JUDGMENT OF THE GENERAL COURT (fifth chamber)

28 April 2010 *

In Joined Cases T-456/05 and T-457/05,

Gütermann AG, established in Gutach-Breisgau (Germany), represented by J. Burrichter, B. Kasten and S. Orlikowski-Wolf, lawyers,

applicant in Case T-456/05,

Zwicky & Co. AG, established in Wallisellen (Switzerland), represented by J. Burrichter, B. Kasten and S. Orlikowski-Wolf, lawyers,

applicant in Case T-457/05,

* Language of the case: German.

European Commission, represented initially by F. Castillo de la Torre, M. Schneider and K. Mojzesowicz, and subsequently by F. Castillo de la Torre and K. Mojzesowicz, acting as Agents,

defendant,

APPLICATIONS 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

1. *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 – Gütermann AG ('Gütermann') and Zwicky & Co. AG ('Zwicky') – had participated in a set of agreements and concerted practices on the market in thread for industrial customers in Benelux and the Nordic countries during the period from January 1990 to September 2001, in the case of Gütermann, and during the period from January 1990 to November 2000, in the case of Zwicky.

2 The Commission imposed a fine of EUR 4.021 million on Gütermann and a fine of EUR 0.174 million on Zwicky for their participation in the industrial thread cartel in Benelux and the Nordic countries.

2. *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.

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 market in thread for industrial customers in the United Kingdom; and (iii) a cartel on the market in thread for industrial customers in Benelux, as well as in Denmark, Finland, Norway and Sweden (collectively, 'the Nordic countries').

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.

6 On 15 March 2004, the Commission issued a statement of objections regarding 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 market in thread for industrial customers in Benelux and the Nordic countries.

7 All the undertakings to which the statement of objections was addressed submitted written observations. Gütermann replied in its own name and in the name of Zwicky.

8 A hearing took place on 19 and 20 July 2004.

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.

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

3. *The contested decision*

Definition of the relevant markets

Product market

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.

12 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.

13 According to the Commission, industrial thread may be regarded, from the point of view of supply, as a single product market since there is no strict correspondence between the end-use and the type of fibre and/or the structure of the thread.

14 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.

15 In the present cases, the product market by reference to which the infringement complained of was investigated is the market for industrial thread other than for the motor industry ('industrial thread').

Geographic markets

16 In the contested decision, the Commission notes that, according to the information provided by the parties, the relevant geographic market for industrial thread is regional. It adds that, according to the case, 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.

17 In the present case, the geographic market relevant to the alleged infringement on the part of the applicants is Benelux and the Nordic countries.

Size and structure of the relevant markets

18 It can be seen from the contested decision that the sales of industrial thread in Benelux and the Nordic countries was approximately EUR 50 million in 2000 and approximately EUR 40 million in 2004.

19 It also emerges from the contested decision that, at the end of the 1990s, the main suppliers of industrial thread in Benelux and the Nordic countries included Gütermann, Zwicky, Amann und Söhne GmbH & Co. KG ('Amann'), Barbour Threads Ltd, before it was acquired by Coats, Belgian Sewing Thread NV ('BST') and Coats.

Description of the unlawful conduct

20 The Commission states in the contested decision that the events relating to the cartel on the market for industrial thread in Benelux and the Nordic countries took place between 1990 and 2001.

21 According to the Commission, the undertakings concerned met at least once a year and those meetings were split into two sessions, one dealing with the Benelux market and the other dealing with the market in the Nordic countries. The primary objective of the meetings was the maintenance of high prices on both markets.

22 The participants exchanged price lists, as well as information on rebates, the application of increases in list prices, reductions in rebates and increases in the special prices applied to certain customers. They also concluded agreements on future price lists, maximum rebates, reductions in rebates and increases in the special prices applied to certain customers, as well as agreements to avoid undercutting, to the advantage of the incumbent supplier and with a view to arranging customer allocation (contested decision, recitals 99 to 125).

Enacting terms of the contested decision

23 By Article 1(1) of the contested decision, the Commission found that eight undertakings, including Gütermann and Zwicky, had infringed Article 81 EC and Article 53 of the EEA Agreement by participating in agreements and concerted practices affecting the markets of thread for industrial customers in Benelux and the Nordic countries, during the period between January 1990 and September 2001 in the case

of Gütermann and during the period between January 1990 and November 2000 in the case of Zwicky.

24 Under the first paragraph of Article 2 of the contested decision, the following fines were imposed in respect of the cartel on the market for industrial thread in Benelux and the Nordic countries on the following undertakings, among others:

— 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.

25 By Article 3 of the contested decision, the Commission ordered the undertakings covered by that decision to bring to an end immediately, if they had not already done so, the infringements which had been found to exist. It also ordered them to refrain from repeating any act or conduct referred to in Article 1 of the contested decision and from adopting any act or conduct having equivalent object or effect.

Procedure and forms of order sought

26 By applications lodged at the Registry of the General Court on 30 December 2005, the applicants brought the present actions.

27 In Case T-456/05, Gütermann claims that the General Court should:

— annul Article 1 of the contested decision in so far as it declares that Gütermann infringed Article 81 EC and Article 53 of the EEA Agreement as regards the market in Finland, Norway and Sweden in the period from January 1990 to September 2001 or, in the alternative, in the period from January 1990 up to and including December 1993;

— annul Article 2 of the contested decision in so far as it imposes on Gütermann a fine of EUR 4.021 million or, in the alternative, reduce that fine to an appropriate amount;

— order the Commission to pay the costs.

28 The Commission contends that the General Court should:

— dismiss the action;

— order Gütermann to pay the costs.

29 In Case T-457/05, Zwicky claims that the General Court should:

— annul Article 1 of the contested decision in so far as it declares that Zwicky infringed Article 81 EC and Article 53 of the EEA Agreement as regards the market in Finland, Norway and Sweden in the period from January 1990 to November 2000 or, in the alternative, in the period from January 1990 up to and including December 1993;

— annul Article 2 of the contested decision in so far as it imposes on Zwicky a fine of EUR 0.174 million or, in the alternative, reduce that fine to an appropriate amount;

— annul Article 3 of the contested decision in so far as it concerns Zwicky;

— order the Commission to pay the costs.

30 The Commission contends that the General Court should:

— dismiss the action;

— order Zwicky to pay the costs.

31 By order of 9 December 2008, the President of the Fifth Chamber of the General Court decided, after hearing the parties, to join Cases T-456/05 and T-457/05 for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the General Court.

Law

32 First of all, the applicants have put forward two pleas in law concerning the alleged unlawful conduct. By their first plea, the applicants allege infringement 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). Zwicky has also put forward a plea alleging that the injunctions to bring the infringement to an end and to refrain from repeating such conduct were unjustified.

33 Secondly, the applicants have put forward a series of pleas with a view to having the fine cancelled or reduced. On the one hand, Zwicky complains that the Commission imposed on it a fine which exceeded the upper limit of 10% of turnover. On the other hand, the applicants have put forward five pleas alleging, respectively: (i) incorrect assessment of the gravity of the infringement as regards its effects; (ii) incorrect assessment of the duration of the infringement; (iii) failure to take account of certain mitigating circumstances; (iv) misapplication of the Leniency Notice; and (v) imposition of fines which are disproportionate.

1. *The pleas challenging the finding that an infringement has occurred and the injunctions to bring that infringement to an end and to refrain from repeating it*

The plea, put forward by Gütermann and Zwicky, alleging infringement of Article 7(1) of Regulation No 1/2003

Arguments of the parties

34 According to the applicants, the Commission infringed Article 7(1) of Regulation No 1/2003, which provides that '[w]here the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 [EC] or of Article 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end'. When it accused the applicants of infringing Article 81 EC and Article 53 of the EEA Agreement by reason of their participation in agreements and concerted practices on the markets for industrial thread in Benelux and the Nordic countries, during the period from January 1990 to September 2001 in the case of Gütermann and from January 1990 to November 2000 in the case of Zwicky, the Commission failed to take account of the fact that the EEA Agreement did not enter into force until 1 January 1994 and, consequently, before that date, did not apply to Finland, Norway or Sweden. Similarly, since Finland and Sweden did not accede to the European Community until 1 January 1995, Article 81 EC did not become directly applicable there until that date.

35 The applicants also maintain that the Commission was correct in considering that an infringement in the legal sense of the term – that is to say, an infringement of Article 81 EC and Article 53 of the EEA Agreement by reason of their conduct – can exist in relation to Finland, Norway and Sweden only from 1 January 1994. The Commission therefore erred by taking as its starting point, from a legal point of view, the existence of a single infringement which simply grew in intensity. The Commission made no distinction between the factual assessment of the applicants' conduct as a single and continuous collusive agreement, from January 1990 to September 2001 in the case of Gütermann and from January 1990 to November 2000 in the case of

Zwicky, and the legal assessment of that conduct as an infringement of the competition rules during those two periods.

36 Furthermore, the applicants maintain that their plea alleging infringement of Article 7(1) of Regulation No 1/2003 is admissible. The Commission has argued, incorrectly, that it is inadmissible on the ground that they have not established the existence of a manifest error of assessment in the categorisation of their conduct as a single and continuous collusive agreement. In the applicants' view, the Commission categorised their conduct as a single and continuous collusive agreement from the point of view of the facts, which the applicants do not challenge in the context of the present plea. On the other hand, the legal assessment set out in Article 1(1) of the contested decision is erroneous, since Zwicky was not present on the market for industrial thread in the Nordic countries and, in relation to Finland, Norway and Sweden, there could not have been any infringement of the competition rules between January 1990 and December 1993.

37 The Commission relies principally on the inadmissibility of the applicants' present plea and, in the alternative, contends that that plea is not well founded.

Findings of the Court

38 The Court considers that the merits of the plea alleging infringement of Article 7(1) of Regulation No 1/2003 should be assessed, without there being any need to examine the admissibility of that plea.

39 It should first be noted that, in points (g) and (h) of Article 1(1) of the contested decision, the Commission finds that the applicants infringed Article 81 EC and Article 53 of the EEA Agreement by reason of their participation, from January 1990 to September 2001 in the case of Gütermann and from January 1990 to November 2000 in the

case of Zwicky, in concerted practices on the market for industrial thread in Benelux and the Nordic countries.

40 It must be stated that, taken in isolation, those provisions could suggest that the Commission concluded that the applicants had committed an infringement by participating in concerted practices on the market for industrial thread in Finland, Norway and Sweden between January 1990 and December 1993, that is to say, before the EEA Agreement entered into force. However, it is common ground that, during that period, there was no legal basis for a finding by the Commission that the applicants had committed such an infringement.

41 As it is, it is clear from the case-law that the enacting terms of an act are indissociably linked to the statement of reasons for those provisions, so that, when they have to be interpreted, account must be taken, if necessary, of the reasons which led to their adoption (Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21, and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 39).

42 It is clear from recitals 246, 295 to 298 and 331 of the contested decision that, in so far as the cartel covered Finland, Norway and Sweden, it constituted an infringement of the Community competition rules and the EEA competition rules only from 1 January 1994, the date on which the EEA Agreement entered into force. Accordingly, points (g) and (h) of Article 1(1) of the contested decision must be read in the light of that statement of reasons, which is clear and entirely unambiguous. It follows that the enacting terms of the contested decision are to be read as meaning that the elements of the single and continuous infringement existed, in relation to Finland, Norway and Sweden, only from 1 January 1994.

43 Secondly, it is to no avail that the applicants rely, essentially, on a distinction supposedly made by the Commission in the contested decision between, on the one hand, the legal assessment of an infringement of Article 81 EC and Article 53 of the EEA Agreement and, on the other, a factual assessment – in recitals 264 to 277 of that decision – of their conduct as a single and continuous infringement. They conclude

from that, also wrongly, that since an infringement 'in the legal sense of the term' could exist in relation to Finland, Norway and Sweden only from 1 January 1994, the Commission erred in finding that there was a single infringement which had simply grown in intensity.

44 First, it is important to point out that the applicants in no way deny the single and continuous nature of the infringement on the market for industrial thread in Benelux and the Nordic countries.

45 Also, it should be borne in mind 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 (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 81, and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 155).

46 Thus, a single and continuous infringement frequently consists of a series of acts which follow each other in time and which, in themselves, at the time when they occur, can also constitute an infringement of the competition rules. The distinctive feature of those acts lies in the fact that they form part of an overall strategy. That is essentially what the Commission concluded in recitals 264 to 277 of the contested decision with regard to the cartel on the market for industrial thread in Benelux and the Nordic countries.

47 Contrary to the applicants' claim, the considerations set out in the abovementioned recitals of the contested decision do not simply rehearse the facts, but set out the objective reasons which require the Commission to conclude that the infringement on the market for industrial thread in the Nordic countries constituted, together with that on the market for industrial thread in Benelux, a single and continuous infringement.

48 The fact that the legal basis on which the Commission relied in finding that there had been an infringement on the markets for industrial thread in Finland, Norway and Sweden did not exist until after the infringement had begun is irrelevant in that regard since, as is clear from the statement of reasons in the contested decision, the applicants' conduct on the market was taken into account only as from 1 January 1994.

49 Secondly, the complaint raised by Zwicky that it was not present on the market in the Nordic countries must be rejected. As was pointed out in paragraph 44 above, Zwicky confirmed that it did not challenge the single and continuous nature of the infringement on the market for industrial thread in Benelux and the Nordic countries.

50 However, it can be seen from the case-law that an undertaking which has participated in a single complex infringement through its own conduct – conduct which meets the definition of an agreement or concerted practice with an anti-competitive object for the purposes of Article 81 EC, and which was intended to help bring about the infringement as a whole – may also be liable for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably have foreseen such conduct, and was prepared to accept the risk (*Commission* v *Anic Partecipazioni*, paragraph 45 above, paragraph 203, and Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 73).

51 In the present case, Zwicky does not deny that it participated regularly in the meetings concerning industrial thread on the market in the Nordic countries; it does not challenge the Commission's statement that it was active on the market for industrial thread in the Nordic countries before the beginning of the single infringement; it has not denied participating in the acts which constitute the infringement on the market for industrial thread in Benelux; nor does it deny that those acts formed part of an overall strategy and, in consequence, were merely some of the constituent parts of a

single and continuous infringement on the market for industrial thread in Benelux and the Nordic countries.

52 It follows that the mere fact that Zwicky was not present on the market for industrial thread in the Nordic countries in the period during which the single and continuous infringement was committed does not relieve it of liability for the conduct engaged in on that geographic market by other undertakings in the context of that infringement.

53 Moreover, in so far as Zwicky's complaint is to be understood as meaning that only undertakings which are active on the geographic market in the Nordic countries as competitors, or on the side of supply or demand, are capable of coordinating their conduct as undertakings which are the (co-)perpetrators of an infringement, it must be pointed out that an undertaking can infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has itself to be active on that relevant market (see, by analogy, Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraph 122).

54 In the light of the findings set out in paragraph 51 above, Zwicky cannot validly deny that it is also liable, as co-perpetrator, for the infringement of the competition rules as regards the cartel concerning industrial thread on the market in the Nordic countries.

55 The plea alleging infringement of Article 7(1) of Regulation No 1/2003 must therefore be rejected.

The plea, put forward by Zwicky, alleging that the injunctions to bring the infringement to an end and to refrain from repeating such conduct were unjustified

Arguments of the parties

56 Zwicky states that, in Article 3 of the contested decision, the Commission ordered the undertakings concerned to bring to an end immediately the infringements which had been found to exist in so far as they had not already done so and to refrain in future from any act relating to those infringements or any conduct having an equivalent object.

57 Zwicky argues that, not only has it no longer been present on the markets concerned by the contested decision since November 2000, but also it has abandoned all its commercial activities and now merely manages real estate. It maintains that the abovementioned injunctions are in breach of the principle of proportionality and that Article 3 of the contested decision is unlawful. In its view, in so far as the Commission could have determined, without carrying out any further investigations, that Zwicky had brought the infringements to an end and that there was no risk of further infringements being committed, it had no legitimate interest in issuing an injunction. Zwicky relies in that regard on Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraph 24 et seq.

58 The Commission contends that this plea should be rejected.

Findings of the Court

59 It should be pointed out that, by the present plea, Zwicky is seeking annulment of Article 3 of the contested decision in so far as it relates to Zwicky.

60 It should be noted that Article 3 of the contested decision contains, in fact, two injunctions.

61 First of all, that provision requires the undertakings concerned to bring to an end immediately the infringements referred to in Article 1 of the contested decision, in so far as they have not already done so. In so far as Zwicky had ceased to trade in the industrial thread sector at the time when the contested decision was adopted, the argument raised against that provision is manifestly devoid of all foundation. Even though Zwicky is one of the undertakings listed in Article 1 of the contested decision, it had, by virtue of the fact that it had ceased to trade, already brought the infringement to an end and was therefore no longer concerned by the injunction at issue (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, paragraph 1247). That circumstance also frustrates Zwicky's argument concerning the breach of the principle of proportionality in that regard (see, to that effect, Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 196).

62 Secondly, Article 3 of the contested decision requires the undertakings listed in Article 1 to refrain from repeating any act or conduct described in Article 1 and from adopting any measure having equivalent object or effect.

63 It should be borne in mind that the application of Article 7(1) of Regulation No 1/2003 may involve a prohibition on continuing certain activities, practices or situations which have been found to be unlawful, but also a prohibition on adopting similar future conduct. Such obligations on undertakings must not, however, exceed the limits of what is appropriate and necessary to achieve the aim pursued (see, by analogy, 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, paragraphs 4704 and 4705 and the case-law cited). Furthermore, the Commission's power to issue injunctions is to be applied according to the nature of the infringement found (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and*

Commercial Solvents v *Commission* [1974] ECR 223, paragraph 45; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 298; and Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 82).

64 In the present case, the Commission found, in Article 1 of the contested decision, that Zwicky, with other undertakings, had infringed Article 81 EC and Article 53 of the EEA Agreement by participating – over the course of a very long period indeed – in agreements and concerted practices in the industrial thread sector in Benelux and the Nordic countries, in the framework of which Zwicky and the other undertakings had agreed to fix future price lists, maximum rebates, reductions in rebates and increases in special prices applied to certain customers; to avoid undercutting, to the advantage of the incumbent supplier; and to arrange customer allocation. Zwicky does not dispute the statements made in the contested decision in that regard.

65 In those circumstances, by enjoining the undertakings concerned to refrain in future, in the market for industrial thread in Benelux and the Nordic countries, from any measure having the same or equivalent object or effect, the Commission did not exceed the powers conferred on it under Article 7(1) of Regulation No 1/2003 (see, to that effect and by analogy, *Hoechst* v *Commission*, paragraph 61 above, paragraph 199).

66 The fact that Zwicky was no longer active in the industrial thread sector on the day that the contested decision was adopted does not cast doubt on that conclusion. An injunction such as that in issue is, of its very nature, preventive and does not depend on the situation of the undertakings concerned at the time when the contested decision was adopted.

67 The fact that Zwicky had given no undertaking to refrain from repeating its anti-competitive conduct means that the Commission was all the more justified in including that injunction in the enacting terms of the contested decision (see, to that effect, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 678).

68 In addition, the judgment in *GVL* v *Commission*, paragraph 57 above, relied on by Zwicky, is irrelevant to the present case. Above and beyond the fact that the circumstances of the present case are different from those in *GVL* v *Commission*, it has been shown in paragraphs 60 to 67 above that Zwicky was not concerned by the injunction to bring to an end immediately the infringements referred to in Article 1 of the contested decision and that the Commission had a perfectly legitimate interest in ordering it to refrain in future from any act relating to those infringements or any conduct having an equivalent object.

69 For all of those reasons, the present plea must be rejected.

2. *The pleas challenging the fine and the amount thereof*

The plea, put forward by Zwicky, alleging that the upper limit of 10% of turnover has been exceeded

Arguments of the parties

70 After indicating that it had discontinued its commercial activities in the industrial thread sector in November 2000, Zwicky complains first that the Commission took Gütermann's turnover as the basis for calculating the maximum fine of 10% of turnover. Gütermann had taken over only a part of Zwicky's activities and was not under Zwicky's control. Accordingly, only Zwicky's turnover matters. Since Zwicky has had no turnover since 2001, no fine can be imposed on it under Article 23(2) of Regulation No 1/2003. Regulation No 1/2003 refers to the total turnover in the last business

year preceding the adoption of the decision. The fact of linking the fine to the latter figure makes it possible to take account of the size and influence of the undertaking on the market. Thus, what matters is the present position of undertakings with regard to turnover. An undertaking which no longer has a turnover has no influence on the market and, as a consequence, cannot be fined.

71 Zwicky then states that the judgment in Case T-33/02 *Britannia Alloys & Chemicals* v *Commission* [2005] ECR II-4973, relied on by the Commission, must be interpreted as meaning that the taking into account of a turnover figure which is not that of the last complete business year preceding the adoption of the decision is possible where the undertaking concerned has ceased its commercial activities or diverted its turnover in order to avoid the imposition of a heavy fine. That is not the position in the present case. Zwicky claims in that regard that it sold its commercial activities one year before the Commission's inspections, following a decline in its competitive situation.

72 Zwicky also states that, in the present case, Gütermann acquired Zwicky's commercial business in the framework of an asset deal and that, in consequence, income related to the activities acquired should have been passed to Gütermann to increase the turnover to be taken into account for the purposes of applying Article 23(2) of Regulation No 1/2003. In addition, Zwicky argues that the sale of its activities to Gütermann does not constitute a mere internal reorganisation.

73 Finally, the fact that the applicants sent a single document in reply to the statement of objections is explained by the fact that Zwicky's industrial thread activities had been taken over by Gütermann and that, as a result of that transaction, the chairman of Zwicky's Board of Directors had been appointed to the Board of Gütermann. However, that in no way alters the fact that Zwicky is independent of Gütermann and that Gütermann did not become a shareholder in Zwicky.

74 The Commission argues that the present plea is ineffective *ab initio* inasmuch as, even if Zwicky's argument were correct, the Commission would have determined the maximum fine permissible by taking account of the turnover for the preceding business year, as it has already done in other cases. It notes that Zwicky's total turnover for 1999 was EUR 4.5 million and that the fine of EUR 0.174 million in no way exceeds the upper limit of 10% of turnover.

75 In the alternative, the Commission contends first that even though, in November 2000, Gütermann bought the business activities of Zwicky that were connected with the cartel on the industrial thread market, the Commission took account of the fact that Zwicky had been implicated for 10 years in the infringement being penalised and formed the view that, after Zwicky's sale of its commercial activities, the fact of continuing to exist in law in the form of an 'empty shell' was a strategy which had been adopted for the specific purpose of avoiding penalties for infringement of the competition rules. The Commission also points out that Zwicky did not challenge the case-law to the effect that, in principle, it falls to the natural or legal person managing the undertaking in question at the time when the infringement is committed to answer for that infringement. The Commission adds that, since Zwicky's chairman was a director of Gütermann and therefore had precise knowledge of the participation of the two undertakings in the cartel, the reasons for maintaining Zwicky in existence are easy to understand.

76 The Commission also maintains that Zwicky's interpretation of the second subparagraph of Article 23(2) of Regulation No 1/2003 is not compatible with the principle of effectiveness, because it would enable undertakings to escape their liability by carrying out purely internal reorganisations. That was the Court's approach in *Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above.

77 Finally, the Commission contends that the close links between Zwicky and Gütermann are clear from the wording of a common reply to the statement of objections and from the fact that the same lawyers defended both undertakings before the Court.

Findings of the Court

78 Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission may impose on undertakings fines not exceeding 10% of turnover for the business year preceding the adoption of the decision. The purpose of the upper limit of 10% is to prevent fines from being disproportionate to the size of the undertaking and, in particular, to prevent the imposition of fines which undertakings are unlikely to be able to pay. Since only the total turnover figure can effectively give an approximate indication of that size, the aforementioned percentage must be understood as referring to the total turnover (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 119).

79 It should also be pointed out that the purpose of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 is to give the Commission power to impose fines so as to enable it to carry out the task of supervision entrusted to it by Community law (*Musique Diffusion française and Others* v *Commission*, paragraph 78 above, paragraph 105, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 105). That task includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that the Commission must ensure that fines have a deterrent effect (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraphs 105 and 106).

80 It should also be noted that 'preceding business year' within the meaning of Article 15(2) of Regulation No 17 and the second subparagraph of Article 23(2) of Regulation No 1/2003 refers, in principle, to the last complete business year for each of the undertakings concerned at the date on which the decision was adopted (Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 32).

81 In the present case, since the contested decision is dated 14 September 2005, the preceding business year is that from 1 July 2004 to 30 June 2005. However, Zwicky sold its industrial thread business to Gütermann in November 2000. Consequently, the Commission formed the view that, at the time when the contested decision was adopted, it did not have to hand a turnover figure for Zwicky in respect of an economic activity pursued by that undertaking in the preceding business year. Taking as its basis, in recital 383 of the contested decision, the assumption that the relationship between Gütermann and Zwicky following the latter's sale of its industrial thread business to the former was that of holding company and subsidiary, the Commission considered itself entitled to use Gütermann's turnover for the purposes of applying the 10% upper limit.

82 There are two aspects to the complaints put forward by Zwicky: (i) the fact that the Commission chose to take account of Gütermann's turnover and (ii) the failure to take account of Zwicky's turnover for the business year ending on 30 June 2005, even though it was nil.

83 With regard to the first aspect of Zwicky's complaints, it must be stated that the Commission erred in referring to Gütermann's turnover for the purposes of determining the upper limit of 10% of turnover not to be exceeded when calculating the amount of the fine to be imposed on Zwicky.

84 Gütermann merely took over Zwicky's industrial thread business in November 2000. Zwicky explained at the hearing that that cessation of activity took place in two ways, namely by the conclusion in Switzerland of a contract for the transfer of assets such as warehouses and machines and by the sale of shares in Germany.

85 However, the Commission acknowledged at the hearing that Gütermann had in no sense taken over Zwicky and that, in consequence, Gütermann had not become the owner of Zwicky. The sale of the industrial thread business thus had no effect on Zwicky's legal and economic independence.

86 The arguments that Zwicky's chairman became a director of Gütermann, that the two undertakings consulted the same lawyer and that they provided a common reply to the statement of objections are not enough in themselves to justify, in the present case, the Commission's view that the relationship between the two undertakings was that of holding company and subsidiary.

87 In addition, the Commission has in no way shown how it was misled by the information provided by Zwicky in response to the Commission's request for information concerning the sale of Zwicky's business and its links to Gütermann.

88 It follows that, by referring to Gütermann's turnover, the Commission committed an error of assessment, the consequences of which are set out in paragraph 104 et seq. below.

89 The second aspect of Zwicky's complaints – namely the failure to take account of Zwicky's zero turnover from its declared business activities in the year preceding the adoption of the contested decision – necessitates consideration of the manner in which the Commission is required to define the concept of 'preceding business year' in cases where the economic situation of the undertaking concerned undergoes substantial changes between the end of the period during which the infringement was committed and the date of the adoption of the Commission decision imposing the fine.

90 As regards the concept of 'preceding business year', it should be pointed out that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also its context and the objectives pursued by the rules of which it is part (Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41; Case C-391/05 *Jan De Nul* [2007] ECR I-1793, paragraph 20; and *Britannia Alloys & Chemicals* v *Commission*, paragraph 80 above, paragraph 21).

91 In that regard, as was pointed out in paragraph 79 above, the purpose of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 is to give the Commission power to impose fines so as to enable it to carry out the task of supervision entrusted to it by Community law. That task includes, in particular, the curbing of illegal activities and the prevention of repeat offences (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173).

92 It should be added that, pursuant to Article 15(2) of Regulation No 17 and Article 23(3) of Regulation No 1/2003, the Commission is required to take into account the gravity and the duration of the infringement in question.

93 In the light of those factors, the purpose of the upper limit, expressed in terms of turnover and laid down in Article 15(2) of Regulation No 17 and the second subparagraph of Article 23(2) of Regulation No 1/2003, is to prevent fines imposed by the Commission from being disproportionate to the size of the undertaking concerned (*Musique Diffusion française and Others* v *Commission*, paragraph 78 above, paragraph 119).

94 It is clear from the above considerations that, in determining the 'preceding business year', the Commission must assess, in each specific case and having regard both to the context and to the objectives pursued by the scheme of penalties created by Regulation No 17 and Regulation No 1/2003, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's true economic situation in the period during which the infringement was committed (*Britannia Alloys & Chemicals* v *Commission*, paragraph 80 above, paragraph 25).

95 It is clear, however, both from the objectives of the system of which Article 15(2) of Regulation No 17 and the second subparagraph of Article 23(2) of Regulation No 1/2003 form part and from the case-law cited in paragraph 80 above, that the

application of the 10% upper limit presupposes, first, that the Commission has at its disposal the turnover figure for the last business year preceding the date of adoption of the decision and, second, that those data represent a full year of normal economic activity over a period of 12 months (*Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above, paragraph 38).

96 Thus, if the business year had ended before the adoption of the decision but the annual accounts of the undertaking in question had not yet been drawn up or had not been disclosed to the Commission, the latter would have the right, indeed the obligation, to use the turnover achieved in an earlier business year in order to apply Article 15(2) of Regulation No 17 and the second subparagraph of Article 23(2) of Regulation No 1/2003. Similarly, if, as a result of a reorganisation or a change in accounting practices, an undertaking has, for the preceding business year, produced accounts which relate to a period shorter than 12 months, the Commission is entitled to rely on the turnover achieved in an earlier complete year in order to apply those provisions (*Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above, paragraph 39). The same is true if an undertaking has not carried on any economic activity during the preceding business year and, accordingly, the Commission does not have at its disposal a figure for the undertaking's turnover, representing economic activity carried on by it during that year. Contrary to the requirements of the case-law, the turnover for that period gives no indication of the size of the undertaking and, in consequence, cannot serve as a basis for determining the maximum amount permissible under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 (*Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above, paragraph 42).

97 It should also be borne in mind that – as is clear from *Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above, paragraph 49, applicable by analogy to the present case – even in a year of normal business activity, the turnover of an undertaking may fall significantly, or indeed substantially, as compared with previous years, for various reasons, such as a difficult economic context, a crisis in the sector concerned, an

accident or a strike. However, as long as an undertaking has in fact achieved a turnover during a complete year in which economic activities, albeit on a reduced scale, have been carried on, the Commission must take account of that turnover for the purposes of determining the maximum amount permissible under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. Accordingly, at least in situations where there is no indication that an undertaking has ceased its commercial activities or has diverted its turnover in order to avoid the imposition of a heavy fine, it is appropriate to regard the Commission as obliged to fix the maximum limit of the fine by reference to the most recent turnover corresponding to a complete year of economic activity (*Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above, paragraph 49).

98 According to Zwicky, the Commission has in no way shown that Zwicky had diverted its turnover and it therefore misapplied the exception to the principle that the turnover for the preceding business year is to be taken into account. However, as it stated at the hearing, the Commission is in no way claiming that Zwicky acted improperly in order to avoid the imposition of a heavy fine; the Commission merely states that, on the facts, Zwicky has ceased to trade and therefore exists as an 'empty shell'.

99 In its written pleadings, Zwicky mentioned that, since 2001, it had merely managed real estate and pointed out that it had had no turnover since then. Consequently, it must be concluded that Zwicky did not achieve a turnover in the complete business year preceding the contested decision, that is to say, in the period from 1 July 2004 to 30 June 2005. When asked at the hearing about the exact nature of its activities, Zwicky reiterated its statements that it managed real estate which had remained its property. It explained that its real estate consisted of buildings formerly occupied by its industrial thread business and which have been empty since the sale of that business to Gütermann, as well as dwellings let to former employees. It argued that the dwellings could be used for rental purposes and that investments will be made with that end in view. It also referred to a development plan drawn up jointly with the local authorities. Lastly, it admitted that since the sale of its industrial thread business, it no longer had any employees.

100 Although it is common ground that Zwicky continued to exist in law after the sale of its business to Gütermann, it must be stated that there are serious grounds – such as a zero turnover over several years, the lack of employees or the lack of solid evidence that it is making use of its real estate or has investment projects for that purpose – for supposing that Zwicky did not continue to carry on a normal economic activity within the meaning of the abovementioned case-law, and specifically in the period between 1 July 2004 and 30 June 2005.

101 The answers provided by Zwicky in its written pleadings and at the hearing remained vague and have not therefore enabled the Court to determine the existence of a 'normal economic activity'. In addition, Zwicky has confirmed the content of an extract from an economic summary of its situation, read by the Commission at the hearing, which shows that Zwicky's turnover is nil, its profits are nil and it has no employees; nor does Zwicky deny that that was the situation specifically in the period between the sale of its industrial thread business to Gütermann and 30 June 2005.

102 Contrary to Zwicky's claims at the hearing, the mere fact that a board of directors and a manager are dealing with the company's development plan, the reality of which, moreover, has not been established, is not sufficient to constitute conclusive evidence of the existence of a normal economic activity on the part of that company as the Court understood that concept in *Britannia Alloys & Chemicals* v *Commission*, paragraph 71 above.

103 It follows that the Commission was required to take account of an overall turnover figure for Zwicky which pre-dated that for the business year that ended on 30 June 2005.

104 With regard to the consequences of the Commission's error in referring to Gütermann's overall turnover, it must be determined whether that error justifies a reduction in the fine imposed on Zwicky, or even its cancellation, by the Community judicature.

105 It must be pointed out that the Court has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. In the first place, it has the task of reviewing the lawfulness of those decisions under Article 230 EC (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 53 and 54).

106 In the second place, the Court has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 229 EC, Article 17 of Regulation No 17 and Article 31 of Regulation No 1/2003, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty under Article 253 EC to state reasons, to be set out in the decision (*SCA Holding* v *Commission*, paragraph 105 above, paragraph 55).

107 In the present case, the Court considers, in the exercise of its unlimited jurisdiction, that reference must be made to Zwicky's turnover, not Gütermann's.

108 For the reasons set out above and in the light of the line of authority established in the judgments in *Britannia Alloys & Chemicals* v *Commission*, paragraphs 71 and 80 above, the last turnover for Zwicky arising from real economic activities on its part, to which the Commission should have referred, is that arising from the business year running from 1 July 1999 to 30 June 2000. It can be seen from recital 76 of the contested decision that that turnover is EUR 4.5 million. The basic amount of the fine which the Commission imposed on Zwicky is EUR 205 000 and does not therefore exceed 10% of that turnover.

109 It should also be noted that, at the hearing, Zwicky argued that the alternative approach of referring to its turnover for the business year which ended on 30 June 2000 is unacceptable on the ground that it would amount to taking account of its turnover twice. Since Zwicky's industrial thread business had been taken over by Gütermann,

the Commission had already taken account of the turnover generated by that business in Gütermann's overall turnover. The Commission contends that that is a new argument and must therefore be rejected.

110 Zwicky's argument must be rejected as unfounded.

111 Zwicky's argument consists in maintaining that the alternative approach would be tantamount to attributing to Zwicky the turnover already attributed to Gütermann. However, the Court considers that the only question which arises in this connection is that of identifying the relevant turnover figure to be used for calculating the 10% upper limit for the purposes of the fine to be imposed on Zwicky. As has been shown above, the only acceptable figure is the EUR 4.5 million achieved by Zwicky in the business year running from 1 July 1999 to 30 June 2000.

112 Even supposing that it had to be accepted that that approach is tantamount to attributing Zwicky's turnover twice at that stage of the calculation of the fine to be imposed on Gütermann and Zwicky, it must be considered that the illegality was to the disadvantage of Gütermann. Zwicky's argument thus really amounts to asking the Court to review the legality of the amount of the fine imposed on Gütermann. However, Zwicky cannot claim any right of action in that regard. If an addressee of a decision decides to bring an action for annulment, the matter to be adjudicated by the Community judicature relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be adjudicated by the Community judicature (Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 53).

113 In the light of those considerations, the plea, put forward by Zwicky, alleging infringement of Article 15(2) of Regulation No 17 and the second subparagraph of Article 23(2) of Regulation No 1/2003 must be rejected.

The plea, put forward by Gütermann and Zwicky, alleging incorrect assessment of the gravity of the infringement as regards its effects

Arguments of the parties

114 First of all, the applicants claim that, in accordance with the 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') and settled decision-making practice, the assessment of the gravity of the infringement expressly depends on the actual impact of the infringement on the market. The principle of proportionality requires the Commission to take account of any such impact in assessing the gravity of the infringement. The applicants explain that, by this complaint, they are not seeking to challenge the infringement as such but are challenging its categorisation as a very serious infringement.

115 Secondly, the applicants conclude, after considering the question of the actual impact of the infringement on the market, that it had no impact. They therefore argue that the Commission could not rely on impact as a basis for categorising the infringement as very serious. Although they admit that the price increases mentioned in the lists decided on during the meetings were mostly put into effect by the various undertakings, they maintain that those price increases did not lead to an increase in real net prices. The considerations set out by the Commission in Section 4.1.4 of the contested decision do not support the conclusion that there was such an impact. The fact that the undertakings met over a period of 11 years is not in itself a sufficient basis for concluding that the price increases had an influence on net prices. According to the applicants, they have provided proof that the principal purpose of the meetings was to exchange legal information. The Commission itself admits that it does not have sufficient evidence of actual impact.

116 By reason of the particular way in which prices are determined in the industrial thread sector – invoices to customers are almost never based on the prices quoted in the lists – the applicants submit that it is in no way possible in the present case to infer from the implementation of the agreement that there was an actual impact on

the market. On the contrary, real average prices on the market did not rise and even dropped.

117 Thirdly, the applicants submit that, on the facts, the infringement had no actual impact on their real average prices; they argue that the infringement should not have been categorised as very serious at individual level; and they accordingly maintain that the Commission should have credited them with that factual situation.

118 In view of the considerable disparity between the size of the undertakings concerned and the low turnover they achieved on the market concerned, the applicants claim that the Commission should have accepted, as an exculpatory circumstance in accordance with Section 1A of the Guidelines, the fact that the infringement had no actual impact on their net prices.

119 They complain that the Commission merely compared, on the basis of their turnover, the relative significance on the market of the various undertakings and thus took account only of their abstract economic capacity to influence competition, giving no consideration to the actual impact of their conduct on net prices.

120 Fourthly, according to the applicants, the Commission erred in finding that Zwicky had participated in the infringements on the industrial thread market in the Nordic countries, since Zwicky had never done business on the industrial thread market in those countries.

121 The Commission contends that this plea should be rejected.

Findings of the Court

122 First of all, it should be pointed out that, with regard to the assessment of the gravity of an infringement as such, the first and second paragraphs of Section 1A of the Guidelines state as follows:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.'

123 In the contested decision, the Commission pointed to the following three factors:

— the infringement at issue 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, to the advantage of the incumbent supplier, such practices constituting by their very nature the most serious type of infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement (contested decision, recital 345);

— the collusive agreements were implemented and had an impact on the market in the EEA for the product concerned, but that impact cannot be measured with precision (contested decision, recital 351);

— the cartel covered a number of parties to the EEA Agreement, namely Benelux and the Nordic countries (contested decision, recital 352);

124 The Commission's conclusion is worded as follows (contested decision, recital 353);

'Taking all these factors into account, the Commission considers that the undertakings concerned by [the contested decision] have committed a very serious infringement of Article 81 [EC] and Article 53 of the EEA Agreement.'

125 The applicants challenge the very serious nature of the infringement: on the one hand, they argue that the Commission concluded that there had been an actual impact on the market without being able to prove this and, on the other, they claim that there had been no impact on net prices or, at least, no actual impact on real average prices.

126 It should be pointed out, first, that, in order to assess the actual impact of an infringement on the market, the Commission must take as a reference the competition which would normally have existed if there had been no infringement (Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 165; see, to that effect, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 235, and *Thyssen Stahl* v *Commission*, paragraph 67 above, paragraph 645).

127 In the present case, it should be noted that the applicants in no way deny the implementation of the cartel. On the contrary, it is clear from point 40 of Gütermann's application and point 46 of Zwicky's application that they 'expressly admitted both in the reply to the statement of objections and in the presentation of the facts in [those

applications]' that 'the price increases appearing in the lists decided on at the meetings were mostly implemented by the various undertakings'.

128 In the case of a price cartel, in particular, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices, for example by increasing the list prices that serve as a basis for the calculation of real prices; by giving up rebates; by increasing special prices; and by exerting pressure, by means of complaints, on undertakings which have breached the agreement to refrain from undercutting, to the advantage of the incumbent supplier. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers' room for negotiation (*Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 126 above, paragraph 166; see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 61 above, paragraphs 743 to 745).

129 On the other hand, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel (*Hoechst* v *Commission*, paragraph 61 above, paragraph 348; see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 61 above, paragraphs 743 to 745). It would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility has in no way been demonstrated (*Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 126 above, paragraph 167).

130 In order to assess the gravity of the infringement, the decisive point is whether the cartel members did all they could to give practical effect to their intentions. What then happened at the level of the market prices actually obtained is liable to have been influenced by other factors outside the control of the members of the cartel. The cartel

members cannot therefore benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine (*Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 126 above, paragraph 168).

131 Furthermore, in Section 4.1.4 of the contested decision, the Commission set out a list of specific and credible evidence indicating that the cartel had an actual impact on the market. First of all, the Court agrees with the Commission's argument, set out in recital 164 of the contested decision, that the increases in the list prices – which Gütermann itself confirmed – resulted in higher net prices for certain small customers, whose negotiating power is generally weaker. The Court also agrees with the finding made by the Commission in recital 165 of the contested decision that the increases in the list prices could also have influenced the prices actually charged to large customers inasmuch as the list prices served as the starting point for negotiations with those customers. Lastly, the Commission's argument regarding the fact that certain undertakings applied genuine increases to special prices and dropped rebate arrangements tends to confirm that the infringement had an actual impact on the market concerned.

132 It follows from those considerations and from the finding that the cartel had lasted for more than 11 years that the Commission was properly entitled to conclude that there had been an actual impact on the market concerned.

133 Secondly, the arguments relating to the cartel's alleged lack of actual impact on the applicants' real average prices and to the fact that Zwicky never traded on the industrial thread market in the Nordic countries concern the individual conduct of those two undertakings and cannot therefore be accepted. The actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of assessing the impact of a cartel on the market. Only the effects resulting from the whole of the infringement are to be taken into account (*Commission* v *Anic Partecipazioni*, paragraph 45 above, paragraph 152, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 342).

134 Thus, the Commission's consideration of the unlawful conduct of Gütermann and Zwicky with regard to competition sheds light on the individual situation of the two undertakings, but can have no bearing whatsoever on the categorisation of the infringement as 'very serious'.

135 In addition, the fact that Zwicky never traded on the industrial thread market in the Nordic countries is irrelevant. As was pointed out in paragraph 51 above, Zwicky has in no way denied the single and continuous nature of the infringement on the industrial thread market in Benelux and the Nordic countries.

136 With regard to the evidence based on the long duration of the infringement, put forward by the Commission in recital 166 of the contested decision in relation to the impact of the cartel, it should be pointed out that since the practices complained of were applied for at least 11 years, it is unlikely that the producers regarded them at the time as wholly ineffective and pointless (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 61 above, paragraph 748, and Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraph 130).

137 Lastly, it should be noted that the three aspects of the assessment of the gravity of the infringement do not each carry the same weight in the context of an overall examination. The nature of the infringement plays a major role, in particular, in distinguishing 'very serious' infringements. It is clear from the description of very serious infringements given in the Guidelines that agreements or concerted practices which – as in the present case – are mainly designed to fix prices may, on the basis of their nature alone, be categorised as 'very serious', without there being any need to distinguish such conduct by reference to a particular impact or geographic area. That conclusion is corroborated by the fact that, whilst the description of serious infringements expressly mentions their impact on the market and their effects on extensive areas of the common market, the description of very serious infringements makes no mention of any requirement as to actual market impact or effects produced in a particular geographic area (Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 178; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 150; *Hoechst* v *Commission*,

paragraph 61 above, paragraph 345; and *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 126 above, paragraph 171).

138 In the present case, it is clear from the facts set out in Part I of the contested decision and from recitals 345 and 346 of that decision that, by its very nature, the infringement was a very serious one. It follows that, solely on the basis of the nature of the infringement, its categorisation as 'very serious' remains appropriate.

139 It follows from all of the above considerations that the plea alleging incorrect categorisation of the infringement as regards its effects must be rejected.

The plea, put forward by Gütermann and Zwicky, alleging incorrect assessment of the duration of the infringement

Arguments of the parties

140 A number of claims have been put forward in support of this plea.

141 First of all, the applicants complain that the Commission automatically applied to the starting amount a 10% increase for each year of the infringement even though that percentage is merely the upper limit provided for in the Guidelines for long-term infringements and not the rule. The Guidelines do not require the Commission to increase the starting amount automatically by an additional amount equal to a certain percentage for each year of the infringement; rather, they leave the Commission a measure of discretion. In the present case, the Commission did not exercise that

discretion either as regards the basic principle of increasing the starting amount for the fine or as regards the size of that increase.

142 Secondly, the 5% increase applied to the fines imposed on the applicants – in the case of Gütermann, for a nine-month infringement in 2001 and, in the case of Zwicky, for a 10-month infringement in 2000 – are at odds with the plain meaning of Section 1B of the Guidelines, which provides for an increase only in respect of an entire year. Moreover, the Commission's approach in that regard has not been confirmed by the case-law.

143 Thirdly, the fixed increases of 115% for Gütermann and 105% for Zwicky in the starting amounts for the fines are unlawful inasmuch as they were calculated in the same way for all the countries concerned by the infringement, regardless of the true duration of the infringements. It is true that the Commission considered that, although Benelux and the Nordic countries constituted two separate markets, they had to be examined together since the discussions concerning them took place on the same days and involved the same undertakings. However, Zwicky points out that it was never present on the industrial thread market in the Nordic countries and states that, as a consequence, it did not participate in the infringements regarding those countries. Similarly, the applicants point out that the EEA Agreement did not enter into force until 1 January 1994 and state that, in so far as the agreements also concern Finland, Norway and Sweden, they infringed neither Article 81 EC nor Article 53 of the EEA Agreement before that date. They conclude from this that the Commission should have taken account of that fact in assessing the duration of the infringement.

144 The applicants thus claim that the Commission failed to distinguish between, on the one hand, the facts constituting infringements of competition law – from January 1990 to September 2001 in the case of Gütermann and from January 1990 to November 2000 in the case of Zwicky – in the sense of a single or continuous act of

infringement and, on the other, the legal assessment of those facts as an infringement of Article 81 EC and Article 53 of the EEA Agreement.

145 According to Gütermann, the Commission should therefore have determined the starting amount for the fine by means of a specific and separate calculation on the basis of the turnover achieved on the industrial thread market in Benelux and Denmark, on the one hand, and in Finland, Norway and Sweden, on the other. In that way, the Commission would have obtained two segments of the starting amount, to each of which it would have been appropriate to apply a percentage reflecting the duration of the infringement in each of those groups of countries, namely 115% to the segment relating to the infringement in Benelux and Denmark and 75% to the segment relating to the infringement in Finland, Norway and Sweden.

146 The Commission disputes those arguments.

Findings of the Court

147 Under Article 15(2) of Regulation No 17 and Article 23(3) of Regulation No 1/2003, the duration of the infringement is one of the factors to which regard is to be had in fixing the amount of the fine to be imposed on undertakings which have infringed the competition rules.

148 In relation to that factor, the Guidelines distinguish between infringements of short duration (in general, less than one year), for which the starting amount determined for gravity should not be increased; infringements of medium duration (in general, one to five years), for which the starting amount may be increased by 50%; and

infringements of long duration (in general, more than five years), for which the starting amount may be increased by 10% for each year (Section 1B, first paragraph).

149 It is clear from recitals 359 and 360 of the contested decision, the content of which is not disputed by the applicants, that they participated in the cartel on the industrial thread market in Benelux and the Nordic countries from January 1990 to September 2001 in the case of Gütermann (that is to say, an infringement which lasted 11 years and 9 months) and from January 1990 to November 2000 in the case of Zwicky (that is to say, an infringement which lasted 10 years and 10 months). In both cases, the duration is that of a long-term infringement. The starting amount for the fine was consequently increased by 115% for Gütermann and 105% for Zwicky, on the basis of the duration of the infringement.

150 As regards, first, the applicants' objection to the fact that the Commission automatically applied the maximum rate of 10% for each year of infringement, it should be borne in mind that, even though the third indent of the first paragraph of Section 1B of the Guidelines does not provide for an automatic increase of 10% per year for long-term infringements, it leaves the Commission a measure of discretion in that regard (*Hoechst* v *Commission*, paragraph 61 above, paragraph 396, and Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 362).

151 In the present case, it is clear from paragraph 149 above that the Commission complied with the rules which it had laid down for itself in the Guidelines when it applied an increase, proportionate to the duration of the infringement, to the amount of the fines imposed on the basis of the gravity of the infringement. Taking into account the factors in the case before it, the Commission did not make a manifest error of assessment by increasing the fine by 10% for each year of the infringement.

152 Secondly, the complaint alleging an unjustified 5% increase in the starting amount for each period exceeding six months must be rejected. There is nothing in the Guidelines to prevent the actual duration of the infringement from being taken into account in the calculation of the amount of the fine. Such an approach is entirely logical and

reasonable and falls, in any event, within the Commission's discretion (*BPB* v *Commission*, paragraph 150 above, paragraph 361).

153 Thirdly, the applicants argue, wrongly, that the duration of the infringement was not calculated in the same way for all the countries concerned by the infringement inasmuch as no consideration was given to Zwicky's absence from the industrial thread market in the Nordic countries and proper account was not taken of the true duration of the infringements on the markets in Benelux and the Nordic countries.

154 It must first be recalled that, according to the Commission, the applicants participated in a continuous 'single complex infringement' of Article 81(1) EC and Article 53(1) of the EEA Agreement, and that infringement extended to several EEA countries. It should also be noted that the applicants confirmed at the hearing that they do not deny the existence in the present case of a single infringement.

155 With regard, first, to Zwicky's argument that it was not present on the industrial thread market in the Nordic countries, that undertaking has not shown how such an absence could have affected the calculation of the duration of the infringement, as carried out by the Commission. The additional amount of the fine, reflecting the duration of the infringement, was calculated on the basis of the starting amount for the fine, which was in turn fixed on the basis of Zwicky's turnover on the market concerned in 1999. The fact that Zwicky did no business on the industrial thread market in the Nordic countries is already reflected in that turnover inasmuch as, by definition, it includes no revenue from non-existent activity on the market in the Nordic countries.

156 Moreover, as was recalled in paragraph 50 above, the fact that an undertaking has not taken part in all aspects of a cartel or that it played only a minor role in the aspects in which it did participate is of no relevance to the establishment of the existence of an

infringement. Where it is established that an undertaking was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk, it is also regarded as responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement (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 328). In the present case, far from being unaware of the unlawful conduct of the other cartel participants on the industrial thread market in the Nordic countries, Zwicky actually took part in the meetings concerning that market. The Commission was therefore right to impute to Zwicky the single and continuous infringement, including the part of the infringement committed on the market in the Nordic countries, and to consider, implicitly, that the duration of the infringement could not be divided on the basis of the intensity of the participation in the markets concerned.

157 If the role played in a cartel by an undertaking has been correctly taken into account in determining the starting amount for the fine, the fact that the undertaking did not take part in all the conduct by which the cartel is identified cannot once again be taken into account in determining the duration of the infringement (judgment of 8 July 2008 in Case T-50/03 *Saint-Gobain Gyproc Belgium* v *Commission* (not published in the ECR), paragraph 108).

158 Secondly, the Court must reject the applicants' argument that, in calculating the duration of the infringement, account should have been taken of the varying intensity of the infringement and that, in consequence, a distinction should have been made in that calculation between the groups of countries, that is to say, between Benelux and Denmark, on the one hand, and Finland, Norway and Sweden, on the other.

159 It is clear from the case-law that the increase is calculated by the application of a certain percentage to the starting amount which is determined according to the gravity of the infringement as a whole, thus already reflecting the varying levels of intensity of the infringement. Thus, it would not be logical to take into account, for the increase of that amount on the basis of the duration of the infringement, a variation in the intensity of the infringement during the period concerned (*BPB* v *Commission*, paragraph 150 above, paragraph 364).

160 In that regard, even on the assumption that certain types of cartel are inherently meant to last, a distinction should always be made, pursuant to Article 15(2) of Regulation No 17 and Article 23(3) of Regulation No 1/2003, between the duration of their actual operation and their gravity as resulting from their particular nature (judgment of 15 June 2005 in 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), paragraph 275). Accordingly, the increase for the duration of the infringement does not take account of the gravity of the infringement for a second time (*Hoechst* v *Commission*, paragraph 61 above, paragraph 397).

161 In the present case, the infringement first became apparent on the industrial thread market in Denmark and in Benelux. From the date on which the EEA Agreement entered into force, the infringement increased in intensity because it was extended to the industrial thread market in the Nordic countries. Since it has been shown that the infringements on the various geographic markets were part of a single and continuous infringement, account must be taken of the duration of that infringement as a whole when calculating the amount of the fine. The starting amount, which was determined on the basis of the gravity of the infringement, had already reflected the varying intensities of the infringement. Doubt is not cast on that reasoning by the fact that the increase in the intensity of the infringement originates in the legal fact that the rules prohibiting anti-competitive practices had begun to apply in territories not originally covered by those rules.

162 It follows that the Commission was not required to take account of the variations in the intensity of the infringement when it increased the starting amount for the fine in proportion to the duration of the infringement.

163 Accordingly, the Court must reject the applicants' argument that the duration of the infringement was incorrectly assessed.

The plea, put forward by Gütermann and by Zwicky, alleging failure to take account of certain mitigating circumstances

Arguments of the parties

164 First of all, the applicants point out that Section 3 of the Guidelines sets out a series of mitigating circumstances which give rise to a reduction of the fine. The Commission has thus restricted its discretion when it comes to setting the amount of the fines.

165 The applicants also draw attention to the fact that Section 3 of the Guidelines permits account to be taken of other mitigating circumstances not expressly listed and that those other circumstances have been accepted by the Commission in its decision-making practice.

166 In support of this plea, the applicants rely on three mitigating circumstances which, they maintain, the Commission ought to have taken into account.

167 First, the applicants state that the Commission should have taken into account, as justifying a reduction of the fine, the fact that the infringement had no actual impact on real prices. They rely in that regard on the second indent of Section 3 of the Guidelines, which provides that the non-implementation in practice of an agreement related to the infringement is to give rise to a reduction of the fine.

168 Secondly, they maintain that, pursuant to the first indent of Section 3 of the Guidelines, account should have been taken of their exclusively passive or 'follow-my-leader' role.

169 Zwicky claims that it did no business on the markets in the Nordic countries and could not therefore have participated in the infringements concerning those countries. Similarly, given its insignificant position on the industrial thread market in Benelux, it could not have influenced either the discussions concerning price lists for those three countries or the bilateral contacts. Gütermann, too, claims that it occupied a minor place on the industrial thread market in Benelux and the Nordic countries and that it could not influence the discussions concerning price lists or the bilateral contacts, such influence being primarily exercised by Coats.

170 With regard to bilateral contacts, the applicants argue that they took part only rarely in such contacts, unlike Coats and Amann, which maintained much more frequent bilateral contacts.

171 As proof of the insignificant nature of their role in the cartel in question, the applicants point to their limited market shares. Zwicky argues that its share of the industrial thread market in Benelux between 1990 and 2000 was less than 1%. Gütermann argues that its market share in Benelux and the Nordic countries is approximately 5.6%. Those shares are derisory when compared with the shares of Coats and Amann on the market in the Nordic countries (44% and 46% respectively) and on the Benelux market (40% and 27% respectively).

172 According to the applicants, the passive nature of their conduct is not called into question by the allegation that their respective former employees, Mr B. and Mr F., chaired the meetings. The chairmanship was allocated on the basis of age and the employees concerned had no influence whatsoever on the conduct or content of the meetings, such influence – including influence at the organisational level – being exercised by Coats. The applicants rely in that regard on an e-mail from the representative of Coats, Mr L., dated 10 November 2000, in which it can be seen that the latter had reserved a room in a hotel near Frankfurt-am-Main (Germany) for the purpose of holding a meeting on 16 January 2001, for which he had drawn up the agenda.

173 Thirdly, the Commission should have taken account of the economic crisis which has been present for many years in the industrial thread sector in Europe. The applicants refer, in that regard, to the Commission's 'Seamless steel tubes' decision (Commission Decision of 8 December 1999 relating to a proceeding under Article 81 [EC] (Case IV/E-1/35.860-B – Seamless steel tubes), recital 168) and to the Commission's 'Alloy surcharge' decision (Commission decision of 21 January 1998 relating to a proceeding pursuant to Article 65 [CS] (Case IV/35.814 – Alloy surcharge), recital 83), in which the economic crisis in those sectors was taken into account, and to the Commission's 'French beef' decision (Commission Decision of 2 April 2003 relating to a proceeding pursuant to Article 81 [EC] (Case COMP/C.38.279/F3 – French beef), recital 185), in which account was taken of the bovine spongiform encephalopathy (ESB) crisis.

174 In the alternative, the applicants claim, referring to case-law, that the principle of the individuality of punishments and penalties should have led the Commission to take account of the individual conduct of each undertaking when considering the gravity of their participation in the infringement and, consequently, to reduce significantly the fines imposed on them.

175 The Commission challenges the arguments put forward by the applicants.

Findings of the Court

176 Section 3 of the Guidelines provides for a reduction in the starting amount for the fine for 'special mitigating circumstances' such as an exclusively passive or 'follow-my-leader' role in the carrying-out of the infringement, the non-implementation in practice of the collusive agreements, termination of the infringement as soon as the Commission intervened and other circumstances not expressly mentioned.

177 First of all, the applicants claim that the Commission should have given them the benefit of the mitigating circumstances arising from the non-implementation in practice of the agreement by reason of the fact that the infringement had no actual impact on prices.

178 However, it should be borne in mind that the abovementioned mitigating circumstances are all based on the individual conduct of each undertaking. It follows that in order to assess any mitigating circumstances, including those relating to the non-implementation of agreements, it is necessary to take into account not the effects arising from the infringement as a whole, which must be taken into consideration in assessing the actual impact of an infringement on the market for the purposes of determining its gravity (first paragraph of Section 1A of the Guidelines), but the individual conduct of each undertaking, for the purposes of examining the relative gravity of the participation of each undertaking in the infringement (*Groupe Danone* v *Commission*, paragraph 137 above, paragraph 384).

179 It follows that the applicants' argument based on the infringement's lack of actual impact on prices must be rejected.

180 The Court therefore considers it necessary to determine whether the applicants have put forward other arguments which are capable of showing that, during the period in which they were party to the unlawful agreements, they actually avoided implementing those agreements by adopting competitive conduct on the market or, at the very least, that they clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation (see, in that respect, Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113).

181 It must be stated that the applicants have provided no evidence in support of such a conclusion. On the contrary, they admit that the price increases indicated in the lists decided on at the meetings were mostly put into effect by the various undertakings, including themselves.

182 Consequently, the applicants cannot validly rely on their purported non-implementation in practice of the agreements.

183 It must be considered, secondly, that the argument based on their purportedly exclusively passive or 'follow-my-leader' role in the infringement is unfounded.

184 A passive role implies that the undertaking adopted a 'low profile', that is to say, that it did not actively participate in the creation of any anti-competitive agreements (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 167, and the judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission* (not published in the ECR), paragraph 765).

185 It is clear from the case-law that amongst the circumstances that may indicate the adoption by an undertaking of a passive role within a cartel is the situation where the undertaking's participation in cartel meetings is significantly more sporadic than that of the 'ordinary' members of the cartel, and likewise its belated entry to the market where the infringement occurred, regardless of the duration of its participation in the infringement, or again the existence of express statements to that effect emanating from representatives of other undertakings which participated in the infringement (*Cheil Jedang* v *Commission*, paragraph 184 above, paragraph 168; 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 331; and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 126).

186 In the present case, it should first be noted that the Commission has established to the requisite legal standard that the applicants had participated in numerous meetings of the cartel and in bilateral meetings, and had repeatedly participated in a number of the collusive practices referred to in the contested decision. The claim that those undertakings had fewer bilateral contacts with the other cartel members than Amann and Coats had with their competitors is irrelevant in that regard.

187 Secondly, neither Gütermann nor Zwicky has referred to any specific circumstances, or evidence such as statements by other cartel members, capable of demonstrating that their respective attitudes differed significantly – on account of their purely passive or 'follow-my-leader' nature – from the conduct of the other participants in the cartel.

188 The limited market share or the lack of market share on which they rely cannot be regarded as evidence of a passive or purely 'follow-my-leader' role of any sort. To accept such a fact as a mitigating circumstance would duplicate the taking into account of the size of Gütermann and Zwicky for the purposes of calculating the fines on the basis of different treatment by category of undertaking, since the size by turnover already reflects the significance of each undertaking for the purposes of assigning them to different categories.

189 It is true that the Court accepted, in *Cheil Jedang* v *Commission*, paragraph 184 above, paragraph 180, that the small size of an undertaking is an important factor to take into consideration in assessing the actual impact of its late entry on the market on which the infringement occurred and its conduct in relation to the other producers. However, the circumstances of *Cheil Jedang* v *Commission* were very specific since the undertaking concerned was clearly placed at a disadvantage within the cartel concerning sales quotas as compared with the other producers and since it was possible to construe that as being a direct consequence of its more sporadic attendance at meetings and its late entry on the market. Those special circumstances do not exist in the present case.

190 Finally, the Commission was fully entitled to consider that the fact that representatives of Gütermann and Zwicky, respectively, undertook the role of chairman at a number of meetings belies the passivity of the conduct of those undertakings.

191 Gütermann and Zwicky do not in any way deny that their representatives formally chaired a number of meetings. However, they try to minimise that role by referring to the fact that, in reality, the chairmanship was effectively undertaken by Mr L., the

representative of Coats, even when a representative of one or other of the applicants was in the chair.

192 However, although it is true that the e-mail of 10 November 2000, on which the applicants rely, shows that the representative of Coats played an active role in the organisation of the meeting of 16 January 2001, the fact remains that it was indeed the representative of Zwicky, Mr F., who sent the invitations to the other participants. It must be stated that the fact that invitations were sent on 2 December 2000 – that is to say, immediately after the period during which Zwicky has been found to have participated in the infringement – is irrelevant in that regard. Sending the invitations is the last stage of preparatory work which began after reception of the e-mail of 10 November 2000. In any event, the mere fact that Zwicky allowed its representative to accept the chair reveals an attitude which was in no way passive or 'follow-my-leader'.

193 With regard to Gütermann's representative, Mr B., not merely did he act as chairman of cartel meetings, but he also organised them, as can be seen from his statements appended to Gütermann's reply to the statement of objections.

194 It is settled law that convening meetings, proposing an agenda and distributing preparatory documents for meetings are incompatible with a low-profile, passive or 'follow-my-leader' role. Such initiatives show the applicant's positive and active attitude to the founding, continuation and control of the cartel (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 257).

195 Thirdly, the applicants cannot properly rely on the economic difficulties they encountered in the period covered by the cartel. It is precisely because of the difficulties encountered by all undertakings in the industrial thread market in the mid-1990s that some of them, including Gütermann and Zwicky, decided to engage in anti-competitive conduct. As a general rule, cartels like those in the present case come into being when a sector encounters problems (see, to that effect, *Tokai*

I, paragraph 185 above, paragraph 345, and *Jungbunzlauer* v *Commission*, paragraph 194 above, paragraph 256).

196 Even supposing that, as Gütermann and Zwicky claim, a number of Commission decisions take account of the poor financial health of the sector in question, the fact that in previous cases the Commission took account of the economic situation in the sector as a mitigating circumstance does not mean that it must necessarily continue to do so (Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 372). The Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings, other product and service markets or other geographical markets at different times (Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* [2003] ECR II-4251, paragraph 191).

197 Fourthly, the applicants put forward, in their replies, a complaint alleging breach of the principle of the individual nature of punishments.

198 In the first place, it should be recalled that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

199 In the second place, according to settled case-law, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39; *Cableuropa and Others* v *Commission*, paragraph 196 above, paragraph 111; and the judgment of 12 July 2007 in Case T-229/05 *AEPI* v *Commission* (not published in the ECR), paragraph 21).

200 In the present case, it must be held, first, that no argument concerning the individual nature of punishments was raised in the applications and, secondly, that the present plea does not amplify another plea put forward in the applications and is not closely connected with the pleas put forward therein.

201 Since the argument also does not make reference to matters of law or of fact which have come to light in the course of the procedure, it must be rejected as inadmissible.

202 It follows that the plea alleging failure to take account of certain mitigating circumstances cannot be upheld.

The plea, put forward by Gütermann and Zwicky, alleging misapplication of the Leniency Notice

Arguments of the parties

203 The applicants were granted a 15% reduction in the fine in return for their cooperation before notification of the statement of objections and for not contesting the facts in their reply to that statement. In their view, a reduction of that size is insufficient given that their cooperation after the notification of the statement of objections went well beyond merely not contesting the facts.

204 First, the applicants provided information which permitted the Commission to have a complete overview of the conduct, content and context of the meetings and bilateral contacts.

205 With regard to the conduct of the meetings, they point out, first, that they corrected the statements made by Coats, which claimed, wrongly, that the meeting on 19 September 2000 was the only one during which increases in list prices were discussed and agreed on. Discussions concerning list prices and increases in those prices were held at all the meetings. The applicants also argue that the purported explanations provided by Coats in its reply to the statement of objections dealt only with the special prices and could not therefore call into question the usefulness of the corrections made by the applicants. Lastly, they maintain that those corrections, on the one hand, and the clarifications made by Coats, on the other, were provided at an essentially identical stage of the administrative procedure, even though the clarifications reached the Commission a few days before the corrections, and that chronological order cannot therefore be decisive in assessing cooperation.

206 Secondly, the applicants claim that they were the only ones who clearly explained that the purpose of the meetings was to reduce the difference between actual net prices and list prices, a point which is confirmed in recital 167 of the contested decision. The Commission wrongly relied on paragraph 141 of the statement of objections as a basis for arguing that, in that paragraph, it had already taken note of that purpose and the effects of the agreements on list prices. In fact, paragraph 141 of the statement of objections merely reveals that the Commission was able to prove that the participants in the meetings had tried, in a single case, to bring about an indirect increase in planned net prices but that the Commission did not, at that time, have any indications as to the general background to the discussions concerning list prices.

207 Secondly, the applicants claim that their cooperation was erroneously categorised as less useful than that of BST, to which the Commission granted a 20% reduction in the fine, and argue that this constitutes an infringement of the principle of equal treatment.

208 Thirdly, the applicants regard the 15% reduction in the fine, granted to them by the Commission, as insufficient on the ground that it is clear from the Commission's previous decision-making practice and from the case-law that the fact of not contesting the correctness of the facts gives rise to a reduction of at least 10% and, in certain cases, even 20%. It follows, in their view, that cooperation after notification of

the statement of objections which goes well beyond merely not contesting the facts should have led the Commission to grant a much larger reduction.

209 Fourthly, the applicants claim that they cooperated with the Commission within the meaning of the two indents of Section D2 of the Leniency Notice and that, on that basis, each should have been granted a reduction in the fine of at least twice 10%.

210 In that regard, according to the applicants, it does not appear from the contested decision that the Commission actually assessed their cooperation after they had received the statement of objections. Moreover, even supposing that their cooperation after receiving the statement of objections effectively went no further than not contesting the correctness of the facts, a reduction of at least 20% should have been granted to them even if their cooperation was of no use except in so far as the fact that they refrained from contesting the facts served to confirm the Commission's evidence. The applicants point out in that regard that, unlike the notice applicable in the present case, the Commission Notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) lays down the condition that the evidence provided must add significant value to that already in the Commission's possession.

211 Fifthly, the previous decision-making practice of the Commission has not been taken into account. The applicants claim that their cooperation is comparable to that of KME, the undertaking concerned in the 'Industrial tubes' case, which was granted a 30% reduction in the fine (Commission Decision of 16 December 2003 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 – Industrial tubes), recital 423). The only difference lies in the fact that the applicants corrected statements made by the other participants in the reply to the statement of objections and not at an earlier stage. In their view, it does not follow from Section D2 of the Leniency Notice that the contributions made by undertakings

to establishing the facts are to be assessed differently according to whether those contributions were made before or after notification of the statement of objections and, accordingly, the Commission should also have granted the applicants a total reduction in the fine of at least 30%.

212 The Commission contests that plea.

Findings of the Court

213 In its Leniency Notice, the Commission sets out the conditions in accordance with which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them (Section A3 of the Leniency Notice).

214 According to Section D1 of the Leniency Notice, '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated'.

215 Section D2 of the Leniency Notice states as follows:

'Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

216 In the present case, it is clear from the contested decision that the Commission considered that it could grant Gütermann and Zwicky a 15% reduction each in the fine, pursuant to the first and second indents of Section D2 of the Leniency Notice (contested decision, recital 397).

217 To justify its assessment, the Commission states, first, that the information, documents and other evidence provided by Gütermann and Zwicky before notification of the statement of objections had materially contributed to establishing the existence of the infringement (contested decision, recital 395). It then pointed out that the applicants had admitted, in their first reply to the request for information, that list prices had been exchanged and discussed at the meetings. Lastly, the Commission stated that the applicants had not substantially contested the facts on which the Commission's allegations were based (contested decision, recital 396).

– The usefulness of the cooperation

218 First of all, it should be pointed out that the applicants do not deny the truth of the statement made in recital 385 of the contested decision that they did not meet the conditions for application of Section B and Section C of the Leniency Notice, with

the result that their conduct had to be assessed in the light of Section D of that notice, which is entitled 'Significant reduction in a fine'.

219 It should also be recalled that the Commission has a broad discretion as regards the method of calculating fines and that it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 81).

220 The Commission enjoys a broad discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, especially in comparison with the contributions made by other undertakings (*SGL Carbon* v *Commission*, paragraph 219 above, paragraph 88).

221 Lastly, it should be borne in mind that, according to the case-law, the reduction of fines in cases where the undertakings which participated in infringements of Community competition law have offered cooperation is justified only where it is considered that the cooperation made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 399, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363). In view of the rationale for the reduction, the Commission cannot disregard the usefulness of the information provided, which inevitably depends on the evidence already in its possession.

222 To that effect, it can be seen from the case-law that where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information that has already been provided by another undertaking by way of

cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable with that provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly, that is to say, sufficiently to justify a reduction in the fine for cooperation (see, to that effect, *Groupe Danone* v *Commission*, paragraph 137 above, paragraph 455).

223 In the present case, it is important first to make it clear that, although Section D2 of the Leniency Notice does not contemplate the possibility of new information and evidence being provided after notification of the statement of objections, that in no way rules out the possibility that such a circumstance might lead to a reduction in the fine on the basis of that provision. The list of circumstances set out in Section D2 of the Leniency Notice is merely illustrative, as is confirmed by the use of the words 'may include' (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 274).

224 That assessment is confirmed in Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 59, inasmuch as the Court of Justice accepted in that case that the Commission may take account of an admission by undertakings as to the legal characterisation of the facts complained of at an early stage of the procedure, since that amounts to an admission of the infringement. That situation is referred to in Sections B and C of the Leniency Notice but is not expressly envisaged in Section D. The Court of Justice held, however, that there was no reason why an undertaking should not be rewarded for such an admission, even if it was made at an earlier stage than that envisaged in Sections B and C of the Leniency Notice. By opting for that approach, the Court of Justice confirmed the more general principle that leniency is a reward granted by the Commission in return for facilitating establishment of the infringement, whatever the stage at which the undertaking provided assistance and regardless of whether the assistance consisted in the provision of new information and evidence, or in the admission of facts or of the legal characterisation of the facts.

225 It follows that, in the present case, the question whether the new information and evidence provided by Gütermann and Zwicky after notification of the statement of objections must be taken into account and, accordingly, whether that must lead to a reduction in the fine in recognition of that cooperation, depends principally on the quality and usefulness of the cooperation provided, which, as was pointed out in paragraphs 219 and 220 above, is a matter for the Commission to assess in the exercise of its broad discretion.

226 Thus, a satisfactory answer to that question does not emerge from the simple finding that the information and evidence was provided after notification of the statement of objections; on the contrary, it is necessary to determine specifically – with regard both to the quality and usefulness of the information and evidence and to the time at which it was provided – whether the Commission committed a manifest error in its assessment of the degree of cooperation shown by Gütermann and Zwicky.

227 It should be noted from the start that the applicants do not dispute the finding that the information provided by Coats was decisive in establishing the existence of the cartel on the industrial thread market in Benelux and the Nordic countries. On that basis, recital 387 of the contested decision lists the evidence, provided by Coats, which was used to substantiate many points made in the statement of objections.

228 First, however, the applicants claim that they corrected the statements made by Coats concerning the frequency of the meetings dealing with list prices and increases in those prices, and of the meetings dealing with the special prices.

229 With regard, in the first place, to the frequency of the meetings dealing with list prices and increases in those prices, the applicants rely, wrongly, on a statement, made by the representative of Coats in the request for application of the Leniency Notice, to the effect that the meeting on 19 September 2000 was the only one at which increases in 'actual prices' were discussed and agreed on.

230 The Commission found, in paragraph 100 of the statement of objections, that the suppliers – including Coats, BST, Gütermann and Zwicky – had admitted that price lists had been discussed and exchanged at the meetings. Moreover, it is clear from the observations set out in paragraph 102 of the statement of objections that, unlike Gütermann and Zwicky, Coats had conceded that, at those meetings, the undertakings had agreed on future price lists and the dates on which the increases would be put into effect. The information provided by Gütermann and Zwicky concerning actual prices did not therefore enhance the Commission's understanding of the situation. In consequence, the applicants' argument is irrelevant.

231 With regard, in the second place, to the frequency of discussions concerning the special prices, it should be pointed out that, in paragraph 107 of the statement of objections, the Commission stated that the suppliers, including Coats, had denied, or had failed to mention, that they had exchanged information and arrived at agreements concerning special prices and net prices. Moreover, with regard to the exchange of information on discounts and rebates, the Commission stated in paragraph 105 of the statement of objections that the suppliers – with the exception of Coats in the period up to the mid-1990s – had denied, or failed to mention, the existence of discounts and rebates. It should also be noted that the undertakings concerned, such as Coats, Zwicky, Gütermann and BST, did not point out until after the statement of objections had been notified that special prices had been discussed and agreed on at the meetings.

232 However, the Commission correctly argues that it was able to prove those aspects of the infringement by virtue of documents which Coats had appended to its reply to the request for information. Those documents include, first, the minutes of a meeting held on 8 September 1998, drawn up by a representative of Barbour Threads, indicating the existence of agreements providing for discounts and reductions in rebates and of agreements on increases in special prices. The Commission referred to those documents several times in the statement of objections (paragraphs 106, 108 and 121). The documents also include an e-mail of 10 October 2000, appended to the statements made by F. S., the representative of Coats, confirming that reductions in discounts and increases in special prices had been agreed on at a meeting on 19 September 2000. The Commission mentions this in paragraph 126 of the statement of objections. Lastly, the documents include e-mails appended by Coats to its request for leniency, including an e-mail of October 2000 which indicates an exchange of information with

Amann and Gütermann concerning special prices. That document is mentioned in paragraph 133 of the statement of objections, in the footnote on page 268.

233 The Commission was also right to point out that the information provided by BST had also helped it to establish the existence of the discussions and agreements concerning special prices. That finding emerges, in particular, from paragraphs 104 and 106 of the statement of objections, as well as from the footnotes on pages 173, 174 and 176.

234 It follows that the alleged corrections made to the statement of objections by the applicants were merely confirmations of what the Commission already knew, by virtue of the information referred to above, before notification of the statement of objections.

235 Consequently, the Commission's assessment of the cooperation provided by the applicants was unaffected by the fact that Coats comments concerning the special prices, made following that notification, reached the Commission before the applicants' comments.

236 Secondly, the applicants' argument that they were the only undertakings to have explained, in their reply to the statement of objections, that the purpose of the meetings was to close the gap between list prices and actual net prices, and to increase indirectly the net prices for various products, must be rejected.

237 Although it is true that, in recital 167 of the contested decision, the Commission quoted words used by Gütermann in its reply to the statement of objections in order to explain the purpose of the meetings, the fact remains that the Commission had already discovered that purpose, as well as the effects of the agreements, as is clear from paragraphs 141 and 142 of the statement of objections. The information mentioned in those paragraphs was provided by Coats in the framework of its request for leniency,

and by giving a specific example – the increase in the list prices – that information enabled the Commission to provide details concerning the general background to the discussions concerning list prices.

— The allegedly incorrect assessment of the cooperation as compared with that of BST

238 As regards the applicants' request for a reduction at least equivalent to that granted to BST, it should be borne in mind that, according to settled case-law, when assessing the cooperation provided by the undertakings concerned, the Commission cannot ignore the principle of equal treatment, which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see *Tokai I*, paragraph 185 above, paragraph 394 and the case-law cited). However, it must be accepted that the Commission has a broad discretion in assessing the quality and usefulness of the cooperation provided by the various members of a cartel, and only a manifest abuse of that discretion can be censured.

239 However, it can be seen from a comparison of the cooperation provided by those undertakings that the Commission did not infringe the principle of equal treatment in any way.

240 With regard, first, to the cooperation provided before notification of the statement of objections of 15 March 2004, the Commission considered that BST had helped it considerably to establish the content of many agreements (including the greater part of the content of the agreements concluded at the beginning of the 1990s, the content of the agreement concluded in Vienna (Austria) on 8 October 1996 and the content of the agreement concluded in Zurich (Switzerland) on 9 September 1997); that BST had been the only undertaking to provide it with the price lists it had received from its competitors at the meetings; and that BST had provided information going well beyond what was required by the request for information. In support of its findings, the Commission refers to numerous footnotes in the statement of objections which

show that BST had provided a great deal of evidence (including Annex 14 to BST's reply to the request for information, which contains the price lists exchanged at the meetings) and that it was also an important source of information in the context of the Commission's provisional findings.

241 With regard to the applicants' cooperation before notification of the statement of objections, it should be pointed out that the Commission certainly admits that the applicants also provided it with documents giving an overview of the meetings at the beginning of the 1990s. It is none the less true that the Commission considered that that information turned out to be less useful than the information provided by BST. The applicants have not challenged those findings; they have merely claimed that the information available to them did not permit them to know whether BST had provided more information and evidence than they had. However, as was pointed out above, it is clear from recitals 391 to 397 of the contested decision and from numerous references in the footnotes to documents supplied by BST in support of the Commission's findings in the statement of objections that BST's cooperation was more significant.

242 With regard, secondly, to the cooperation shown after notification of the statement of objections, it is clear from the contested decision that neither BST nor the applicants challenge the accuracy of the facts found and that all three undertakings provided identical cooperation at the stage of the administrative procedure. In the light of the observations made in paragraphs 228 to 237 above, the applicants are wrong to argue that, after notification of the statement of objections, they provided the Commission with information of which it had been unaware. Consequently, they cannot claim to have provided information so useful as to justify a reduction in their fines at least equal to that granted to BST.

243 Even supposing that it had to be accepted that the applicants had provided details as useful as those provided by BST concerning certain points in the statement of objections, the Commission did not commit a manifest error of assessment by giving priority to the fact that the information and evidence from BST was provided before notification of the statement of objections.

— The alleged misapplication of the Leniency Notice and the alleged failure to take account of the case-law of the Court

244 The applicants argue – incorrectly – that, since the Commission accepted that their cooperation met the conditions characterising the two categories of conduct referred to in Section D of the Leniency Notice, it should have granted each of them a reduction in the fine of at least twice 10%, that is to say, of at least 20%.

245 It must be stated that Section D of the Leniency Notice provides for a range extending from 10% to 50%, without setting particular criteria for the adjustment of the reduction within that range. The Leniency Notice does not therefore give rise to any legitimate expectation of a specific percentage reduction. In addition, contrary to what the applicants are essentially arguing, Section D of the Leniency Notice is in no way to be interpreted as requiring the Commission to grant a specific minimum reduction of 10% for every case which has been found to constitute cooperation covered by that provision but, on the contrary, must be understood as providing for a single reduction of at least 10%.

246 Thus, so long as the Commission does not manifestly exceed its broad discretion when it assesses the extent to which its work has been facilitated by the cooperation of an undertaking, it is perfectly free to mention in its decision the specific percentages which it has adopted for each case of cooperation which has been found to fall under Section D of the Leniency Notice and then to add them together, just as it is permissible to mention only a single overall percentage which it considers itself able to grant for the same situations. As the Commission correctly points out, the assessment of the usefulness of cooperation is in no way based on an arithmetical formula automatically indicating a reduction of at least 20% if the two indents of Section D of the Leniency Notice are found to apply.

247 The judgment in *Tokai I*, paragraph 185 above, on which the applicants rely, does not cast doubt on that assessment. It is clear from Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/36.490 – Graphite electrodes) (OJ 2002 L 100, p. 1), which was at issue in *Tokai I*, that the Commission had relied solely and expressly on the first indent of Section D2 of the Leniency Notice in the case of the undertaking concerned. However, the Court found that the undertaking concerned had also cooperated under the second indent. The Commission sought to explain that it had carried out a single reduction, combining the two types of cooperation. However, in contrast with the present case, the finding that the undertaking concerned had not contested the facts did not appear in any of the recitals concerning that undertaking's cooperation. That is why the Court considered itself compelled to accept that the Commission had not allowed the undertaking concerned the benefit of the second indent of Section D2 of the Leniency Notice.

— The alleged failure to take account of previous decision-making practice

248 The argument put forward by the applicants on the basis of the alleged previous decision-making practice of the Commission must be rejected. The mere fact that, in the framework of its previous decision-making practice, the Commission granted a certain rate of reduction for given conduct does not mean that it is required to grant a reduction of the same proportion when assessing similar conduct in the course of a later administrative procedure (*Brugg Rohrsysteme* v *Commission*, paragraph 50 above, paragraph 193).

249 In any event, the applicants' cooperation is in no way comparable with that of KME, as determined in the 'Industrial Tubes' decision, paragraph 211 above, to which they refer. It is clear from that decision that, before receiving the statement of objections, KME had provided significant cooperation which contributed to proving as a fact the existence of the cartel over its entire duration. KME had in fact produced documents concerning the infringement, together with a detailed description of how the cartel operated, explaining in detail the context in which to place the various documents

which the Commission had discovered during its inspections. The applicants' cooperation before the notification of the statement of objections was not of that degree of significance.

250 In the light of the above, the plea alleging misapplication of the Leniency Notice must be rejected.

The plea, put forward by Gütermann and Zwicky, alleging that the fines are disproportionate

Arguments of the parties

251 The applicants put forward a number of arguments in support of their plea alleging that the fines are disproportionate.

252 First of all, they argue that the Commission did not take account of the considerable economic difficulties they had encountered for many years as a result of the structural changes undergone by the thread industry. The crisis in the sector caused a drop in their profits and led Zwicky to terminate its activities on the market in November 2000. The Commission also overlooked the banking problems encountered by Gütermann and the additional interest burden which flowed from them.

253 Secondly, according to the applicants, the fines imposed on Gütermann (EUR 4.021 million) and Zwicky (EUR 0.174 million) are disproportionate to their turnover on the market concerned by the infringement. In support of that position,

they argue that Gütermann's operating results, during the eleven and a half years of the infringement, amounted to EUR 318 000 after taxes and Zwicky's turnover for 2000 was only EUR 200 000.

254 Similarly, Gütermann – supported by Zwicky in its reply – claims that the starting amounts used to calculate the fines (EUR 2.2 million for Gütermann and EUR 100 000 for Zwicky) are, on the one hand, disproportionate to the cumulative turnover of all the undertakings in respect of the products concerned by the infringement (EUR 50 million) and, on the other hand, excessive when compared with the latter figure, which reflects the size of the market for the products concerned, and the size of the world market for industrial thread (EUR 4 billion to EUR 5 billion).

255 In the applicants' view, the Commission had a duty, in accordance with the case-law, to take account of the size of the relevant market when considering the gravity of the infringement and the proportional nature of the fine. The Commission is thus incorrect in arguing that that criterion was merely one factor among others and that it was not therefore required to take it into account.

256 Thirdly, Gütermann claims that the method of calculation used in order to arrive at the amount of the fine imposed on it is clearly disadvantageous to small and medium-sized undertakings. The size of such undertakings is not taken into account and the fines obtained by that method of calculation are thus disproportionate. The effect is that, in the present case, the fine imposed on it is disproportionate to the fines imposed on other undertakings such as BST or Coats.

257 Fourthly, the application of the Guidelines in the present case is inappropriate, particularly from the point of view of equal treatment, in the light of the fact that, for future cases concerning small and medium-sized undertakings, more equitable treatment

is provided for in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

258 The Commission contests that plea.

Findings of the Court

259 First, the applicants are incorrect in arguing that the fine imposed on them was disproportionate in the light of their precarious financial situation and because of the risk that the fine might cause them to cease trading.

260 According to settled case-law, and as was repeated in recital 404 of the contested decision, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to conferring an unfair competitive advantage on the undertakings least well adapted to market conditions (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55; *Dansk Rørindustri and Others* v *Commission*, paragraph 221 above, paragraph 327; and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 105).

261 Furthermore, even if a measure taken by a Community authority were to lead to the liquidation of an undertaking, such a liquidation of the undertaking in its existing legal form – although it may adversely affect the financial interests of the owners, investors or shareholders – does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value (see, to that effect, *Tokai I*, paragraph 185 above, paragraph 372).

262 In the light of that case-law, it must be concluded that the Commission had absolutely no obligation to take account of Gütermann's economic situation in the contested decision or even to mention the explanations put forward by Gütermann with regard to that situation. The fact that the Commission considered it appropriate to refer to the financial situation of Zwicky, and not that of Gütermann, is easy to understand in the light of Zwicky's particularly difficult economic situation, which led it to sell its industrial thread business to Gütermann.

263 Secondly, the applicants complain, in essence, that the Commission did not take account of the size of the relevant market and thus imposed a fine which was out of all proportion to the size of that market. They also refer to the disproportionate nature of the fine in relation to the turnover which each of them achieved on the market concerned by the infringement and to the disproportionate nature of the starting amount in relation to their respective turnovers.

264 It should be borne in mind, first, that the principle of proportionality requires that measures adopted by Community institutions must not exceed the limits of 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 (*Jungbunzlauer* v *Commission*, paragraph 194 above, paragraphs 226 to 228).

265 With regard to the complaint that the Commission did not take account of the size of the relevant market, it should be borne in mind that, under Article 15(2) of Regulation No 17 and 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 size of the relevant geographic market.

266 Thus, neither Regulation No 17, nor 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 (Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 148).

267 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 78 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.

268 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.

269 In the present case, the infringement 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, to the advantage of the incumbent supplier and with a view to customer allocation (contested decision, recitals 99 to 125 and 345). Such practices constitute horizontal restrictions of the 'price cartel' type within the meaning of the Guidelines and, accordingly, are inherently 'very serious'. In that context, the limited size of the relevant market – even if that were to be established – is of lesser importance than all the other factors indicative of the gravity of the infringement.

270 In any event, account should be taken of the fact that the Commission considered that the infringement had to be regarded as very serious within the meaning of the Guidelines, which provide that a starting amount in excess of EUR 20 million may be regarded as 'likely' for such cases. In the present case, the Commission, in the contested decision, divided the undertakings concerned into a number of categories according to their relative importance on the relevant market. It can be seen from recital 358 of the contested decision that the Commission fixed a starting amount of only EUR 14 million for undertakings in the first category, EUR 5.2 million for those in the second category, EUR 2.2 million for those in the third category (such as Gütermann), and EUR 0.1 million for those in the fourth category (such as Zwicky). It follows that the amounts which served as the starting point for the calculation of the fines to be imposed on Gütermann and Zwicky are significantly lower than those which, pursuant to the Guidelines, the Commission could have regarded as 'likely' for very serious infringements. The starting amounts determined for the fines suggest that account was indeed taken of the size of the market for the products in question.

271 In the light of those considerations, it must be concluded that the fines imposed on Gütermann and Zwicky are in no way disproportionate to the size of the market for industrial thread in Benelux and the Nordic countries.

272 In addition, the argument that the starting amount for the fines was disproportionate to the turnover of Gütermann and of Zwicky on the market in question must also be rejected.

273 It should be borne in mind that, in order to fix the starting amount for the fine, to be determined according to the gravity of the infringement, the Commission considered it necessary to treat the undertakings which had participated 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, hence 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 market for the product covered by the cartel.

274 Consequently, and as was pointed out in paragraph 270 above, the Commission divided the undertakings into four categories. In view of its turnover of EUR 2.36 million, Gütermann was placed in the third category and Zwicky, in view of its turnover of EUR 0.2 million, was placed in the fourth. On the basis of the gravity of the infringement, the Commission decided on a starting amount of EUR 2.2 million for Gütermann and EUR 0.1 million for Zwicky (contested decision, recitals 356 to 358).

275 It is clear from 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 184 above, paragraph 91, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 79 above, paragraph 196). That turnover figure is likely to give a fair indication of the liability of each cartel member 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.

276 In the light of those considerations, it must be concluded that the starting amounts decided upon for the calculation of the fines to be imposed on Gütermann and Zwicky do not appear to be in any way disproportionate to the turnovers of those undertakings on the relevant market.

277 As a consequence, it is also necessary to reject the argument that the fine is disproportionate to the turnovers respectively achieved by the applicants on the relevant market. The applicants 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, Case T-23/99

LR AF 1998 v *Commission* [2002] ECR II-1705, paragraph 304, and Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 185). In any event, it should be pointed out that Community law contains no general principle that the penalty be proportionate to the turnover which the undertaking made from the sale of the product in respect of which the infringement was committed (see, to that effect, Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 339).

278 Thirdly, it is also necessary to reject Gütermann's argument that the method of calculation is disadvantageous to small and medium-sized undertakings and leads, in the present case, to the imposition of a fine which is disproportionate for Gütermann, when compared with the fines imposed on the other undertakings.

279 Since the Commission is under no obligation to base its calculation of the fines on the turnover of the undertakings concerned, it is by the same token under no obligation, where fines are imposed on a number of undertakings involved in the same infringement, to ensure that the final amounts calculated for the fines reflect every difference between the undertakings concerned in terms of their overall turnover or their turnover on the market for the product in question (Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 202).

280 It should be noted in that regard that, likewise, there is no requirement under Article 15(2) of Regulation No 17 or Article 23(2) of Regulation No 1/2003 to the effect that, where fines are imposed on a number of undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than the fines imposed on the larger undertakings. It is clear from those provisions that, both for small or medium-sized undertakings and for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified,

for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than the amount of the fines imposed on other undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 279 above, paragraph 203, and *Westfalen Gassen Nederland* v *Commission*, paragraph 277 above, paragraph 174).

281 Thus, there is nothing to compel the Commission to moderate fines where the undertakings concerned are small or medium-sized undertakings. The size of the undertaking is already taken into consideration by virtue of the upper limit laid down in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, and the provisions of the Guidelines (*Westfalen Gassen Nederland* v *Commission*, paragraph 277 above, paragraph 174). Apart from those considerations concerning size, there is no reason to treat small and 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 (Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 84).

282 The complaint that the Commission failed to take account of the overall turnover of the various undertakings when it set the amount of the fine is irrelevant. 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 184 above, paragraph 81).

283 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 general 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 paragraph 273 above (see, to that effect, *Cheil Jedang* v *Commission*, paragraph 184 above, paragraph 82, and *Tokai I*, paragraph 185 above, paragraph 195).

284 In the present case, however, as was pointed out in paragraph 275 above, it was consistent and objectively justified on the part of the Commission to refer to the turnover on the relevant market in order to determine the capacity of each of the undertakings concerned to cause damage. In so doing, the Commission also sought to deter, inasmuch as it made public the fact that, where undertakings participated in a cartel on a market where they had significant weight, it would penalise them more severely.

285 Fourthly, Gütermann is wrong in relying, in support of its plea concerning the disproportionate nature of the fine, on the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. The Court finds that it cannot be inferred that the fine imposed by the contested decision is disproportionate merely because, if the new method for calculating fines – as set out in those guidelines, which are not applicable to the facts of the present case – were applied, the fine would be lower.

286 That finding merely reflects the margin of discretion enjoyed by the Commission for the purposes of establishing, in compliance with the requirements set out in Regulation No 17 and Regulation No 1/2003, the method which it intends to apply in order to calculate the fines and thus to give practical effect to the competition policy for which it is responsible. The Court may therefore take into account, as some of the

criteria for assessing whether the fines imposed at a particular time are proportionate, the circumstances of fact and law obtaining in the period when the unlawful conduct took place, as well as the competition objectives current at that time, as defined by the Commission in accordance with the requirements of the EC Treaty.

287 The plea alleging that the fines are disproportionate must therefore be rejected in its entirety.

288 It follows from the above considerations that the actions in Cases T-456/05 and T-457/05 must be dismissed.

Costs

289 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants 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 actions;

2. Orders Gütermann AG and Zwicky & Co. AG to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 28 April 2010.

[Signatures]

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