, they determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount for the fines imposed by the contested decision and, consequently, ensure legal certainty for the undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 137 above, paragraphs 211 and 213). It follows that the adoption by the Commission of the Guidelines, in so far as it fell within the legal framework laid down in Article 15(2) of Regulation No 17 and, more recently, in Article 23(2) and (3) of Regulation No 1/2003, contributed to clarifying the limits, already implicit under those provisions, of the exercise of the discretion conferred on the Commission thereunder (see, to that effect and by analogy, *Degussa* v *Commission*, paragraph 124 above, paragraph 82).

147 Consequently, in view of the various considerations set out above, a prudent trader is able, if need be by taking legal advice, to foresee in a sufficiently precise manner the method and order of magnitude of the fines which he incurs for a given line of conduct. The fact that that trader cannot know in advance precisely the level of the fines which the Commission will impose in each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis, because, owing to the gravity of the infringements which the Commission is required to penalise, the objectives of punishment and deterrence justify preventing undertakings from being in a position to assess the benefits which they would derive from their participation in an infringement by taking account, in advance, of the amount of the fine which would be imposed on them for that unlawful conduct (*Degussa* v *Commission*, paragraph 124 above, paragraph 83, and *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 143 above, paragraph 45).

148 In that regard, even if undertakings are not able, in advance, to know precisely the level of fines that the Commission will adopt in each individual case, it should be noted that under Article 253 EC the Commission is required, despite the generally known context of the decision, to provide a statement of reasons in a decision imposing a fine, inter alia for the amount of the fine imposed and for the method chosen in that regard. That statement of reasons must show clearly and unequivocally the reasoning

followed by the Commission so as to enable those concerned to know the grounds justifying the measure taken in order that they may assess whether it is appropriate to bring the matter before the Community judicature and, if they do so, to enable the Court to carry out its review (*Degussa* v *Commission*, paragraph 124 above, paragraph 84, and *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 143 above, paragraph 46).

149 Secondly, with regard to the argument based on the existence of a single infringement and on the fact that the consequent upper limit of 10% of turnover was exceeded, it should in the first place be borne in mind that consideration of the plea seeking annulment of the contested decision revealed that the Commission was right to conclude that there had been two separate infringements. As was pointed out in paragraph 94 above, a finding that multiple infringements exist may entail the imposition of a number of separate fines, each time within the limits laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. Accordingly, the Commission was at first sight entitled to impose a fine for each of the infringements and was under no obvious obligation to impose a single, overall fine.

150 In the second place, it must be determined whether, in the case of an undertaking which has committed multiple infringements, the total amount of the fines imposed on it may exceed the 10% upper limit. It should be recalled in that regard that Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 provide that, for each undertaking and association of undertakings participating in the infringement, the fine is not to exceed 10% of its total turnover in the preceding business year. Those provisions do not refer to the sum of various fines imposed on a company. If Amann and Cousin have indeed committed separate infringements, the question whether the infringements were established in a number of decisions or in only one decision is immaterial, the only relevant question being whether the infringements are in fact separate. Thus, as a rule, the characterisation of certain unlawful actions as constituting one and the same infringement or as constituting multiple infringements affects the penalty that may be imposed, since a finding that multiple infringements exist may entail the imposition of a number of distinct fines, each time within the limits laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation

No 1/2003 (see, to that effect and by analogy, *Tokai II*, paragraph 93 above, paragraph 118, and *BASF* v *Commission*, paragraph 91 above, paragraph 158).

151 As a consequence, by imposing two fines the amount of which exceeded the upper limit of 10% of turnover of Amann and Cousin, the Commission did not infringe the principle of *nulla poena sine lege*.

152 It follows from all the above considerations that the plea alleging breach of the principle of *nulla poena sine lege* and the plea of illegality raised in respect of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 must be rejected.

The plea alleging an obligation to impose a single fine for multiple infringements

153 It is also necessary to reject the alternative argument put forward by Amann and Cousin to the effect that, even if there were two separate infringements, a single, overall fine should have been imposed.

154 It is true that, according to the case-law, the Commission may impose a single fine for multiple infringements (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 236; Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 4761; and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 265).

155 However, that is merely a possibility of which the Commission has made use in certain circumstances, in particular where the infringements form part of a coherent overall strategy (see, to that effect, *Cimenteries CBR and Others* v *Commission*, paragraph 154 above, paragraphs 4761 to 4764, and *Tetra Pak* v *Commission*, paragraph 154 above, paragraph 236), or where the infringements constitute a single offence (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 127) or where the infringements ascertained in the Commission decision were concerned with the same type of conduct on different markets, in particular the fixing of prices and of quotas and exchange of information, and the undertakings involved in those infringements were, largely, the same (see, to that effect, Case T-144/89 *Cockerill Sambre* v *Commission* [1995] ECR II-947, paragraph 92). Consideration of the first plea has shown that there are no such circumstances in the present case.

156 Nor can it be inferred from that case-law that the Commission had a previous practice by which it imposed upon itself an obligation to make automatic use of the possibility of imposing a single fine in the case of multiple infringements, or that the Commission was required to state the reasons for which it declined to make use of that option. In fact, the case-law shows rather that the practice of imposing a single fine is exceptional inasmuch as it is employed only in certain circumstances.

157 Nor do the Commission decisions referred to by Amann and Cousin reveal such a practice. In both Commission Decision 2002/758/EC of 10 October 2001 relating to a proceeding under Article 81 [EC] (Case COMP/36.264 – Mercedes-Benz) (OJ 2002 L 257, p. 1; see, in particular, recital 253) and in the Vitamins decision, paragraph 119 above (recitals 711 and 775), fines of different amounts were imposed for the various infringements found to have been committed and those amounts were then added together to establish the total amount of the fine. Thus, the approach followed by the Commission was to impose a number of fines, which were then added together. In any event, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17, in Regulation No 1/2003 and in the Guidelines (see, to that effect and by analogy, Case T-23/99 *LR AF 1998* v *Commission* [2002]

ECR II-1705, paragraph 234, and *Michelin* v *Commission*, paragraph 154 above, paragraph 254).

158 Consequently, it is necessary to reject the argument based on the allegation that it was previous practice on the part of the Commission to impose a single, overall fine in the case of separate infringements and to apply the upper limit of 10% of the total turnover of the undertaking concerned to the final amount of the fine obtained by adding together the various fines imposed for each separate infringement committed by the undertaking in question.

The complaint alleging failure to have regard for the legal objectives of the penalty

159 Amann and Cousin erroneously claim that, in imposing the fine for the cartel on the EEA automotive thread market, the Commission should have taken into account the deterrent effect of the order to pay a fine for the cartel on the industrial thread market in Benelux and the Nordic countries.

160 The objective of deterrence which the Commission is entitled to pursue when setting fines is intended to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the European Community or the EEA (Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraph 181). In the case of multiple infringements, the Commission is fully entitled to take the view that that objective could not be attained merely by imposing a penalty for one of those infringements.

161 This complaint must therefore be rejected.

162 In the light of all the above considerations, the plea alleging failure to respect the upper limit for penalties, as laid down in Article 15(2) of Regulation No 17 and Article 23 of Regulation No 1/2003, must be rejected as unfounded.

2. *The plea, put forward by Amann and Cousin, alleging breach of the principles of equal treatment and proportionality in the imposition of the fine*

(a) Arguments of the parties

163 Amann and Cousin raise a number of complaints in support of their plea alleging that the fine is disproportionate and that it was imposed in breach of the principle of equal treatment.

164 In the first place, with regard to the alleged breach of the principle of proportionality, Amann and Cousin claim first that, when setting the fines, the Commission did not take into account the considerable differences in size between the undertakings concerned, even though the Guidelines require it to do so. The Commission erred in relying exclusively on the undertakings' turnover on the market affected by the infringement. Thus, the fine imposed on Amann and Cousin represented 13.7% of the worldwide turnover of the group, whereas the fine imposed on Coats represented only 2.3% of its worldwide turnover. Compared with major competitors like Coats, Amann considers itself a medium-sized undertaking.

165 Secondly, according to Amann and Cousin, breach of the principle of proportionality follows from the fact that the principle of equal punishment, laid down in the seventh paragraph of Section 1A of the Guidelines, has been infringed. The Commission did

not take account of the economic capacity of the undertakings or their ability to pay, which is measured by reference to their overall turnover.

166 Thirdly, the 'flat-rate system' put in place by the Guidelines is abnormally disadvantageous for small and medium-sized undertakings, a fact confirmed both by the Member of the Commission responsible for competition matters and by the Commission itself.

167 Fourthly, according to Amann and Cousin, the fine imposed on them is wholly disproportionate in the light of the size of the market. The Commission has thus acted contrary to the principle of appropriate punishment and the principle of proportionality. Amann and Cousin state that decisions imposing a fine are intended both to punish and to deter and that, accordingly, the punishments cannot go beyond what is necessary in order to ensure the 'rehabilitation' of the offender. It follows that the lower the turnover concerned by the infringement is in relation to the overall turnover of an undertaking, the further the penalty should be from the 10% limit.

168 In the second place, Amann and Cousin argue, with figures in support, that there has been a breach of the principle of equal treatment – as between Amann and Cousin, on the one hand, and Coats, on the other – both as regards the starting amount for the fine and as regards the final amount. The Commission took no account of the fact that Amann is small in absolute terms and, with regard to industrial thread, in relative terms, and thus erred in law by placing Amann in the same category as Coats. Moreover, the Commission itself assumed from the outset that Coats held a preponderant position, but fails to mention in the contested decision how it took account of that fact.

169 The Commission is required to take account of the size of the other undertakings concerned, since the size and economic strength of the undertakings are assessment factors of equal weight, which must be taken into account, along with other criteria, when setting the fine.

170 The Commission contests that plea.

(b) Findings of the Court

Alleged breach of the principle of proportionality

171 It should be borne in mind that the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued. When it comes to the calculation of fines, the gravity of infringements has to be determined by reference to numerous factors and it is important not to confer on one or other of those factors an importance which is disproportionate in relation to other factors. In this context, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228).

— The argument alleging failure to take account of the size of the market

172 Amann and Cousin erroneously complain that the Commission set fines which are disproportionate in relation to the markets concerned.

173 It should be borne in mine that, under Article 23(2) of Regulation No 1/2003, the Commission may impose fines on undertakings but, for each undertaking participating in the infringement, the fine must not exceed 10% of its turnover in the preceding

business year. Article 23(3) of Regulation No 1/2003 requires that, for the purposes of determining the amount of the fine within that limit, regard be had to the gravity and to the duration of the infringement. Moreover, in accordance with the Guidelines, the Commission is to determine the starting amount on the basis of the gravity of the infringement, taking account of the intrinsic nature of the infringement, its actual impact on the market, if that is measurable, and the extent of the geographic market.

174 Thus, neither Regulation No 1/2003 nor the Guidelines provide that the amount of fines must be determined in direct relation to the size of the affected market, that being only one relevant factor among others. That legal framework does not therefore expressly require the Commission to take account of the limited size of the product market (see, by analogy, Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 148).

175 However, according to the case-law, in assessing the gravity of an infringement the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (*Musique Diffusion française and Others* v *Commission*, paragraph 155 above, paragraph 120). It cannot be ruled out that cases may arise in which one of the factors indicative of the gravity of an infringement is the size of the market for the product in question.

176 Consequently, although market size may constitute a factor to be taken into account in establishing the gravity of the infringement, its importance varies according to the particular circumstances of the infringement concerned.

177 In the present case, the infringement on the automotive thread market consisted primarily in the fixing of target prices for core products sold to European automotive

customers; in the exchange of information on the prices charged to certain customers; in agreements on minimum target prices for those customers; and in agreements to avoid undercutting, to the advantage of the incumbent supplier (contested decision, recitals 215 and 420). The infringement on the industrial thread market consisted essentially in the exchange of sensitive information on price lists and/or prices charged to individual customers; in agreements on price increases and/or on target prices; and in refraining from undercutting the incumbent supplier's prices, with a view to arranging customer allocation (contested decision, recitals 99 to 125 and 345).

178 Such practices constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and, accordingly, are inherently 'very serious'. It should be pointed out in that regard that Amann and Cousin do not contest the very serious nature of the infringement committed over a period of two years on the automotive thread market in the EEA, on the one hand, or the very serious nature of the infringement committed over a period of more than 10 years on the industrial thread market in Benelux and the Nordic countries, on the other. In that context, the limited size of the relevant markets – even if that were to be established – is of lesser importance than all the other factors indicative of the gravity of the infringement.

179 In any event, account should be taken of the fact that the Commission considered that the infringements had to be regarded as very serious within the meaning of the Guidelines, which provide that the Commission may regard as 'likely' a starting amount in excess of EUR 20 million for such cases. However, with regard to the infringement on the automotive thread market, the Commission fixed, on the basis of the gravity of the infringement, a starting amount of EUR 5 million for Amann and Cousin and EUR 1.3 million for the other undertakings (contested decision, recitals 432 to 435). Similarly, with regard to the infringement on the industrial thread market, the Commission fixed a starting amount of EUR 14 million for undertakings in the first category (such as Amann), EUR 5.2 million for those in the second category, EUR 2.2 million for those in the third category and EUR 0.1 million for those in the fourth category (contested decision, recital 358).

180 It follows that the amounts which served as the starting point for the calculation of the fines to be imposed on Amann and Cousin are significantly lower than the amount which, under the Guidelines, the Commission could have regarded as 'likely' for very serious infringements.

181 In the light of those considerations, it is necessary to reject the argument put forward by Amann and Cousin to the effect that the fines imposed on them were disproportionate, in the light of the size of the automotive thread market in the EEA, on the one hand, and the size of the industrial thread market in Benelux and the Nordic countries, on the other.

— The argument that account was taken exclusively of the turnover on the markets relevant to the infringements

182 Amann and Cousin erroneously invoke breach of the principle of proportionality on the alleged ground that, for the purposes of determining the starting amount for the fines, the Commission based its considerations exclusively on the turnover of the undertakings on the relevant market for the products at issue and thus took no account of the difference in size between the undertakings concerned.

183 First, with regard to the complaint that the Commission relied on the turnover of the undertakings concerned on the relevant markets, it should be pointed out that, in order to fix the starting amount for the fines, to be determined according to the gravity of the infringement, the Commission considered it necessary to treat the undertakings involved in the cartels differently, so as to take account of the effective economic capacity of each offender to cause significant damage to competition and so as to fix the fine at a level ensuring sufficient deterrent effect. The Commission

added that account had to be taken of the specific weight of each undertaking and, as a consequence, the actual impact on competition of its offending conduct. The Commission chose to base its assessment of those factors on the turnover achieved by each undertaking on the relevant markets for the products covered by the cartels.

184 Consequently, and as was pointed out in paragraph 179 above, the Commission divided the undertakings concerned into two categories with regard to the infringement on the automotive thread market. In view of their turnover of EUR 8.55 million, Amann and Cousin were placed in the first category. Oxley, Coats and Barbour, in view of their turnover of between EUR 1 million and EUR 3 million, were placed in the second category. With regard to the infringement on the industrial thread market, the Commission divided the undertakings concerned into four categories. In view of their turnover of between EUR 14 million and EUR 18 million, Amann and Coats were placed in the first category. BST, in view of its turnover of between EUR 5 million and EUR 8 million, was placed in the second category. In view of their turnover of between EUR 2 million and EUR 4 million, Gütermann, Barbour and Bieze Stork were placed in the third category and Zwicky, in view of its turnover of between EUR 0 and EUR 1 million, was placed in the fourth category.

185 On the basis of the above considerations, the Commission fixed a starting amount, determined according to the gravity of the infringement, of EUR 5 million for Amann and Cousin for the first infringement (contested decision, recitals 432 to 435) and of EUR 14 million for Amann for the second infringement (contested decision, recitals 356 to 358).

186 It should first be noted that the Guidelines do not state that fines should be calculated according to the overall turnover of the undertakings or their turnover on the relevant market. On the other hand, provided that the choice made by the Commission is not vitiated by a manifest error of assessment, the Guidelines do not preclude

the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances so require (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 ('*Tokai I*'), paragraph 195). Turnover may thus be taken into account when consideration is being given to such assessment factors as the effective economic capacity of offenders to cause significant damage to other operators, in particular to consumers, and the setting of the fine at a level which ensures sufficient deterrent effect. The Commission may also take account of turnover when assessing the specific weight, hence the actual impact on competition, of the offending conduct of each undertaking, particularly where there is considerable disparity in size between undertakings committing infringements of the same type (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 82).

187 As regards the choice open to the Commission to use one and/or the other turnover figure, it is apparent from the case-law that, for the purposes of the analysis – undertaken with a view to setting the fine for an infringement of the competition rules – of the effective economic capacity of the offending companies to cause significant damage to competition, which involves an assessment of the actual importance of those undertakings on the market affected, that is to say, of their influence on the market, their overall turnover gives only an incomplete picture. The possibility cannot be ruled out that a powerful undertaking with many different activities may have only a limited presence on a specific product market. Similarly, the possibility cannot be ruled out that an undertaking occupying an important position on a geographical market outside the Community occupies only a weak position on the Community market or the EEA market. In such circumstances, the mere fact that the undertaking concerned has a high overall turnover does not necessarily mean that it has a decisive influence on the market affected. That is why, even though the turnovers of an undertaking on the markets affected cannot be a decisive factor in concluding that that undertaking belongs to a powerful economic entity, it is nevertheless relevant for the purposes of determining the influence which that undertaking may exert on the market (see, to that effect, Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 65, and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 152).

188 In that sense, it is settled case-law that the proportion of turnover derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the scale of the infringement on the relevant market (*Cheil Jedang* v *Commission*, paragraph 186 above, paragraph 91, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 196). That turnover figure is likely to give a fair indication of the liability of each undertaking on those markets, since it constitutes an objective criterion which gives a proper measure of the harm which the offending conduct represents for normal competition and it is therefore a good indicator of the capacity of each undertaking to cause damage.

189 In the light of those considerations, the Commission did not act in breach of the principle of proportionality by giving priority, when setting the starting amounts for the calculation of the fines to be imposed on Amann and Cousin, to the turnovers achieved on the relevant markets and for the products concerned.

190 Secondly, in the light of those considerations, the complaint that the Commission did not take account, when setting the fines, of the size of the undertakings concerned, as determined by their overall turnover, is also irrelevant.

191 It should be borne in mind that according to the Guidelines it is necessary to take account of the offenders' effective economic capacity to cause significant damage to other operators – in particular, consumers – and to set the fine at a level which ensures that it has sufficient deterrent effect (Section 1A, fourth paragraph). The Guidelines add that in cases involving a number of undertakings, such as cartels, it may be necessary to apply weightings to the general starting amount in order to take account of the specific weight, hence the actual impact on competition, of the unlawful conduct of each undertaking, particularly where there is considerable disparity in terms

of size between undertakings which have committed infringements of the same type. As a consequence, it may be necessary to adjust the general starting amount according to the specific nature of each undertaking (Section 1A, sixth paragraph) (*Cheil Jedang* v *Commission*, paragraph 186 above, paragraph 81).

192 In addition, as was pointed out in paragraph 186 above, the Guidelines do not provide that the fines are to be calculated according to the respective overall turnovers of the undertakings concerned, but nor do they preclude such turnover from being taken into account, in accordance with the conditions set out in the same paragraph of the present judgment, for the purposes of that calculation.

193 In the present case, as was pointed out in paragraphs 183 to 189 above, it was consistent and objectively justifiable on the part of the Commission to choose to refer to the turnover on the relevant market for the purposes of determining the capacity of each undertaking to cause damage. In so proceeding, the Commission was also seeking to ensure deterrence by making it quite clear that it would penalise more severely undertakings which had participated in a cartel affecting a market on which they had significant weight.

194 As a consequence, it is also necessary to reject the argument that the fines are disproportionate to the overall turnovers respectively achieved by Amann and Cousin on the relevant market. Amann and Cousin cannot legitimately claim that the final amount of the fine imposed on them is disproportionate, since the starting point for their fines is justified in the light of the criteria which the Commission used in assessing the importance of each of the undertakings on the relevant market (see, to that effect, *LR AF 1998* v *Commission*, paragraph 157 above, paragraph 304, and Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 185).

— The 'flat-rate system' put in place by the Guidelines

195 The criticisms made by Amann and Cousin of the 'flat-rate system' put in place by the Guidelines are irrelevant.

196 It is settled case-law that, as regards the setting of the amount of the fines to be imposed on the various participants in a cartel, the method of dividing the cartel members into a number of categories – a method which results in a flat-rate starting amount for the fines to be imposed on undertakings belonging to the same category, even though differences in size between undertakings in the same category are ultimately not reflected – cannot be criticised if the principles of proportionality and equal treatment are respected (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385; Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraphs 83 to 85; and Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 150). Provided that those principles are respected, it is not for the Court to rule on the expediency of such a system, even supposing that it placed smaller undertakings at a disadvantage. As part of its review of the lawfulness of the Commission's exercise of its discretion in the matter, the Court must confine itself to checking that the division of the cartel members into categories is consistent and objectively justified, and must not automatically substitute its own assessment for that of the Commission (Case T-15/02 *BASF* v *Commission*, paragraph 157).

— Failure to take account of the fact that Amann and Cousin were 'medium-sized undertakings'

197 The argument that the Commission should have taken account of the fact that Amann and Cousin were medium-sized undertakings is irrelevant.

198 It should be borne in mind that, since the Commission is under no obligation to calculate the fine on the basis of amounts determined by reference to the overall turnover of the undertakings concerned, it is also under no obligation 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 every difference between those undertakings in terms of their overall turnover or their turnover on the relevant product market (Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 202).

199 In that regard, it should be pointed out that, likewise, Article 23(3) of Regulation No 1/2003 does not lay down any requirement that, where fines are imposed on a number of undertakings involved in the same infringement, the fine imposed on an undertaking which is small or medium-sized must be no higher, 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 the undertakings, the fine is higher in relation to its turnover than that imposed on the others (see, by analogy, *Dansk Rørindustri* v *Commission*, paragraph 198 above, paragraph 203, and *Westfalen Gassen Nederland* v *Commission*, paragraph 194 above, paragraph 174).

200 Thus, the Commission is not required to reduce the fines where the undertakings concerned are small or medium-sized undertakings. The size of the undertaking is taken into consideration by virtue of the upper limit laid down in Article 15(2) of Regulation No 17, Article 23(2) of Regulation No 1/2003 and in the Guidelines. Apart from those considerations concerning size, there is no reason to treat small or medium-sized undertakings differently from other undertakings. The fact that the undertakings concerned are small or medium-sized undertakings does not exempt

them from their duty to comply with the competition rules (see, by analogy, *SNCZ* v *Commission*, paragraph 187 above, paragraph 84).

201 For all of those reasons, the argument alleging breach of the principle of equal punishment must also be rejected.

Breach of the principle of equal treatment

202 With regard to the alleged breach of the principle of equal treatment, it should be noted that the division into categories must be effected in accordance with that principle, under which comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified. From that perspective, the sixth paragraph of Section 1A of the Guidelines provides that a considerable disparity in size between the undertakings committing infringements of the same type is a factor which particularly justifies differentiated treatment for the purposes of assessing the gravity of the infringement.

203 The division of the undertakings concerned into categories may breach the principle of equal treatment: either as between the groups, by treating differently undertakings which are in a comparable situation, or within the groups, by treating undertakings which are in a different situation in the same way. In the present case, both situations have been complained of by Amann and Cousin, the first in relation to the cartel on the automotive thread market and the second in relation to the cartel on the industrial thread market in Benelux and the Nordic countries. It is necessary, therefore, to consider whether there was indeed differential treatment and, if so, whether it was objectively justified (see, to that effect, *CMA CGM and Others* v *Commission*, paragraph 196 above, paragraphs 407 and 408).

204 It is common ground that there is a considerable difference in size between Amann and Cousin, on the one hand, and Coats, on the other. Since, in relation to the cartel on the EEA automotive thread market, a different starting amount was applied to them because they had been placed in two different categories and, in relation to the cartel on the industrial thread market in Benelux and the Nordic countries, the same starting amount was applied to them because they had been placed in the same category, it must be considered whether the differential treatment can be justified by the priority given to the respective importance of the undertakings on the relevant market (determined by the turnover on the relevant market for the product concerned) as compared with the size of the undertakings (determined by their overall turnover).

205 In that regard, the Court has previously held that it was consistent and objectively justified to place a number of undertakings in the same category where one of those undertakings had an overall turnover which was clearly, even 'significantly', lower than that of the others, on the basis that their turnovers on the relevant market and their market shares were very similar, and to apply to them the same specific starting amount. It therefore considered that the Commission had not acted in breach of the principle of equal treatment (see, to that effect, *Cheil Jedang* v *Commission*, paragraph 186 above, paragraphs 104 to 115, and *Union Pigments* v *Commission*, paragraph 187 above, paragraphs 155 to 158).

206 The same conclusion must be drawn in the present case. As was noted above, in relation to the automotive thread market, Amann and Cousin were placed in the first category and Coats in the second, on the ground that the turnover achieved by Amann and Cousin on that market was about five times higher than that of Coats. Similarly, in relation to the industrial thread market, Amann and Coats were placed in the same category because their turnover on that market was very similar. It was thus consistent and objectively justified to group the undertakings together on that basis.

207 It follows that the Commission did not act in breach of the principle of equal treatment.

208 In the light of those considerations, the plea alleging breach of the principles of proportionality and equal treatment must be rejected.

3. *The plea, put forward by Amann, alleging incorrect determination of the starting amount for the fine to be imposed for the industrial thread cartel*

(a) Arguments of the parties

209 Amann argues that, by placing it in the same category as Coats, the Commission acted in breach of the Guidelines.

210 First of all, in order to differentiate the undertakings, the Commission relied exclusively on the turnover for the year 2000 in respect of products covered by the cartel on the industrial thread market. The Commission failed, however, to take account of the fact that Coats had acquired the entire shareholding in Barbour in 1999 and that, in consequence, Coats' turnover should have been added to that of Barbour when the differentiation was carried out.

211 Secondly, since the Commission indicated only that those two undertakings fell within certain turnover brackets (EUR 2 million to EUR 4 million for one; EUR 14 million to EUR 18 million for the other), Amann was unable to determine the exact turnover figures. According to Amann, the Commission should have been particularly careful in setting the starting amount for the fines, since the flat-rate system for calculating fines as laid down in the Guidelines does not ultimately take into account differences in the size of undertakings. Amann argues that the method used to place the undertakings in the various categories must be correct, consistent and non-discriminatory. The Commission failed to fulfil its obligations under the principle of equal treatment. In addition, Amann maintains that, since the only information

available to it had been the turnover brackets, it was unable to determine whether the Commission had acted in a correct, consistent and non-discriminatory manner when it set the starting amount for the fine. To that extent, Amann also pleads infringement of Article 253 EC.

212 Lastly, Amann argues that, as compared with other assessment factors, the Commission attributed disproportionate importance to the turnover from the sale of the products which were the subject of the infringement.

213 The Commission contends that this plea is unfounded.

(b) Findings of the Court

214 First, consideration must be given to Amann's argument that the Commission did not act in a correct, consistent and non-discriminatory fashion when it placed the undertakings concerned in the various categories and set the starting amount for the fine.

215 First of all, it is necessary to reject Amann's argument that the Commission did not take into account, for the purposes of differentiating the starting amounts, the turnover achieved by Barbour, whose entire share capital had been acquired by Coats as early as September 1999.

216 In its reply of 11 April 2005 to the Commission's request for information, Coats stated that, since September 1999, Barbour has not been a going concern and has not had

any turnover. Accordingly, the turnover of EUR 14 million to EUR 18 million achieved by Coats in 2000 on the industrial thread market in Benelux and the Nordic countries reflects both Coats' commercial activity and the activities of Barbour which Coats acquired in September 1999, and cannot therefore be called into question.

217 Secondly, it should be borne in mind that the Commission considered it necessary to apply different treatment to the undertakings involved in the cartel in order take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensured that it had sufficient deterrent effect. The Commission added that it was necessary to take account of the specific weight of the offending conduct of each undertaking, hence of its actual impact on competition (contested decision, recitals 354 and 355). For the purposes of assessing those factors, the Commission chose to base its considerations on the turnover of each undertaking on the industrial thread market during the last year of the infringement, namely the year 2000, as can be seen from the table set out in recital 356 of the contested decision.

218 Consequently, as was stated in paragraph 184 above, the Commission divided the undertakings into four categories, placed Amann and Coats in the first category and set a starting amount of EUR 14 million for both undertakings.

219 In that regard, in the course of its review of the lawfulness of the way in which the Commission has exercised its discretion, the Court must confine itself to checking whether that division was consistent and objectively justified (see *BASF* v *Commission*, paragraph 196 above, paragraph 157 and the case-law cited).

220 In that regard, it is necessary to hold that dividing the undertakings into four categories is not an unreasonable way of taking account of their relative importance on

the market in order to set the starting amount, so long as it does not lead to a grossly inaccurate representation of the market concerned. In the present case, the method used by the Commission, consisting in determining the categories on the basis of the turnovers achieved on the relevant markets for the products concerned – respectively, from EUR 14 million to EUR 18 million, from EUR 5 million to EUR 8 million, from EUR 2 million to EUR 4 million, and from EUR 0 to EUR 1 million – cannot, at first sight, be regarded as lacking internal consistency.

221 Amann's criticisms concerning the method of determining the categories and of setting the starting amount for the fine for each category are unjustified a fortiori because, in the case of the category in which Amann was placed, the amount of EUR 14 million chosen as the starting amount for the calculation of the fine was the lowest in that category.

222 In that regard, it is necessary to reject Amann's argument that it should not have been placed in the same category as Coats because – so Amann states – there was a difference of at least EUR 2 million between their respective turnovers on the industrial thread market and that, in cases where the turnover difference was the same, the undertakings had been placed in different categories. It should be pointed out that, in Case C-57/02 P *Acerinox* v *Commission* [2005] ECR I-6689, paragraphs 74 to 80, to which the Commission correctly refers, the Court of Justice accepted the placing in the same category of undertakings where the difference between their market shares was greater than that in the present case.

223 Lastly, in the light of the considerations set out in paragraphs 182 to 194 above, it is necessary to reject Amann's argument that, as compared with other assessment factors, the Commission attributed disproportionate importance to the turnover achieved from the sale of the products covered by the infringement.

224 Consequently, the Commission acted in a correct, consistent and non-discriminatory manner when it placed the undertakings in the various categories and set the starting amount for the fines.

225 Secondly, Amann erroneously pleads breach of the duty to state reasons on the ground that it was informed only of the turnover brackets and was thus unable to determine the method by which the Commission had set the starting amounts for the fines on the basis of those figures.

226 In the first place, it is apparent from the case-law that, when calculating the fine for an infringement of the rules on competition, the essential procedural requirement of stating 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 (*Atlantic Container Line and Others* v *Commission*, paragraph 57 above, paragraph 1521). Those requirements do not oblige the Commission to indicate in its decision the figures relating to the method of calculating the fines; in any event, the Commission cannot, by mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. In the case of a decision imposing fines on a number of undertakings, the scope of the duty to state reasons must be assessed inter alia in the light of the fact that the gravity of the infringement depends on numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of the fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 464 and 465).

227 In the present case, it follows from the above considerations that the conditions laid down in the case-law have been satisfied, since the Commission indicated that it had assessed the gravity of the infringement by applying the criteria laid down in the Guidelines; that it had then categorised the undertakings in accordance with their importance on the market, as determined by their turnover on that market; and that it had set a starting amount which took account of the scale of the relevant geographic market.

228 In the second place, the Commission fulfilled its obligation to state reasons – whilst preserving business secrets – by indicating turnover brackets which were narrow

enough to enable Amann to determine the manner in which the Commission had set the starting amounts.

229 Consequently, the Commission did not act in breach of the obligation to state reasons.

230 The plea alleging incorrect determination of the starting amount for the fine to be imposed for the industrial thread cartel must therefore be rejected as unfounded.

4. *The plea, put forward by Amann, alleging miscalculation of the duration of the infringement on the industrial thread market*

(a) Arguments of the parties

231 According to Amann, the duration of the infringement was miscalculated.

232 First, the duration of the infringement which Amann committed on the industrial thread market in Benelux and the Nordic countries was only 11 years, not 11 years and 9 months. Amann last participated in the infringement by attending the meeting held on 16 January 2001, not the meeting held on 18 September 2001, as is borne out by recital 147 of the contested decision. Thus, the starting amount for the fine should have been increased by only 110% at most, not 115%.

233 In addition, Amann claims that, even if it were necessary to conclude, on the basis of the bilateral contacts alleged by the Commission, that it had been involved in the agreements at issue after 16 January 2001, then that involvement did not go beyond May 2001. Accordingly, the infringement had a maximum duration of 11 years and 4 months.

234 Secondly, relying on a number of decisions of the Commission, Amann claims that the first year of the infringement should not have been taken into account when the starting amount for the fine was increased.

235 Thirdly, the Commission should have used its discretion under the second paragraph of Section 1B of the Guidelines and increased the starting amount for the fine by a percentage well below 10% per year of infringement, since the prices of thread for the textile industry are at first sight unlikely – or not very likely – to produce durable ill effects with regard to consumers, inasmuch as the cost of thread represents only 0.15% of final production costs.

236 The Commission disputes all of those complaints and, accordingly, contends that the plea should be rejected as unfounded.

(b) Findings of the Court

237 Under Article 23(3) of Regulation No 1/2003, the duration of the infringement is one of the factors to be taken into consideration when determining the amount of the fine to be imposed on undertakings which have infringed the competition rules.

238 As regards the duration of the infringement, the Guidelines draw a distinction between short-term infringements (generally less than one year), for which the starting amount set for the gravity should not be increased; medium-term infringements (generally from one to five years), for which that amount can be increased by up to 50%; and long-term infringements (generally above five years), for which that amount may be increased for each year by 10% (Section 1B, first to third paragraphs).

239 It emerges from recital 359 of the contested decision that Amann participated in the infringement on the industrial thread market in Benelux and the Nordic countries from January 1990 until September 2001, a period of 11 years and 9 months. That period corresponds to an infringement of long duration. The starting amount for its fine was consequently increased by 115% on the basis of the duration of the infringement (contested decision, recital 360).

240 In the first place, the fact that Amann did not participate in the multilateral meeting on 18 September 2001 is not sufficient to show that it had ceased to participate in the infringement after 16 January 2001, the date of the last multilateral meeting at which it was present.

241 The only way in which it could have been concluded that Amann had definitively ceased to belong to the cartel would have been if it had publicly distanced itself from the content of the cartel at the meeting on 16 January 2001, which it did not do (see, to that effect, Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 85, and *BPB de Eendracht* v *Commission*, paragraph 145 above, paragraph 203).

242 Furthermore, as was mentioned in recital 99 of the contested decision, the cartel on the industrial thread market in Benelux and the Nordic countries was organised not only on the basis of multilateral meetings, but also on the basis of bilateral meetings. Indeed, Amann maintained regular bilateral contacts after 16 January 2001. It is

apparent from recital 151 of the contested decision that Amann and Coats exchanged e-mails containing information on prices, something which Amann does not deny.

243 The fact that the last e-mails date from May 2001 is not sufficient to support the conclusion that Amann ceased to participate in the infringement with effect from June 2001.

244 It should be noted in that regard that, as was pointed out in paragraph 27 above, the cartel consisted in the exchange of information on prices, rebates and special prices and in agreements on future price lists, rebates and special prices, as well as in agreements to avoid undercutting, to the advantage of the incumbent supplier and with a view to arranging the allocation of customers. The mere fact – even if it were to be established – that, following the e-mails of May 2001, Amann ceased reporting information to the other cartel members does not demonstrate that it ceased to participate in the cartel (see, to that effect, Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 252).

245 It follows that the Commission did not make a miscalculation when it increased the starting amount for the fine imposed on Amann by 5% for its participation in the infringement after the multilateral meeting of 16 January 2001.

246 In the second place, the method of calculation in accordance with which the first year of the infringement is not taken into account when the fine is increased to reflect the duration of the infringement is not established practice on the part of the Commission. That method has not been applied in more recent decisions of the Commission. Moreover, it should be noted that – as the Commission contends – the decisions relied upon by Amann in support of its arguments concern infringements of medium duration (up to five years) and, accordingly, are not illustrative of established decision-making practice on the part of the Commission with regard to infringements of long duration. Furthermore, when it comes to setting the amount of fines, the Commission

has a broad discretion and is not bound by assessments that it has made previously (see, to that effect, *Michelin* v *Commission*, paragraph 154 above, paragraph 292).

247 In addition, it is apparent *a contrario* from *Cheil Jedang* v *Commission*, paragraph 186 above, paragraph 133 – relied upon by Amann – that there is nothing in Section 1B of the Guidelines to the effect that the first year of an infringement should not be taken into account. It is merely stated that, in the case of short-term infringements (generally less than one year), there should be no increase. On the other hand, there will be an increase for infringements which last for more than one year. That increase may, for example, be set as high as 50% where the infringement has lasted between one and five years. The Court has added that, although Section 1B of the Guidelines does not state that there should be an automatic increase of 10% per year in the case of medium-term infringements, it leaves the Commission a measure of discretion. The same may be said of the third indent of the first paragraph of Section 1B of the Guidelines, concerning long-term infringements, which merely states that it is possible to apply an increase of 10% per year (*Cheil Jedang* v *Commission*, paragraph 186 above, paragraphs 133 and 134). In *Cheil Jedang* v *Commission*, the reason which led the Court to conclude that the 10% increase should not be applied is related solely to the particular circumstances of that case, that is to say, to the fact that, in its decision, the Commission had applied – without any justification – a factor of 40% to certain undertakings for an infringement which had gone on for five years, but had applied an increase of 30% with regard to the applicant in that case for an infringement that had gone on for 2 years and 10 months.

248 Thirdly, Amann is wrong in arguing that the Commission did not use its discretion, in that it automatically applied the maximum rate of increase of 10% for each year of infringement and, consequently, did not take account of the fact that the prices of industrial thread are at first sight unlikely – or not very likely – to produce durable ill effects with regard to the consumer.

249 It should be borne in mind that, even though the third indent of the first paragraph of Section 1B of the Guidelines does not state that there should be an automatic increase of 10% per year for infringements of long duration, it leaves the Commission

a measure of discretion in that connection (Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 396, and *BPB* v *Commission*, paragraph 89 above, paragraph 362).

250 In the present case, it is apparent from paragraph 239 above that the Commission complied with the rules which it had laid down for itself in the Guidelines when it increased the amount of the fines to reflect the duration of the infringement. In view of the factors in the present case, it must be held that the Commission made correct use of its discretion by increasing the fine by 10% for each year in which the infringement occurred.

251 It also follows from settled case-law that an increase in the amount of the fine by reference to duration is not limited to situations where there is a direct relation between the duration and acute damage to the Community objectives pursued by the competition rules (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 106, and *Michelin* v *Commission*, paragraph 154 above, paragraph 278).

252 In the present case, it is clear from recitals 347 to 351 of the contested decision that the Commission considered the specific ill effects of the cartel on the relevant market. It concluded that it was difficult to measure them with precision, but that the impact of the collusive agreements was very real.

253 In the light of the case-law and account being taken of the factors in the present case, it must be held that the Commission did not commit a manifest error of assessment by increasing the fine by 10% for each year of the infringement.

254 The plea alleging miscalculation of the duration of the infringement on the industrial thread market must therefore be rejected.

5. *The plea, put forward by Amann, alleging failure to take account of certain mitigating circumstances in relation to the infringement on the industrial thread market*

(a) Arguments of the parties

255 Amann claims the benefit of mitigating circumstances under the seventh indent of Section 3 of the Guidelines because of its unilateral decision, taken on its own initiative and before the Commission's first interventions, to withdraw from the infringement. Amann maintains that, after the meeting held on 16 January 2001, it did not participate in any more meetings and that it terminated all bilateral contacts with effect from March 2001. It states in that regard that, since it is not relying on the third indent of Section 3 of the Guidelines, the case-law to the effect that it must have been the Commission's intervention that had encouraged the undertakings involved to cease their anti-competitive conduct does nothing to preclude recognition of a mitigating circumstance. Amann argues that, in so acting, it risked being penalised by its competitors, particularly by Coats. Far from being hypothetical, that risk of reprisal is clear from the e-mails exchanged with Coats' representative, as was confirmed by BST at the hearing on 19 and 20 July 2004. The Commission failed to consider those statements, moreover, in breach of its obligation to establish the facts.

256 Furthermore, by arguing that the termination of the infringement had already been taken into account in the assessment of its duration, the Commission failed to have regard to the fact that the objective duration of an infringement must be distinguished from the subjective aspect of the termination of the infringement. The possibility of conduct being taken into account as a mitigating circumstance should not be ruled out if the implications for the undertaking of that conduct are positive in terms of the duration of the infringement.

257 The Commission disputes those arguments.

(b) Findings of the Court

258 It should first be borne in mind that provision is made in Section 3 of the Guidelines for a reduction in the basic amount for 'particular mitigating circumstances', such as an exclusively passive or 'follow-my-leader' role in the infringement, non-implementation in practice of the collusive agreements or practices, termination of the infringement as soon as the Commission intervenes or other circumstances which are not referred to explicitly.

259 It should also be noted that the Guidelines do not list in peremptory terms the mitigating circumstances that the Commission is required to take into account. Consequently, the Commission retains a measure of discretion in making an overall assessment of the size of any reduction in the fines to reflect mitigating circumstances (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 326). Thus, the Commission is under no obligation, in the exercise of its discretion, to reduce a fine because of the termination of a manifest infringement, whether that termination occurred before or after its intervention (*Tokai II*, paragraph 93 above, paragraph 292).

260 It is also important to emphasise that, according to settled case-law, termination of infringements of the competition rules as soon as the Commission intervenes, as referred to in the third indent of Section 3 of the Guidelines, can logically constitute a mitigating circumstance only if there are reasons for supposing that it was the Commission's intervention that prompted the undertakings concerned to cease their anti-competitive activities. It appears that the purpose of that provision is to encourage undertakings to terminate their anti-competitive conduct as soon as the Commission launches an investigation in that regard. The fine cannot be reduced on that basis where a firm decision to terminate the infringement has already been taken by those undertakings before the date on which the Commission first intervenes or where the infringement has already come to an end before that date. The latter situation is sufficiently taken into account by the calculation of the duration of the infringement period established (see, to that effect, C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 158; Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004]

ECR II-2223, paragraphs 280 and 281; and *BASF* v *Commission*, paragraph 91 above, paragraph 128).

261 Moreover, it should be noted that Amann based its right to the benefit of mitigating circumstances on the fact that it had unilaterally decided, immediately after the meeting on 16 January 2001, not to attend any other meetings and to terminate all bilateral contacts. However, as was noted in paragraph 240 et seq. above, Amann continued to attend bilateral meetings after that multilateral meeting.

262 For the same reasons, it is also necessary to reject Amann's argument that Coats played the role of ringleader in the cartel and threatened Amann following its decision not to participate any longer in the infringement. In that regard, Amann's argument alleging breach by the Commission of its obligation to establish the facts is *ab initio* ineffective. As is clear from paragraph 261 above, Amann's premiss – that it terminated its participation in the infringement after the meeting on 16 January 2001 – is false. Accordingly, Amann cannot reasonably argue that the termination of the infringement after that meeting exposed it to reprisals on the part of Coats and, consequently, it cannot rely on any breach of the obligation to establish the facts in that regard.

263 Lastly, even supposing that Amann had ceased earlier to participate in the infringement, it follows from the case-law cited above that the Commission retains a measure of discretion in making an overall assessment of the size of any reduction in the fines to reflect mitigating circumstances and cannot be under any obligation to grant such a reduction in the fine for the termination of a manifest infringement before its intervention.

264 This plea must therefore be rejected.

6. *The plea, put forward by Amann and Cousin, alleging miscalculation of the starting amount and the basic amount of the fine imposed for the infringement on the automotive thread market*

(a) Arguments of the parties

265 First of all, Amann and Cousin criticise as arbitrary the setting of the starting amount for the fine imposed for the infringement on the automotive thread market. The contested decision does not make it possible, they argue, to determine the manner in which the Commission calculated that amount or on what basis it defined the categories. The starting amounts (EUR 5 million for Amann and Cousin and EUR 1.3 million for the other undertakings involved) do not accurately reflect the various turnovers achieved with the product covered by the cartel.

266 Next, according to Amann and Cousin, the Commission did not explain why, unlike Coats and Barbour, Amann and Cousin constitute a unit. In that regard, the Commission's allegations that Amann exercised a strong influence on Cousin before it acquired a majority holding in Cousin is unconvincing. Amann and Cousin argue that the situation of Coats and Barbour should have been assessed in the same way as theirs. The information provided by Oxley in the reply to the statement of objections also shows that the Commission underestimated the importance of 'Coats/Barbour'. Amann and Cousin argue that it cannot be excluded that, if the Commission had categorised those undertakings correctly, it would have arrived at a different starting amount. In the light of those observations, the statement of reasons for the contested decision is inadequate.

267 According to Amann and Cousin, the Commission's reply confirms its error of logic, because Barbour's participation was not taken into account until its acquisition by Coats in September 1999 and, after that acquisition, the Commission took account only of Coats' turnover, whereas it should also have attributed to Coats the

turnover achieved by Barbour for 1999. That turnover amounted to approximately EUR 6 million. Consequently, Amann and Cousin criticise the fact that the starting amount applied to them is EUR 5 million (since their combined turnover amounted to EUR 8.55 million), whereas the starting amount applied to Coats was only EUR 1.3 million (since its turnover amounted to approximately EUR 6 million). They also criticise the fact that the categorisation made by the Commission caused their combined turnover to be taken into account for the entire period whereas Barbour's turnover was no longer taken into account, for the purposes of setting the starting amount for the fine, after it was acquired by Coats.

268 Secondly, the calculation of the basic amount by reference to the duration of the infringement – from May/June 1998 to 15 May 2000, that is to say, 1 year and 11 months – is erroneous, as is the consequential increase in the starting amount of the fine by 15%.

269 According to Amann and Cousin, there is no evidence that a meeting took place in May/June 1998 or that they attended any such meeting. They argue that the only evidence on which the Commission relies is Coats' reply to the request for information. However, that reply is based only on a note drawn up by a former employee. The claim that that meeting took place is therefore based on 'hearsay' and the authenticity of the note raises doubts which the Commission should have dispelled by carrying out checks. According to Amann and Cousin, the first meeting did not take place until June 1999. Oxley was unable to provide any information about that meeting and Coats was unable to provide any precise information concerning its participation. Given the uncertainties which exist with regard to the meeting in question, Amann and Cousin also criticise the Commission for not attempting to identify the place where the meeting was held. Accordingly, they maintain that the starting amount for the fine should be calculated only from 15 April 1999.

270 The Commission disputes that plea.

(b) Findings of the Court

271 The first matter to consider is the argument that the starting amount for the fine was set in an arbitrary manner.

272 It should be recalled in that regard that the Guidelines provide for the assessment, first, of the gravity of the infringement as such, on the basis of which a 'general starting amount' can then be set. The gravity of the infringement is therefore determined on the basis of objective factors such as the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Secondly, the gravity of the infringement is assessed on the basis of various subjective factors. Account is thus taken of the characteristics of the undertaking concerned – in particular, its size and its position on the relevant market – which can lead to the starting amount being weighted, to the undertakings being grouped into categories and to a 'specific starting amount' being set. Thirdly, the duration of the infringement is taken into account for the purposes of setting the basic amount, as are, fourthly, aggravating and mitigating circumstances which make it possible, in particular, to assess the relative gravity of the participation of each of the undertakings concerned.

273 With regard, specifically, to the subjective factors taken into account in setting the starting amount, the Guidelines state that it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has sufficiently deterrent effect (Section 1A, fourth paragraph).

274 It is also stated in the Guidelines that, in cases involving a number of undertakings, such as cartels, it may be necessary to apply weightings to the general starting amount in order to take account of the specific weight, hence the real impact on competition

of the offending conduct of each undertaking, particularly where there is considerable disparity in size between undertakings which have committed infringements of the same type. Consequently, it may be necessary to adapt the general starting amount according to the specific nature of each undertaking (Section 1A, sixth paragraph) (*Cheil Jedang* v *Commission*, paragraph 186 above, paragraph 81).

275 It should be noted that the Guidelines do not state that fines should be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant market. Nor, however, do they preclude the Commission from taking either figure into account in determining the amount of the fine, in order to ensure compliance with the fundamental principles of Community law and where circumstances so require. Thus, turnover may be relevant for the purposes of taking into consideration the various factors referred to in paragraphs 272 and 273 above (*Cheil Jedang* v *Commission*, paragraph 186 above, paragraph 82, and *Tokai I*, paragraph 186 above, paragraph 195).

276 In the present case, it is apparent from recital 418 et seq. of the contested decision that the Commission complied with the Guidelines. It took account of the nature of the infringement, its actual impact on the market and the size of the relevant geographic market. On the basis of those factors, it categorised the infringement as very serious, while stating in recital 428 of the contested decision that, in setting the amount of the fine, it would take account of the small size of the relevant market.

277 Next, in the context of the cartel on the industrial thread market in Benelux and the Nordic countries, the Commission considered it necessary to apply different treatment to that applied to the undertakings involved in the cartel on the automotive thread market, so as to take account of the effective economic capacity of the offenders to cause significant damage to competition, and to set the fine at a level which would ensure that it had sufficiently deterrent effect. The Commission added that it was necessary to take account of the specific weight of each undertaking, hence of the real impact of its offending conduct on competition. For the purposes of assessing those

factors, the Commission chose to base its considerations on turnover on the relevant market for the product covered by the cartel (contested decision, recitals 430 to 432).

278 Accordingly, the Commission divided the undertakings into two categories. In view of their combined turnover of EUR 8.55 million, Amann and Cousin were placed in the first category. Coats, Oxley and Barbour were placed in the second category in view of their turnover estimated at between EUR 1 million and EUR 3 million. The Commission adopted a starting amount, determined in accordance with the gravity of the infringement, of EUR 5 million for Amann and Cousin and EUR 1.3 million for Coats, Oxley and Barbour (contested decision, recitals 432 to 435).

279 As was pointed out in paragraphs 216 to 220 above, in the course of its review of the lawfulness of the way in which the Commission has exercised its discretion, the Court must confine itself to checking whether that division was consistent and objectively justified (see *BASF* v *Commission*, paragraph 196 above, paragraph 157 and the case-law cited).

280 In that regard, it must be held that dividing the undertakings into two categories is not an unreasonable way of taking account of their relative importance on the market in order to set the starting amount, so long as it does not lead to a grossly inaccurate representation of the market concerned. In the present case, the method used by the Commission, consisting in determining the categories on the basis of the turnovers achieved on the relevant markets for the products concerned, cannot, at first sight, be regarded as lacking internal consistency.

281 With regard to the actual setting of the starting amount, it must be held that the choice of the figure of EUR 5 million for the undertakings placed in the first category cannot be described as arbitrary and does not go beyond the limits of the broad discretion which the Commission enjoys for those purposes. As was noted in paragraphs 277

and 278 above, that figure was determined by taking account of categories which had themselves been validly established. Moreover, the figure of EUR 5 million chosen as the starting amount is lower than the combined turnover of Amann and Cousin, which was used as a reference for the first category.

282 In the light of those observations, Amann and Cousin are wrong in claiming that the Commission proceeded in an arbitrary manner when it defined the two categories and calculated the starting amount for the fine.

283 The complaint that the Commission did not consider that Coats and Barbour constituted a unit and, consequently, did not add their turnovers together is irrelevant. It is apparent from the contested decision (recitals 40 and 67) that Coats did not acquire Barbour until September 1999. Thus, Barbour constituted a legally separate undertaking and, on that basis, could be held individually liable for the infringement committed between May/June 1998 and September 1999. With regard to Coats, it is apparent from the contested decision that it participated in the infringement from 8 June 1999 to 15 May 2000 and that it could therefore be held individually liable for its unlawful conduct.

284 Thus, contrary to the assertions made by Amann and Cousin, it was not appropriate to add together the turnovers of Coats and Barbour or to place them in the first category.

285 However, it should be pointed out that the Commission took account only of Coats' turnover for the year 1999. It would be justifiable to add to that figure the portion of Barbour's turnover which corresponds to the months of October to December 1999, that is to say, 3/12 of Barbour's annual turnover. Coats' turnover would thus have been increased by an amount between EUR 250 000 and EUR 750 000. However, that calculation error does nothing to call into question the placing of Amann and Cousin

in the first category or the starting amount applied to them. Amann and Cousin do not challenge the Commission's finding in recitals 323 and 433 of the contested decision that they had to be regarded as a unit; nor do they claim that the Commission acted incorrectly in adding together their respective turnovers, for that reason.

286 Lastly, it is necessary to reject the argument alleging that Article 253 EC was infringed in so far as, first, the Commission did not explain why it considered that, unlike Coats and Barbour, Amann and Cousin constituted a unit and, secondly, the determination and calculation of the starting amount are incomprehensible.

287 On the one hand, the Commission clearly stated, in recitals 323 and 433 of the contested decision, the reasons why Amann and Cousin had to be regarded as a unit. On the other hand, as was stated in paragraph 226 above, the duty to state reasons does not oblige the Commission to indicate in its decision the figures relating to the method of calculating the fines, it being emphasised that, in any event, the Commission cannot, by mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment.

288 In the present case, as is apparent from paragraphs 276 to 278 above, the Commission fully fulfilled its duty to state reasons by setting out, in recital 418 et seq. of the contested decision, the assessment factors which enabled it to measure the gravity of the infringement.

289 Secondly, with regard to the argument alleging miscalculation of the basic amount of the fine because of an erroneous determination of the duration of the infringement, it is clear from the file that the first meeting concerning the automotive thread market was held, not in June 1999, as Amann and Cousin claim, but in May/June 1998.

290 In its reply to the statement of objections, Amann expressly refers to that meeting and states that it enabled the participants to make initial contact with each other, to exchange information concerning certain prices and to indicate their intention of fixing prices for a period no longer than six months.

291 It must therefore be held that that argument has no basis in fact.

292 In addition, the complaint that the Commission was unable to determine with precision whether the meeting took place in May or in June is irrelevant, since the calculation of the duration of the infringement was made from June, which is the most favourable starting point for Amann and Cousin.

293 In the light of those considerations, the plea alleging miscalculation of the starting amount and the basic amount of the fine must be rejected.

7. *The plea, put forward by Amann and Cousin, alleging failure to take account of the fact that the automotive thread cartel was not implemented*

(a) Arguments of the parties

294 Amann and Cousin claim that the Commission's findings concerning the impact of the infringement on the market are erroneous. The contested decision did not establish

the actual implementation of the agreements entered into in the framework of the cartel on the automotive thread market. The documents on which the Commission based its assertions that the cartel had actually been implemented were referred to only as evidence that meetings had taken place between the participants. The Commission itself admits, in recital 427 of the contested decision, that it had difficulty in establishing the implementation of the cartel.

295 In particular, according to Amann and Cousin, the Commission is wrong to state that Cousin imposed price increases on its customer, Johnson Controls. Amann and Cousin have stated that that increase was part of their individual pricing policy and had no connection with the agreements. Amann and Cousin were not heard on that point, which was raised for the first time in the contested decision, and they therefore maintain that it cannot be used as evidence that the cartel was implemented.

296 Amann and Cousin refer to the Commission's obligation to take account, when assessing the gravity of the infringement, of all the factors which could be decisive with regard to the actual impact of the infringement on the market. The Commission has accepted the existence of a mitigating circumstance, justifying a reduction in the penalty, even in cases in which the agreements had only been partially implemented. Given that, in the present case, the lack of implementation is greater, Amann and Cousin argue that the Commission should have taken it into account, in accordance with its decision-making practice, and should accordingly have granted them the benefit of a mitigating circumstance, pursuant to the second indent of Section 3 of the Guidelines, or taken account of it when determining the gravity of the infringement.

297 The Commission disputes that plea.

(b) Findings of the Court

298 It should be noted at the outset that recital 233 of the contested decision shows that, at the meeting on 9 July 1999, Cousin stated that it would try to increase the prices applied to its customer, Johnson Controls. It is also apparent from Barbour's observations that a representative of Cousin telephoned a representative of Barbour to confirm that the increase had been made. Lastly, it should be noted that Cousin confirms that it increased its prices, but maintains that that increase was not in any way the result of an agreement.

299 First, Amann and Cousin are wrong in claiming that the matter of the increase in prices applied to Johnson Controls was never raised in the statement of objections and that, in consequence, they never had an opportunity to reply to it. Such an argument has no basis in fact, since the Commission expressly referred to the increase in paragraphs 192 and 201 of the statement of objections.

300 Secondly, the Commission was correct in concluding, on the basis of the increase in the prices charged to Johnson Controls, that the agreement had been implemented. The statements made by Cousin at the meeting on 9 July 1999 regarding its intention of increasing the prices charged to Johnson Controls, the telephone conversation between Cousin and Barbour announcing that that intention had been put into effect and the confirmation of the increase by Cousins in the course of the administrative procedure constitute a sufficient body of evidence in that regard. It was therefore for Amann and Cousin to show that the increase in prices did not constitute the implementation of an agreement, something they failed to do by referring merely to their 'individual pricing policy'.

301 Thirdly, with regard to the effects of the infringement, the Commission expressed the view, in recital 427 of the contested decision, that the collusive agreements had been implemented and that they had had an impact on the market concerned and for the

product concerned, 'even if it is difficult to measure that effect in a precise manner'. It should be recalled that, in competition matters, the burden of proving the existence of the effects of the infringement on a market – a burden which is borne by the Commission when it takes such effects into account for the purposes of calculating the fine by reference to the gravity of the infringement – is lighter than the burden of proof incumbent upon the Commission when it must show the existence as such of an infringement in the case of a cartel. For the purposes of taking account of the actual impact of the cartel on the market, it is sufficient for the Commission to provide 'good reasons for taking them into account' (*Jungbunzlauer* v *Commission*, paragraph 171 above, paragraph 161). The increase in prices charged to Johnson Controls thus constitutes, in itself, a very good reason for taking into account the actual impact of the infringement on the market.

302 Fourthly, it follows from the above considerations that Amann and Cousin cannot claim the benefit of a mitigating circumstance in the form of the lack of actual implementation of the agreements.

303 The plea must therefore be rejected.

8. *The plea alleging breach of the right to be heard and the rights of the defence*

(a) Arguments of the parties

304 Two complaints are put forward in support of this plea. The first complaint alleges breach of the right to be heard and the second alleges breach of the rights of the defence.

305 First of all, Amann maintains that its right to be heard, laid down in Article 27(1) of Regulation No 1/2003, has been infringed. The Commission largely based its decision concerning certain reductions on documents referred to in recital 116 of the contested decision. However, neither those documents nor the inferences that the Commission draws from them were brought to Amann's attention in that context in the statement of objections. The documents concerned cannot therefore be used as evidence of an infringement of Article 81 EC and Article 53 of the EEA Agreement. Amann states that the mere presence of those documents in the Commission's file and the possibility of consulting them in the context of access to the file cannot be sufficient to ensure respect for the right to be heard.

306 The Commission also acted in breach of Amann's right to be heard by basing its considerations on complaints on which Amann had had no opportunity to comment. The contested decision refers to a discussion which took place on 19 September 2000 concerning the reduction of rebates in Sweden, as a basis for the complaint that information had been exchanged on rebates and that there was an agreement to reduce them. However, there is nothing in the statement of objections on the subject of agreements of that type concerning Sweden; rather, it refers to agreements concerning Finland. Amann notes that the Commission itself admitted, in recital 116 of the contested decision, that it had inadvertently referred to Finland instead of Sweden in the statement of objections. Amann therefore maintains that it was not heard on that point. The Commission incorrectly states that Amann would have been able to deduce from the document referred to in the statement of objections that the complaint concerned Sweden. The document in question, an e-mail of 10 October 2000, was mentioned in a context other than that of agreements on rebates. Moreover, the contents of the document in no way supported the conclusion that there had been a specific agreement concerning rebates. Amann argues that, according to case-law, it is not the documents as such which are important but the inferences which the Commission has drawn from them. That case-law applies to the present case because, even though the contested decision referred to the e-mail mentioned above, it did so in another context.

307 In addition, the Commission contradicts itself by arguing that it really meant to refer to Sweden rather than Finland, while arguing elsewhere that there were agreements in both countries.

308 Secondly, according to Amann and Cousin, the Commission acted in breach of their rights of defence by requiring them to answer questions concerning contacts with their competitors, set out in the requests for information of 6 and 24 March 2003, without explaining that they were being questioned as the 'accused'. Amann and Cousin argue that, according to case-law, they cannot be required to provide details of the subjects discussed and the decisions taken in the context of contacts with their competitors; nor, a fortiori, beyond a mere statement of the facts and production of existing documents, can undertakings be asked for information concerning the purpose, the conduct and the results of contacts with competitors when the Commission manifestly suspects that the purpose of those meetings was to restrict competition. Amann and Cousin maintain, on the basis of point 4.1 of the requests for information referred to above, that that was what nevertheless occurred in the present case.

309 Given that Amann and Cousin provided a detailed reply to all the Commission's questions, notwithstanding a right of refusal, they claim that a reduction higher than 15% should be applied to their fines, pursuant to Section D2 of the Leniency Notice. They maintain that they went much further than the Commission was entitled to require.

310 Amann and Cousin also consider that the 15% reduction is insufficient when compared with the 50% reduction granted to Coats. According to Amann and Cousin, the Commission should have taken into account the fact that, during its investigation, it had already found essential documents which enabled it to discover without difficulty the existence of an infringement in the areas concerned. In addition, Coats had an advantage over its competitors since it was already aware that a procedure was about to be initiated, with the result that an application for leniency was an obvious necessity. Furthermore, Coats played the role of ringleader, as several of the undertakings involved have confirmed. In the light of those factors, Amann and Cousin maintain that they should have been granted the same treatment as Coats.

311 The Commission disputes that plea.

(b) Findings of the Court

The alleged breach of the right to be heard

312 According to settled case-law, the statement of objections must be couched in terms which, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission and to defend themselves properly before the Commission adopts a final decision. That requirement is satisfied if the decision does not allege that those concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which they have had the opportunity of making known their views (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63; *CMA CGM and Others* v *Commission*, paragraph 196 above, paragraph 109; and *Tokai II*, paragraph 93 above, paragraph 138).

313 Thus, the rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the final decision was not set out in the statement of objections in a manner sufficient to enable the addressees to defend their interests (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 100).

314 It is also apparent from the case-law that it is not the documents as such which are important but the inferences which the Commission has drawn from them and that if those documents were not mentioned in the statement of objections the undertaking concerned was entitled to consider that they were of no importance for the purposes of the case. By not informing an undertaking that certain documents would be used in the decision, the Commission prevents it from putting forward at the appropriate time its view of the probative value of such documents. It follows that they cannot be regarded as admissible evidence so far as that undertaking is concerned (see, to that effect, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 27;

Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 21; and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 55).

315 However, a document used by the Commission in support of an objection in the final decision, where the same document was used in the statement of objections in order to prove another objection, may be used in the decision as against the undertaking concerned only if the latter could reasonably deduce from the statement of objections and the contents of the document the conclusions which the Commission intended to draw (see, to that effect, *Shell* v *Commission*, paragraph 314 above, paragraph 62).

316 Amann's complaint must be considered in the light of the above case-law.

317 It should be borne in mind that, in recital 116 of the contested decision, the Commission admitted that, in paragraphs 104 and 126 of the statement of objections, it had inadvertently stated that a reduction in rebates in Finland had been agreed at the meeting on 19 September 2000 in Budapest (Hungary). In recital 116, the Commission rectified that error by pointing out that the country concerned by the reduction in rebates was in reality Sweden.

318 It should first be noted that the section preceding paragraphs 125 and 126 of the statement of objections, entitled 'Meeting at the Mercure Hotel in Budapest on 19 September 2000', refers to footnote 244, which refers to the e-mail of 10 October 2000 containing the matters discussed at that meeting, including the reduction of rebates in Sweden.

319 It must also be pointed out that Amann was aware of that document, as attested by its reply to the statement of objections. That reply mentions that the statement of

objections contains an e-mail of 10 October 2000 from J. L. (Coats) to F. S. (Coats) containing a very detailed report of what occurred at the meeting in Budapest.

320 It is very clear from that e-mail that the only country concerned by the reduction in rebates was Sweden and that no other factor concerning Finland could have led to the mistaken impression concerning the existence of an agreement on such a reduction in Finland.

321 Furthermore, and contrary to the assertions made by Amann, that e-mail was not produced in a different context, since it sets out the agreements entered into at the meeting on 19 September 2000, in which Amann does not deny taking part.

322 Thus, in accordance with the case-law cited above, it must be held that Amann could reasonably have deduced, from the statement of objections and the content of the document, the conclusions which the Commission intended to draw and, consequently, was able to rectify the error concerning the only country concerned by the reduction in rebates.

323 In that regard, it is necessary to consider irrelevant Amann's argument that the sentence in the e-mail which reads 'Sweden: … special prices should be increased by 3.5% on 1 April 2001 or rebates reduced' did not enable it to realise that the Commission wished to rely on that sentence in order to establish the existence of an agreement on the reduction of rebates in Sweden. It follows from the above considerations that Amann should have expected the Commission to rely on that factor.

324 It must therefore be held that Amann's right to be heard was not infringed.

The alleged breach of the rights of the defence and, in particular, of the privilege against self-incrimination

325 It is apparent from the case-law concerning the extent of the Commission's powers in preliminary investigation procedures and administrative procedures that the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it. However, it 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; *Aalborg Portland and Others* v *Commission*, paragraph 90 above, paragraphs 61 and 65; and *Dalmine* v *Commission*, paragraph 260 above, paragraph 34).

326 Thus, an undertaking in receipt of a request for information pursuant to Article 11(5) of Regulation No 17 cannot be recognised as having an absolute right of silence. To acknowledge the existence of such a right would go beyond what is necessary in order to preserve the rights of defence of undertakings and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the common market are observed. A right of silence can be acknowledged only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*Tokai I*, paragraph 186 above, paragraph 402).

327 In order to ensure the effectiveness of Article 11 of Regulation No 17, the Commission is therefore entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct. This power of the Commission to obtain information does not fall foul of either Article 6(1) and (2) of the ECHR or the case-law of the European Court of Human Rights (*Tokai I*, paragraph 186 above, paragraphs 403 and 404).

328 In any event, the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its request for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of the defence or impair the right to fair legal process, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the ECHR. There is nothing to prevent the addressee of a request for information from showing, whether later during the administrative procedure or in proceedings before the Community judicature, when exercising its rights of defence, that the facts set out in its replies or the documents produced by it have a different meaning from that ascribed to them by the Commission (*Tokai I*, paragraph 186 above, paragraph 406).

329 Lastly, where, in a request for information under Article 11 of Regulation No 17, the Commission, in addition to putting purely factual questions and requesting production of pre-existing documents, asks an undertaking to describe the object and course of a number of meetings in which it participated and also the results of or the conclusions reached in those meetings, when it is clear that the Commission suspects that the object of those meetings was to restrict competition, a request of that nature is of such a kind as to require the undertaking concerned to admit its participation in an infringement of the Community competition rules, so that the undertaking is not required to answer questions of that type. In such a situation, the fact that an undertaking none the less supplies information on those points must be regarded as spontaneous cooperation on the undertaking's part capable of justifying a reduction in the amount of the fine, in application of the Leniency Notice (Case T-48/02 *Brouwerij Haacht* v *Commission* [2005] ECR II-5259, paragraph 107). It is also apparent from the case-law that, in the same situation, undertakings cannot claim that their right not to incriminate themselves has been infringed where they voluntarily replied to such a request (*Dalmine* v *Commission*, paragraph 259 above, paragraph 46).

330 It must be determined, in the light of that case-law, whether the Commission acted in breach of the right of Amann and Cousin not to incriminate themselves.

331 First of all, it should be pointed out that the Commission sought information by making requests for such information (letters of 6 and 24 March 2003) and not by adopting decisions.

332 With regard to the actual information requested, it is apparent from point 4 of the above requests that the Commission was seeking, in particular, information concerning meetings with competitors: the date; the location; the list of participants; the object; the way in which those meetings were conducted; and information concerning bilateral contacts. Amann and Cousin were under no obligation to answer the questions in the event that their answers would lead them to admit that they had participated in the alleged infringement. However, they replied voluntarily to those requests and cannot therefore claim that their right not to incriminate themselves has thereby been infringed.

333 Secondly, with regard to the complaint put forward by Amann and Cousin that the Commission did not inform them of the suspicions concerning them, it should be noted, as a preliminary point, that there must exist a connection between the information requested by the Commission pursuant to Article 11 of Regulation No 17 and the infringement under investigation, to which reference is made in the request. Article 11(1) of Regulation No 17 empowers the Commission to obtain, particularly from undertakings, 'all necessary information' for the purposes of the application by that institution of the principles set out in Articles 81 EC and 82 EC. Moreover, Article 11(3) of Regulation No 17 provides that the Commission must, in particular, state in its request 'the legal basis and the purpose of the request'. It follows, therefore, from Article 11(1) of Regulation No 17, read in conjunction with Article 11(3) thereof, and from the requirements relating to regard for the rights of defence of the undertakings concerned, that the criterion of necessity laid down in Article 11 of Regulation No 17 must be assessed by reference to the purpose of the investigation, which must be stated in the request for information itself. As the Court of Justice held with regard to a provision comparable with Article 11 of Regulation No 17, in paragraph 29 of its judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, relating to the Commission's powers of investigation under Article 14 of Regulation No 17, the obligation on the Commission to specify the subject-matter and purpose of the investigation is a fundamental requirement, not merely in order to show that

the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate, while at the same time safeguarding the rights of the defence. It follows that the Commission is entitled to require the disclosure only of information which may enable it to investigate putative infringements which justify the conduct of the investigation and are set out in the request for information (Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497, paragraph 25, and Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraphs 40, 62 and 63).

334 It follows from that case-law that, in its request for information, the Commission is not required to attribute the putative infringements expressly to the undertakings concerned and, accordingly, it is not required at that stage to inform the undertaking that it is considered to be implicated. Provided that the Commission indicates clearly the legal basis and the purpose of its request, it must be held that the rights of defence of the undertaking concerned have been protected.

335 In the present case, the Commission entirely fulfilled its obligations by indicating clearly in the requests for information mentioned above, the subject-matter and purpose of the request.

336 Thirdly, the complaint put forward by Amann and Cousin that the Commission did not advise them of the information already in its possession is also irrelevant. In the context of an administrative procedure in a competition matter, it is the notification of the statement of objections, on the one hand, and the access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure the rights of the defence and the right of the undertaking concerned to a fair legal process. It is by the statement of objections that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage of the procedure. Consequently, it is only after notification of the statement of objections that the undertaking is able to rely in full on the rights of the defence. If the abovementioned rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's

investigation would be undermined, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission, hence the information that could still be concealed from it (*Dalmine* v *Commission*, paragraph 260 above, paragraphs 58 to 60).

337 Fourthly, Amann and Cousin are wrong in claiming the benefit of an additional reduction in the fine for having cooperated by providing, in their reply to the request for information, information which purportedly went 'much further' than the information which could be required under Article 11 of Regulation No 17.

338 By reason of the cooperation of Amann and Cousin in the investigation into the two cartels, the fines imposed on them were reduced in both cases by 15%, pursuant to the first and second indents of Section D2 of the Leniency Notice. The Commission found that Amann and Cousin had provided information and documents which had materially contributed to establishing the existence of the infringement and, in particular, that they admitted having participated in meetings with their competitors for the purpose of exchanging, discussing and even maintaining prices. Furthermore, they did not substantially contest the truth of the facts on which the Commission based its allegations (contested decision, recitals 390 to 397 and 460 to 463).

339 On the one hand, it should be borne in mind that a reduction in the fine on grounds of cooperation during the administrative proceeding is justified only if the conduct of the undertaking in question made it easier for the Commission to establish an infringement and, as the case may be, to bring it to an end (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 156, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 270).

340 On the other hand, the cooperation of an undertaking in the investigation does not entitle it to a reduction in its fine where that cooperation went no further than the cooperation incumbent upon it under Article 11(4) and (5) of Regulation No 17 (see,

to that effect, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342). Where, however, in response to a request for information under Article 11, an undertaking provides information which goes much further than the information which the Commission may require under that provision, the undertaking in question may receive a reduction in its fine (see, to that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 262).

341 The fact remains that it is the content of the information provided to the Commission which must make it possible to determine whether the information provided went much further than the information that the Commission was entitled to require.

342 As it is, Amann and Cousin have not shown how the content of the information went much further than the Commission was entitled to require.

343 In addition, it should be noted that Amann and Cousin have not admitted all the facts on which the Commission based the contested decision. It should be noted, in particular, that Cousin has claimed that it always continued to make product offerings without ever taking account of the discussions, and that Amann has disputed the duration of the infringement.

344 Consequently, the grant to Amann and Cousin of a 15% reduction in the fine appears justified in the light of the circumstances of the case. Accordingly, the argument that the reduction of 15% is insufficient when compared with the 50% reduction granted to Coats must also be rejected.

345 This plea must therefore be rejected.

346 It follows from the above considerations that the action brought by Amann and Cousin must be dismissed.

Costs

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

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. **Orders Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS to pay the costs.**

Vilaras	Prek	Ciucă

Delivered in open court in Luxembourg on 28 April 2010.

[Signatures]

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