JUDGMENT OF THE COURT (First Chamber)
25 January 2007 *

Table of contents

* Language of the case: Italian.

In Case C-407/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 24 September 2004,

Dalmine SpA, established in Dalmine (Italy), represented by A. Sinagra, M. Siragusa and F. Moretti, avvocati,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by A. Whelan and F. Amato, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász, K. Schiemann and M. Ilešič (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2006,

gives the following

Judgment

1 By its appeal, Dalmine SpA ('Dalmine' or 'the appellant') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 8 July 2004 in Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395 ('the judgment under appeal'), in so far as it dismissed its action for annulment of Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (OJ 2003 L 140, p. 1; 'the contested decision').

I — The contested decision

A — *The cartel*

2 The Commission of the European Communities addressed the contested decision to eight undertakings which produced seamless steel tubes. Those undertakings included four European companies ('the Community producers'): Mannesmann-röhren-Werke AG ('Mannesmann'), Vallourec SA ('Vallourec'), Corus UK Ltd (formerly British Steel Ltd; 'Corus') and Dalmine. The other four addressees of the contested decision are Japanese companies ('the Japanese producers'): NKK Corp., Nippon Steel Corp., Kawasaki Steel Corp. and Sumitomo Metal Industries Ltd ('Sumitomo').

3 Seamless steel tubes are used in the oil and gas industry and consist of two broad categories of products.

4 The first of those categories consists of borehole pipes and tubes, commonly called 'Oil Country Tubular Goods' or 'OCTG'. Those tubes may be sold unthreaded ('plain ends') or threaded. Threading is an operation intended to enable OCTG tubes to be joined. It may be carried out according to the standards laid down by the American Petroleum Institute (API), tubes threaded by that method being known as 'OCTG standard tubes', or according to special techniques, which are generally patented. In the latter case, the threading or joint is 'top quality' or 'premium', pipes threaded according to that method being known as 'OCTG premium pipes'.

5 The second category of products consists of pipes for carrying oil and gas ('line pipe'); pipes manufactured according to standardised norms are distinguished from those made to order for specific projects ('project line pipe').

6 In November 1994, the Commission of the European Communities decided to initiate an investigation into anti-competitive practices concerning those products. In December of that year, it carried out inspections at the premises of a number of undertakings. Between September 1996 and December 1997, the Commission carried out further inspections at the premises of Vallourec, Dalmine and Mannesmann. During an inspection carried out at Vallourec's premises on 17 September 1996, the head of Vallourec Oil & Gas, Mr Verluca, made a number of statements ('Mr Verluca's statements'). During an inspection at Mannesmann's premises in April 1997, the director of that undertaking, Mr Becher, also made a number of statements ('Mr Becher's statements').

7 The Commission also sent requests for information, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), to a number of undertakings. As Dalmine refused to supply some of the information requested, the Commission decision of 6 October 1997 relating to a proceeding pursuant to Article 11(5) of Regulation No 17 was sent to it ('the decision of 6 October 1997'). Dalmine brought an action for annulment of that decision; its action was declared manifestly inadmissible by order of the Court of First Instance of 24 June 1998 in Case T-596/97 *Dalmine* v *Commission* [1998] ECR II-2383.

8 In view of Mr Verluca's and Mr Becher's statements and other evidence, the Commission found in the contested decision that the eight undertakings to which the decision was addressed had concluded an agreement the object of which was, in particular, observance of their respective domestic markets. According to that agreement, each undertaking undertook not to sell OCTG standard pipe and project line pipe on the domestic market of another party to the agreement.

9 The agreement was stated to have been concluded at meetings between Community and Japanese producers known as the 'Europe-Japan Club'.

10 The principle of observance of domestic markets was designated by the term fundamental rules ('fundamentals'). The Commission established that those fundamental rules had actually been observed and that, accordingly, the agreement in question had had anti-competitive effects on the common market.

11 The agreement consisted, in all, of three parts, the first part being represented by the fundamental rules on observance of domestic markets, described above, which

constitute the infringement found in Article 1 of the contested decision, the second part consisting in the fixing of prices for tenders and minimum prices for 'special markets' and the third consisting in sharing the other world markets, with the exception of Canada and the United States of America, by means of 'sharing keys'.

12 As regards the existence of the fundamental rules, the Commission relied on a series of documentary indicia set out at points 62 to 67 of the grounds of the contested decision and also in the table at point 68 thereof. That table shows that the share of the domestic producer in deliveries made by the addressees of the contested decision to Japan and to the domestic market of each of the four Community producers is very high. The Commission inferred that, overall, the domestic markets were in fact observed by the parties to the agreement.

13 The members of the Europe-Japan Club met in Tokyo on 5 November 1993 in order to attempt to reach a new market-sharing agreement with the Latin American producers. The terms of the agreement adopted on that occasion were set out in a document handed to the Commission on 12 November 1997 by an informant not involved in the proceedings, which contained, in particular, a 'sharing key' ('the sharing key document').

B — *The duration of the cartel*

14 The Europe-Japan Club met from 1977, approximately twice each year, until 1994.

15 The Commission considered, however, that 1990 should be taken as the starting point of the cartel for the purpose of fixing the amount of the fines, owing to the existence, between 1977 and 1990, of an agreement between the European Community and Japan on the voluntary restraint of exports. According to the Commission, the infringement came to an end in 1995.

C — *The fines*

16 For the purpose of setting the amount of the fines, the Commission characterised the infringement as very serious on the ground that the agreement was intended to ensure observance of domestic markets and thus jeopardised the proper functioning of the single market. On the other hand, it noted that sales of seamless carbon steel tubes in the four Member States in question by the undertakings concerned amounted only to around EUR 73 million a year.

17 On the basis of those factors, the Commission set the amount of the fine intended to reflect the gravity of the infringement at EUR 10 million for each of the eight undertakings. As they were all large undertakings, the Commission considered that there was no need to differentiate between the amounts adopted.

18 The Commission considered that the infringement was of medium duration and increased by 10% for each year of its participation in the infringement the amount of the fine established on the basis of gravity in order to set the basic amount of the fine imposed on each of the undertakings. However, taking into account the fact that the steel pipe and tube industry had been in crisis for a long time and that the situation in the sector had deteriorated since 1991, the Commission reduced the basic amounts by 10%, on the ground of attenuating circumstances.

19 Last, the Commission reduced Vallourec's fine by 40% and Dalmine's by 20% in accordance with point D.2 of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'), in order to take account of the fact that both undertakings had cooperated with the Commission during the administrative procedure.

20 In Article 2 of the contested decision, the Commission considered that the conclusion of contracts between the Community producers concerning the sale of plain end pipes on the United Kingdom market constituted an infringement. However, it did not impose additional fines for that infringement, on the ground that the contracts constituted merely a means of implementing the principle of observance of domestic markets decided in the framework of the Europe-Japan Club.

D — *The operative part of the contested decision*

21 According to Article 1(1) of the contested decision, the eight undertakings to which the decision was addressed 'infringed the provisions of Article 81(1) of the EC Treaty by participating ... in an agreement providing, inter alia, for the observance of their respective domestic markets for seamless standard ... OCTG pipes and tubes and project line pipe'.

22 Article 1(2) of that decision provides that the infringement lasted from 1990 to 1995 in the case of Mannesmann, Vallourec, Dalmine, Sumitomo, Nippon Steel Corp., Kawasaki Steel Corp. and NKK Corp. In the case of Corus, the infringement is stated to have lasted from 1990 to February 1994.

23 The other relevant provisions of the operative part of the contested decision are worded as follows:

'*Article 2*

1. [Mannesmann], Vallourec ..., [Corus] and Dalmine ... infringed Article 81(1) of the EC Treaty by concluding, in the context of the infringement mentioned in Article 1, contracts which resulted in a sharing of the supplies of plain end OCTG pipes and tubes to [Corus] (to Vallourec ... from 1994).

2. In the case of [Corus], the infringement lasted from 24 July 1991 to February 1994. In the case of Vallourec ..., the infringement lasted from 24 July 1991 to 30 March 1999. In the case of Dalmine ..., the infringement lasted from 4 December 1991 to 30 March 1999. In the case of [Mannesmann], the infringement lasted from 9 August 1993 to 24 April 1997.

...

Article 4

The following fines are imposed on the [undertakings] mentioned in Article 1 on account of the infringement established therein:

1. [Mannesmann] EUR 13 500 000

2. Vallourec ... EUR 8 100 000

3. [Corus] EUR 12 600 000

4. Dalmine ... EUR 10 800 000

5. Sumitomo ... EUR 13 500 000

6. Nippon Steel ... EUR 13 500 000

7. Kawasaki Steel ... EUR 13 500 000

8. NKK ... EUR 13 500 000'.

II — The procedure before the Court of First Instance and the judgment under appeal

24 By applications lodged at the Registry of the Court of First Instance, seven of the eight undertakings on which sanctions were imposed by the contested decision, including Dalmine, brought actions seeking annulment, in whole or in part, of that decision and, in the alternative, annulment of the fine imposed on them or reduction in the amount thereof.

25 By the judgment under appeal, the Court of First Instance:

— annulled Article 1(2) of the contested decision in so far as it found that the infringement imputed by that article to Dalmine existed before 1 January 1991;

— set the amount of the fine imposed on Dalmine at EUR 10 080 000;

— dismissed the remainder of the application;

— ordered the parties to bear their own costs.

III — The procedure before the Court of Justice

26 In its appeal, Dalmine claims that the Court should:

— set aside the judgment under appeal;

— annul the contested decision;

— in the alternative, annul or reduce the fine set in Article 4 of the contested decision;

— furthermore, in the alternative, refer the case back to the Court of First Instance for a fresh judgment based on the decision of the Court of Justice;

— order the Commission to pay the costs incurred before the Court of First Instance and the Court of Justice.

27 The Commission requests the Court to dismiss the appeal as inadmissible in part and in any event as wholly unfounded, and also to order the appellant to pay the costs.

IV — The appeal

28 Dalmine raises, in substance, eight pleas in law with a view to having the judgment under appeal set aside and the contested decision annulled; of these, three concern procedural defects, two relate to defects concerning the finding of the infringement referred to in Article 1 of the contested decision and, last, three relate to defects concerning the finding of the infringement referred to in Article 2 of that decision.

29 In addition, Dalmine relies on two pleas relating to the amount of the fine.

A — *First plea, alleging illegality of the questions put by the Commission during the investigation*

1. Arguments of the parties

30 In Dalmine's submission, the Court of First Instance made an error of law and breached the rights of the defence in that it held that the questions put by the Commission in the course of the investigation were lawful. It follows that the appellant's right not to incriminate itself was disregarded.

31 Dalmine focuses this plea on part (d) of the first question in Annex 1 to the decision of 6 October 1997, which is worded as follows: 'For the meetings for which you have not succeeded in finding the relevant documents, please describe the object of the meetings, the decisions adopted, the type of documents received before and after the meetings, the quotas ("sharing keys") discussed and/or decided by geographic sector and their period of validity, specifying their type ("Target Price", "Winning Price" — "WP", "Proposal Price" — "PP", "Rock Bottom Prices" — "RBP")'.

32 The Commission observes that the right not to incriminate oneself applies only in respect of requests for information to which the addressee is required to reply, under pain of a fine. Part (d) of the first question in Annex 1 is not among the questions to which the decision of 6 October 1997 required a reply under pain of a fine.

2. Findings of the Court

33 In order to determine whether the Court of First Instance made the alleged errors, it is necessary to refer to the case-law concerning the extent of the Commission's powers in preliminary investigation procedures and administrative procedures, having regard to the need to respect the rights of the defence.

34 According to that case-law, the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 34 and 35; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 61 and 65; and Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 49).

35 In the present case, as the Advocate General observed at point 29 of his Opinion, it follows from the operative part of the decision of 6 October 1997 that Dalmine was not compelled to answer part (d) of the first question, cited at paragraph 31 of this judgment. In those circumstances, as the Court of First Instance found at paragraphs 45 and 46 of the judgment under appeal, Dalmine cannot effectively rely on its right not to be compelled by the Commission to admit having participated in an infringement.

36 It follows that the first plea must be rejected.

B — *Second plea, alleging that certain evidence is inadmissible*

1. The sharing key document

(a) Arguments of the parties

37 Dalmine maintains that the Court of First Instance was wrong to consider that the sharing key document was admissible as incriminating evidence and that it thereby infringed Community law, in particular the rights of the defence. As that document was given to the Commission by an unknown third party, its authenticity could not be checked. Furthermore, the Commission is not aware of the identity of the person with whom that document originated.

38 Dalmine observes that, in order for an anonymous document to be admissible as evidence, its relevance and its reliability must be demonstrated to the person against whom it is to be used. It maintains that anonymous documents may, where appropriate, justify the initiation of an investigation but cannot constitute the basis of the accusation.

39 Next, Dalmine contends that the judgment under appeal is contradictory, since the Court of First Instance asserted that Dalmine's arguments might be relevant to an assessment of the credibility of the document in question but failed to examine the substance of that credibility.

40 Last, Dalmine submits that the Court of First Instance ought to have ascertained whether there were overriding reasons why the Commission should not disclose the identity of its informant.

41 The Commission observes, first of all, that the prevailing principle is that of the unfettered evaluation of evidence. It contends that the admissibility and the use of a document cannot be challenged. Only the credibility of the document is open to challenge. Dalmine did not specifically challenge the credibility of the sharing key document before the Court of First Instance; it merely maintained that that document was inadmissible and could not be used, and even accepted that certain parts of it were corroborated by other evidence.

42 Next, the Commission states that when an individual requests the Commission not to reveal his identity, the Commission is bound by secrecy on that point.

43 Last, the Commission claims that even if it were accepted that the sharing key document could not be used, the validity of the contested decision could not be called in question on that ground, since that document is of minor importance in the general scheme of the decision.

(b) Findings of the Court

44 Respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10; Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21; and *Aalborg Portland and Others* v *Commission*, paragraph 66).

45 It must be stated, first of all, that Dalmine was given the opportunity to comment on the sharing key document and to put forward its arguments on the probative value of that document, in the light of its anonymous origin.

46 In so far as the appellant maintains, in substance, that the rights of the defence were not respected owing to the very fact that the origin of the document was unknown and that its reliability had not been demonstrated to the appellant by the Commission, it must be held that such an interpretation of the rights of the defence could compromise the evaluation of evidence where it is necessary to establish the existence of an infringement of Community competition law.

47 In effect, the evaluation of evidence in Community competition law cases is characterised by the fact that the documents examined often contain business secrets or other information that cannot be disclosed, or the disclosure of which is subject to significant restrictions.

48 In those circumstances, the rights of the defence cannot be compromised in the sense that documents containing incriminating evidence must automatically be excluded as evidence when certain information must remain confidential. That confidentiality may also attach to the identity of the authors of the documents and also to the persons who transmitted them to the Commission.

49 The Court of First Instance was therefore correct to hold that:

> '72 [t]he prevailing principle of Community law is the unfettered evaluation of evidence and the sole criterion relevant in that evaluation is the reliability of the evidence ... .

73 Consequently, whilst Dalmine's arguments may be relevant in evaluating the reliability and, therefore, the probative value of the sharing key document, it should not be regarded as inadmissible evidence which should be removed from the file.'

50 The Court of First Instance further stated at paragraph 73 of the judgment under appeal that it might prove necessary to take account, in assessing the credibility of the sharing key document, the anonymous origin of that document.

51 It must be concluded that no error of law was made in the assessment of the admissibility and the usefulness of that document as evidence.

52 Last, the appellant cannot criticise the Court of First Instance for not having explained further its examination of the credibility of the sharing key document and for not having ascertained whether there were binding reasons for the Commission not to reveal the identity of its informant. Since Dalmine's arguments related to the inadmissibility of that document as evidence, the Court of First Instance was entitled to confine itself to responding to those arguments.

53 In the light of all of the foregoing, the first part of the second plea must be rejected.

2. The minutes of the examinations of the former directors of Dalmine

(a) Arguments of the parties

54 Dalmine claims that, in holding admissible the minutes of the examinations of a number of its former directors in the context of examinations carried out by the public prosecutor of Bergamo (Italy), the Court of First Instance breached the rights of the defence and also the right to a fair legal process recognised by the European Court of Human Rights on the basis of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

55 First, the Commission ought to have informed Dalmine earlier, and, in any event, before notification of the statement of objections, of the fact that it was in possession of those minutes.

56 Second, the Commission was entitled to use those documents only for the purpose of deciding whether or not it should initiate a proceeding. In that regard, Dalmine emphasises that the documents in question constituted provisional steps in the context of criminal proceedings and that their credibility was therefore not established.

57 The Commission observes that, under Article 11(1) of Regulation No 17, it may 'obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings' and that it must therefore, logically, be able to use that information. It submits that the

Court of First Instance was correct to hold that it was not within its jurisdiction or the Commission's powers to rule on the lawfulness of that information in the light of the rules of domestic law governing the conduct of investigations carried out by the Italian authorities.

(b) Findings of the Court

58 As regards whether the Commission ought to have informed Dalmine earlier, and indeed even before the notification of the statement of objections, of the fact that it was in possession of the minutes in issue, it must be borne in mind that it is precisely the notification of the statement of objections, on the one hand, and access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure the rights of the defence and the right to a fair legal process, which the appellant invokes in the context of the present plea.

59 It is by the statement of objections that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage of the procedure (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 315 and 316, and *Aalborg Portland and Others* v *Commission*, paragraphs 66 and 67). Consequently, it is only after notification of the statement of objections that the undertaking is able to rely in full on the rights of the defence (Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 47 and 50).

60 As the Court of First Instance correctly stated at paragraph 83 of the judgment under appeal, if the rights in question were, in the sense proposed by the appellant,

extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be prejudiced, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission and therefore the information that could still be concealed from it.

61 Nor is there any indication that the fact that the Commission did not inform Dalmine during the investigation stage that it was in possession of the minutes might have an impact on Dalmine's subsequent possibilities of defending itself during the administrative procedure initiated by the notification of the statement of objections (see, by analogy, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraphs 48 to 50 and 56).

62 As regards, next, the admissibility of those minutes as evidence, it must be held, as the Court of First Instance held at paragraph 86 of the judgment under appeal, that the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. Furthermore, as the Court of First Instance observed at the same paragraph, the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority (Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 9).

63 As regards the use of that information by the Commission, the Court of First Instance correctly observed at paragraph 90 of the judgment under appeal that Dalmine's arguments could affect only 'the reliability and therefore the probative value of its managers' statements and not the admissibility of that evidence in the present proceedings'. As stated in the context of the assessment of the first part of this plea, the principle which prevails in Community law is that of the unfettered evaluation of evidence and the only relevant criterion for the purpose of assessing

the evidence adduced relates to its credibility. Accordingly, as the transmission of the minutes in issue was not declared unlawful by an Italian court, those documents cannot be considered to have been inadmissible evidence which ought to have been removed from the file.

64 The second part of the second plea must therefore also be rejected.

65 It follows that the second plea must be rejected in its entirety.

C — *Third plea, alleging that the contested decision contained grounds unconnected to the objections communicated to the appellant*

1. Arguments of the parties

66 Dalmine observes that it had taken issue with the Commission for having referred in the contested decision to certain facts which had no connection with the infringements and which were potentially harmful to it owing to the fact that the information thus made public might be used by third parties. It refers, in particular, to the Commission's findings concerning the cartels affecting the markets outside the Community and also to price-fixing.

67 In rejecting its submissions on that point, the Court of First Instance disregarded Article 21 of Regulation No 17, which provides that the Commission is to have regard to the legitimate interest of undertakings in the protection of their business secrets.

68 The Commission submits that the Court of First Instance was correct to hold that the addressee of a decision cannot challenge, in an action for annulment, some of the grounds of that decision unless those grounds produce binding legal effects such as to affect that person's interests. In this case, Dalmine has not demonstrated how the contested grounds are capable of producing such effects.

2. Findings of the Court

69 As Dalmine had requested it to annul the superfluous grounds of the contested decision, the Court of First Instance correctly held, at paragraph 134 of the judgment under appeal, that 'it suffices to state that there is no rule of law which enables the addressee of a decision to challenge some of the grounds of that decision by way of an action for annulment under Article 230 EC unless those grounds produce binding legal effects such as to affect that person's interests (see, to that effect, Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraphs 77 and 80 to 85). The grounds of a decision are not in principle capable of producing such effects. In the present case, the appellant has not shown how the contested grounds are capable of producing effects such as to change its legal position'.

70 While it is true that the Court of First Instance thus refrained from considering whether the Commission was entitled to disclose in the contested decision information relating to cartels affecting markets outside the Community and also to price-fixing, it must be held that, even on the assumption that the Commission's disclosure of that information was contrary to its obligation to respect Dalmine's business secrets, the fact remains that such an irregularity could lead to the annulment of the contested decision only if it had been established that in the absence of that irregularity the decision would have had a different content (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 91, and Case C-338/00 P

Volkswagen v *Commission* [2003] ECR I-9189, paragraphs 163 and 164). As the findings in the contested decision relating to the cartels affecting the markets outside the Community and also price-fixing were characterised by the appellant as superfluous grounds, it cannot in any event maintain that in the absence of those findings the contested decision would have had an essentially different content.

71 The third plea must therefore also be dismissed.

D — *Fourth plea, alleging distortion of the facts and failure to state reasons in respect of the infringement referred to in Article 1 of the contested decision*

1. Arguments of the parties

72 Dalmine criticises the Court of First Instance for distorting the facts and for failing to state reasons as regards the determination of the object of the infringement referred to in Article 1 of the contested decision, the finding as to its effects and the assimilation of an infringement which was not implemented or did not have any appreciable harmful effect on competition to a wholly implemented infringement.

73 Dalmine observes that it had claimed before the Court of First Instance that the cartel in question concerned only the sharing of the domestic markets. The Court of First Instance incorrectly considered that Dalmine was pleading only the absence of an appreciable effect on competition. The judgment is therefore vitiated by defective reasoning.

74 The Court of First Instance also distorted the facts, since it did not verify the evidence adduced by the Commission concerning the object of the cartel, particularly in the light of the pleas put forward by Dalmine. In particular, the Court of First Instance distorted the statements made by Vallourec, Mannesmann, Dalmine and Corus at the investigation stage and also the table of deliveries of the members of the Europe-Japan Club at point 68 of the grounds of the contested decision.

75 The Commission contends that the arguments put forward by Dalmine before the Court of First Instance related not to whether the Commission had demonstrated the existence of an agreement having as its object the restriction of competition but rather to whether it had demonstrated that the agreement had been implemented and also the effects which the agreement had had on competition and on the market.

76 The Commission further observes that before the Court of First Instance Dalmine challenged only the probative force of the sharing key document and of the statements of one of its former directors, Mr Biasizzo, and not the probative force of the other evidence used by the Commission. Dalmine cannot therefore maintain that the Court of First Instance distorted that evidence, since it was not requested to adjudicate on that evidence. The complaints alleging distortion of the facts must therefore be declared inadmissible.

2. Findings of the Court

77 The appellant cannot claim that the Court of First Instance failed to respond to its argument that the agreement did not concern the sharing of domestic markets.

78 In that regard, it should be pointed out, first of all, that the Court of First Instance stated at paragraph 136 of the judgment under appeal that according to Dalmine the agreement between the addressees of the contested decision 'did not concern the domestic Community markets'. In the following paragraphs of that judgment, the Court of First Instance expanded on Dalmine's argument. Thus, at paragraphs 138 and 139 of the judgment, the Court of First Instance set out the Commission's conclusion that 'national steel pipe and tube producers were predominant in their own domestic markets' and explained that 'Dalmine claims that the Commission would have reached a quite different conclusion had it confined its examination to the situation in the market for the relevant products'.

79 Next, the Court of First Instance clearly stated that, according to its findings, the agreement sought to share the domestic markets of the Community producers. Thus, at paragraph 152 of the judgment under appeal, it observed that 'in the contested decision, the Commission relied on a body of evidence relating to the object of the agreement in question, the relevance of which Dalmine does not question, particularly on the concise yet explicit statements of Mr Verluca'. As regards, in particular, Mr Biasizzo's statement, the probative value of which is disputed by Dalmine (see paragraph 76 of this judgment), the Court of First Instance, after referring at paragraph 153 of the judgment under appeal to a further piece of evidence, namely Mr Jachia's statement, according to which there was an agreement 'to respect the areas belonging to the different undertakings', stated, at paragraph 155 of the judgment, that Mr Biasizzo's statement corroborates 'Mr Verluca's statement as to the existence of the agreement to share domestic markets described by the latter (see, to that effect, [Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00] *JFE Engineering and Others* v *Commission* [[2004] ECR II-2501], paragraph 309 et seq.)'.

80 In his statement of 17 September 1996, which is analysed by the Court of First Instance in *JFE Engineering and Others* v *Commission*, Mr Verluca asserted that the domestic markets of the participants in the agreement 'were protected' in respect of standard OCTG pipe and also project line pipe (with the exception of the United Kingdom offshore market, which was 'semi-protected'). When questioned on 18 December 1997 during a new inspection, Mr Verluca stated that 'the French, German and Italian markets were regarded as domestic markets. The [United Kingdom] had special status (cf. my statement of 17.09.96)'.

81 It follows from the foregoing that the judgment under appeal is not vitiated by the defective reasoning on which the appellant relies.

82 Nor, in the light of the abovementioned evidence, to which the Court of First Instance referred in support of its finding that the cartel sought to share the domestic markets, can the appellant's argument alleging distortion of the facts be upheld. In particular, the appellant has failed to explain how the Court of First Instance's reading of the statements of Mr Verluca and Mr Jachia, who expressly asserted that the agreement sought to share a number of domestic markets in the Community, is incorrect.

83 Last, the appellant's argument that Article 81 EC cannot be interpreted as meaning that an infringement which is not implemented or which has no appreciable harmful effect on competition can be assimilated to an infringement which has been fully implemented cannot be accepted either.

84 According to a consistent body of case-law, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 122 and 123, and also *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 491). As regards, in particular, agreements of an anti-competitive nature which, as in the present case, are reached at meetings of competing undertakings, the Court of Justice has already held that Article 81(1) EC is infringed where those meetings have as their object the restriction, prevention or distortion of competition and are thus intended to organise artificially the operation of the market (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 508 and 509). For the reasons stated by the Advocate General at points 134 to 137 of his Opinion, it would be inappropriate to nuance that case-law in the sense proposed by the appellant.

85 It follows from all of the foregoing that the fourth plea must be rejected.

E — *Fifth plea, alleging errors of law, distortion of the evidence and failure to state reasons as concerns the effects of the infringement on trade between Member States*

1. Arguments of the parties

86 Dalmine maintains that it has not been demonstrated that the cartel penalised in Article 1 of the contested decision had a harmful effect on intra-Community trade. In that regard, it observes that the Commission was unable to prove, and that the Court of First Instance was unable to ascertain, that the object of the cartel related to the sharing of domestic markets and that, even if it had been demonstrated that the cartel concerned such market-sharing, the level of market interpenetration was so high that the markets could not be partitioned. The diverging assessment of the Court of First Instance is insufficiently reasoned and, moreover, contains no evaluation of the situation on the Community market.

87 The Commission contends that the Court of First Instance correctly relied on the case-law according to which, for the purposes of the application of Article 81 EC, there is no need to prove that harm was actually caused to intra-Community trade, since it is sufficient to prove that an agreement is potentially capable of producing such an effect.

2. Findings of the Court

88 Dalmine's arguments correspond broadly to those, rejected in the context of the fourth plea, whereby the Court of First Instance is criticised for not having examined the question whether the agreement related to the sharing of domestic markets and for having assimilated an infringement which was not implemented or which had no appreciable harmful effect on competition to a wholly implemented infringement.

89 In any event, it follows from well-established case-law that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 81 EC and 82 EC must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the common market (Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17, and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 47).

90 If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16; Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 47; and *Ambulanz Glöckner*, paragraph 48).

91 Accordingly, after finding that the agreement had as its object the sharing of domestic markets in the Community, the Court of First Instance correctly concluded at paragraph 157 of the judgment under appeal that the agreement had the potential effect of affecting trade between Member States. The Court of Justice has already held, moreover, that the sharing of domestic markets in the Community is capable of significantly affecting the pattern of trade between Member States (see *Ambulanz Glöckner*, paragraphs 48 and 49).

92 The fifth plea must therefore also be rejected.

F — *Sixth plea, alleging misuse of powers, an error of law and distortion of the facts as regards the infringement referred to in Article 2 of the contested decision*

1. Arguments of the parties

93 Dalmine criticises the Court of First Instance for not having properly described the unlawful act referred to in Article 2 of the contested decision. It maintains that the Court of First Instance rewrote the decision by attempting to confer legitimacy on it on the basis of a weak element, namely the alleged illegality of the supply contracts between Corus and, respectively, Dalmine, Vallourec and Mannesmann.

94 In particular, the Court of First Instance sought to present the unlawful act mentioned in Article 2 of the contested decision as constituting an autonomous infringement of Article 81 EC, whereas that act merely had as its object the

implementation of the fundamental rules. By placing such an interpretation on the wording of the contested decision, the Court of First Instance misused or exceeded its powers and also distorted the decision. That interpretation also rests on an incorrect presentation of the relevant product market.

95 Dalmine further observes that the Court of First Instance expressly stated that the Commission's assertion at point 164 of the grounds of the contested decision was incorrect. Instead of annulling the contested decision on that point, however, the Court of First Instance reformulated it, which also constitutes a misuse of powers.

96 Last, Dalmine submits that the Court of First Instance's interpretation of the relationship between Articles 1 and 2 of the contested decision proved advantageous for the Japanese producers, which, as they were not held liable for what was alleged to be the separate infringement referred to in Article 2 of the decision, were granted a reduction in their fines.

97 The Commission claims that the supply contracts concluded between Corus and, respectively, Dalmine, Vallourec and Mannesmann are regarded by the contested decision as constituting a separate infringement of Article 81 EC and that for that reason they are dealt with in a specific article of the operative part of that decision. Furthermore, by ordering the addressees of that decision to put an end to the 'infringements established', Article 3 of the decision clearly shows that there were separate infringements.

98 The Commission concludes that the Court of First Instance neither exceeded its powers nor distorted the contested decision. Nor did it reformulate the definition of the relevant product market. The Commission also observes that even if the Court of First Instance had in any way annulled point 164 of the grounds of the decision that would have had no consequence on the validity of Article 2 of that decision.

2. Findings of the Court

99 In so far as the appellant alleges that the Court of First Instance has misused its powers, it must be borne in mind that a misuse of powers exists when an institution exercises its powers with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873, paragraph 52, and Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 64).

100 In fact, the appellant has adduced no evidence capable of supporting the allegation that the Court of First Instance exercised its powers for a purpose other than that, set forth in Article 220 EC, of ensuring that in the interpretation and application of the Treaty the law is observed.

101 Moreover, the present plea rests on the premiss that the Court of First Instance distorted the contested decision by characterising the infringement referred to in Article 2 of that decision as an autonomous infringement and not merely as the implementation of the infringement set out in Article 1 thereof.

102 However, the Court of First Instance did not distort the contested decision in that way. As the Commission has observed, the very fact that the infringement consisting in concluding the supply contracts in question is dealt with in a specific article in the operative part of the contested decision demonstrates that the infringement was characterised by the decision as a separate infringement of Article 81 EC. Furthermore, in Article 3 of the contested decision, the undertakings designated in Articles 1 and 2 are ordered to put an end to 'the ... infringements [referred to in those articles]' and that wording clearly indicates that there are separate infringements.

103 Last, contrary to the appellant's contention, the Court of First Instance was not required to draw other consequences from its findings in respect of point 164 of the grounds of the contested decision.

104 As regards that point of the grounds, the Court of First Instance held, at paragraphs 244 and 245 of the judgment under appeal:

> '244 ... it should be stated, in so far as it may be relevant, that the Commission's assertion in the first sentence of [point] 164 [of the grounds of] the contested decision, that the supply contracts constituting the infringement found in Article 2 of the contested decision were merely a means of implementing the infringement found in Article 1 of the contested decision, goes too far since that implementation was one objective of the second infringement amongst several separate but connected anti-competitive objects and effects. The Court held in *JFE Engineering and Others* v *Commission* ... (paragraph 569 et seq.), that the Commission misconstrued the principle of equal treatment in that it failed to take account of the infringement found in Article 2 of the contested decision in fixing the amount of the fines imposed on European producers notwithstanding that the object and effects of that infringement went beyond their contribution to the continuation of the Europe-Japan agreement (see, in particular, paragraph 571 of that judgment).
>
> 245 Whilst the unequal treatment referred to in the preceding paragraph ultimately provides a ground for reducing the amount of the fines imposed on the Japanese applicants, the analytical error behind that treatment does not constitute a ground for annulling Article 2 of the contested decision or Article 1 in the present proceedings.'

105 As the Advocate General pointed out at points 213 to 216 of his Opinion, the finding made by the Court of First Instance at paragraph 244 of the judgment under appeal meant only that the Commission wrongly considered that there was no need to impose an additional fine in respect of the infringement set out in Article 2 of the contested decision on the ground that those contracts merely constituted a means of implementing the principle of respect for domestic markets decided upon in the context of the Europe-Japan Club (see paragraph 20 of this judgment). That assessment by the Court of First Instance therefore has no effect on the actual finding of that infringement in Article 2 of the contested decision and does not provide a ground for annulling that article.

106 Regard being had to all of the foregoing considerations, the sixth plea must be rejected.

G — *Seventh plea, alleging misuse of power, errors of law and distortion of the facts as concerns the effects of the infringement referred to in Article 2 of the contested decision*

1. Arguments of the parties

107 In Dalmine's submission, the Court of First Instance distorted the facts by taking the view that the supply contract between Dalmine and Corus limited competition on the market for plain end and threaded pipes and tubes in the United Kingdom. The Court of First Instance wrongly considered that, following the conclusion of that contract, Dalmine had practically cut itself off from the United Kingdom market for plain end and threaded pipes. In that regard, Dalmine observes that it could not in any event gain access to the United Kingdom market for OCTG premium pipes and tubes, since it did not have the requisite licence.

108 Dalmine emphasises that its supply contract with Corus relates to plain end pipe, namely a product unconnected with the relevant market. Consequently, that contract cannot be regarded as a means of implementing the alleged agreement to share domestic markets referred to in Article 1 of the contested decision. On the contrary, that contract is based on lawful commercial logic.

109 The Commission contends that the Court of First Instance correctly considered that Dalmine could have obtained a licence to market OCTG premium pipes on the United Kingdom market had it been interested in doing so, but that the fact of concluding the supply contract in question precluded such an interest and thus eliminated Dalmine as a potential competitor.

110 The Commission further contends that in the absence of that supply contract Dalmine could also have had an interest in selling more OCTG standard pipes and tubes on that market. It points out, moreover, that Dalmine already sold OCTG standard pipe in the United Kingdom, for which no licence was necessary, and that its argument that it did not have access to the United Kingdom market is therefore unfounded.

2. Findings of the Court

111 At paragraph 179 of the judgment under appeal, the Court of First Instance makes the following reading, which is not per se disputed by the appellant, of the supply contracts referred to in Article 2 of the contested decision:

'... Taken as a whole, those contracts divide Corus's requirements for plain end pipes, at least from 9 August 1993, between the three other European producers (40% for Vallourec, 30% for Dalmine and 30% for Mannesmann). Moreover, each

contract provides that the price payable by Corus for plain end pipes is to be determined on the basis of a mathematical formula which takes account of the price it receives for its threaded pipes.'

112 In the light of those clauses of the supply contracts, the argument put forward by the appellant, which seeks essentially to demonstrate the absence of any link, as regards the effects of those contracts on competition, between plain end tubes and threaded pipes, cannot be accepted. In that regard, far from having distorted the facts, the Court of First Instance explained convincingly, at paragraph 181 of the judgment under appeal, the anti-competitive effects of the supply contracts not only on the market for plain end pipes but also on the market for threaded pipes, as follows;

'By each of the supply contracts, Corus bound its three Community competitors in such a way that any actual or potential competition on their part on its domestic market disappeared at the cost of sacrificing its freedom of supply. Those competitors lost sales of plain end pipes if Corus's sales of threaded pipes fell. Moreover, the profit margin on the sales of plain end pipes which the three suppliers undertook to make also fell in proportion to the price Corus obtained for its threaded pipes and could even become a loss. In those circumstances, it was virtually inconceivable that those three producers were seeking to provide effective competition for Corus on the British market for threaded pipes, in particular on price ...'

113 In so far as the appellant presents the conclusion of its supply contract with Corus as a logical and lawful commercial activity, it is sufficient to state that that argument was duly refuted by the Court of First Instance at paragraph 181, cited above, of the judgment under appeal, and also at paragraph 185 of that judgment, which states that '[i]f the supply contracts had not existed, it is perfectly clear that the European producers concerned other than Corus would, but for the fundamentals, ordinarily have had a genuine or at the very least a potential business interest in competing with Corus on the United Kingdom market for threaded pipes and in competing amongst themselves to supply Corus with plain end pipes'.

114 Last, as regards the appellant's argument that it did not have access to the United Kingdom market, in particular since it did not have a licence there to sell OCTG premium pipes, it is sufficient to refer to the entirely correct analysis made by the Court of First Instance at paragraph 186 of the judgment under appeal:

'As for Dalmine's arguments concerning the practical obstacles which prevented it from directly selling premium and standard OCTG on the United Kingdom market, those obstacles are not sufficient to show that it would never have been able to sell those products on that market had it not been for the supply contract it entered into with Corus and subsequently with Vallourec. On the assumption that conditions on the United Kingdom market for OCTG improved, it cannot be precluded that Dalmine would have been able to obtain a licence to sell premium thread pipes on that market or that it might have increased its production of standard OCTG in order to sell those products in that market. It follows that, by signing the supply contract in question, it in fact accepted constraints on its commercial policy ... .'

115 Regard being had to all of the foregoing, the seventh plea must be rejected.

H — *Eighth plea, alleging errors of law and distortion of the facts as concerns the economic context of the supply contract between Dalmine and Corus*

1. Arguments of the parties

116 Dalmine challenges the Court of First Instance's finding that the clauses of the supply contract concluded with Corus are unlawful by nature.

117 In that regard, Dalmine explains, in particular, the commercial logic of the contract in question, recalls the extent of Corus's bargaining power by comparison with that of its potential suppliers and reiterates its assertion that on the United Kingdom market its standard OCTG sales were absolutely marginal and it sold no OCTG premium pipes at all.

118 The Commission claims that this plea consists in restating the arguments which Dalmine submitted before the Court of First Instance in order to challenge the anti-competitive nature of certain clauses in the supply contract between Dalmine and Corus and that it is therefore inadmissible.

119 In any event, the appellant's argument is unfounded. The Commission observes, in particular, that the commercial interests and bargaining power of one of the parties cannot affect the unlawful nature of a contract contrary to Article 81 EC.

2. Findings of the Court

120 As indicated at paragraphs 111 to 113 of this judgment, the Court of First Instance found, on properly stated grounds, correctly and without distorting the facts, that the supply contracts referred to in Article 2 of the contested decision were capable of affecting trade between Member States and had as their effect the prevention, restriction or distortion of competition within the common market. Accordingly, the appellant cannot challenge the Court of First Instance's finding that the clauses of those contracts were unlawful in nature.

121 In so far as the appellant invokes certain business interests and the bargaining power of one of the parties to those contracts, it should be observed, as the Advocate General observed at points 229 and 230 of his Opinion, that those complaints were not expressly raised before the Court of First Instance and must therefore be declared inadmissible in the present appeal (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 58). Furthermore, those complaints cannot be upheld in any event. The assessment of the conformity of conduct with Article 81(1) EC must, admittedly, be made in its economic context (see, to that effect, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 66, and Case C-74/04 P *Commission* v *Volkswagen* [2006] ECR I-6585, paragraph 45). However, even on the assumption that the appellant's allegations were correct, they would not be capable of proving that the economic context precluded any possibility of effective competition (see, by analogy, Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 127).

122 The eighth plea must therefore also be rejected.

I — *Ninth plea, alleging errors of law and defective reasoning in relation to the gravity of the infringement*

1. Arguments of the parties

123 Dalmine claims that the gravity of the infringement must be assessed by reference to the size of the relevant market, since that constitutes the only strictly objective parameter. An evaluation of the gravity of the infringement which ignored that objective criterion would be illogical and based on elements not found in the case-law, in Regulation No 17 or in the Guidelines on the method of setting fines imposed

pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3: 'the Guidelines'). Consequently, the Court of First Instance wrongly found that the size of the relevant market was only one among a number of relevant elements for the purpose of setting the fine.

124 Dalmine then submits a number of arguments designed to demonstrate that, contrary to the Court of First Instance's assertion, the criteria established in the Guidelines, namely the nature of the infringement, its actual impact on the market and the size of the relevant geographic market, were not observed by the Commission. It concludes that the alleged infringement cannot be characterised as 'very serious'. Dalmine further submits that the Court of First Instance failed to state proper reasons for thus characterising the infringement, but merely took note of the Commission's findings, without making a determination as to their relevance or their merits.

125 Last, Dalmine criticises the Court of First Instance for not having taken account of the individual size of the undertakings to which the contested decision was addressed. It contends that it is contrary to any criterion, in law and in equity, to impose on it a penalty equal to that adopted in, for example, the case of Nippon Steel, whose annual turnover is much higher than the appellant's. The disproportionate nature of the fine imposed on the appellant is further demonstrated by the fact that the basic amount of the fine is equivalent to 16% of the sales of the relevant products in 1998 on the world market, to 38% of sales on the Community market and to 95% of sales during what was established as the infringement period, in Germany, France, Italy and the United Kingdom.

126 The Commission observes, first of all, that according to the Guidelines the size of the relevant market is only one of the elements to be taken into consideration when evaluating the gravity of the infringement.

127 Next, the Commission claims that the criteria established by the Guidelines were correctly applied. It submits, in particular, that a cartel may, owing to the nature of the infringement or because it affects a significant part of the common market, be characterised as a 'very serious infringement' even if it concerns a product whose sales do not represent an especially high turnover on that market.

128 Last, the Commission submits that it follows from the Guidelines that the differentiation of fines by reference to the turnover of the undertakings involved is not an obligation but an option.

2. Findings of the Court

129 According to a consistent line of decisions, the gravity of infringements of Community competition law must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 465, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 241).

130 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel, the profit which they were able to derive from it, their size, the value of the goods concerned and the threat that infringements of that

type pose to the objectives of the Community (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 129, and *Dansk Rørindustri and Others* v *Commission*, paragraph 242).

131 Point 1A of the Guidelines states that '[i]n 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'.

132 Contrary to the appellant's assertion, therefore, the Court of First Instance was correct to observe, at paragraph 259 of the judgment under appeal, that the size of the relevant market was just one among a number of other factors to be taken into account in evaluating the gravity of the infringement and setting the amount of the fine.

133 As regards, next, Dalmine's argument that the Court of First Instance incorrectly, and without stating adequate reasons, confirmed the Commission's application of the Guidelines and the characterisation of the infringement as 'very serious', it must be borne in mind that the Commission has a wide discretion and that the method of calculation defined in the Guidelines contains various flexible elements (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraphs 46 and 47).

134 It is none the less for the Court of Justice to verify whether the Court of First Instance has correctly assessed the Commission's exercise of that discretion (*SGL Carbon* v *Commission*, paragraph 48).

135 In that regard, it should be observed, first of all, that the Court of First Instance, at paragraphs 263 to 265 of the judgment under appeal, correctly summarised the Commission's application of the criteria laid down in the Guidelines:

'263 ... in [point] 161 [of the grounds of] the contested decision, the Commission relied essentially on the nature of the offending conduct of all the undertakings to support its finding that the infringement found in Article 1 of the contested decision was "very serious". It referred in this regard to the seriously anti-competitive nature of the market-sharing agreement, the fact that it jeopardised the proper functioning of the single market, the deliberate nature of the infringement and secret and institutionalised nature of the system designed to restrict competition. The Commission also took account in [point] 161 of the fact that "the four Member States in question account for most of the consumption of seamless OCTG and line pipe in the Community and therefore constitute an extended geographic market".

264 On the other hand, in [point] 160 [of the grounds of] the contested decision the Commission stated that "the specific impact of the infringement on the market has been limited" because the two specific products covered by the infringement, namely standard OCTG and project line pipe, represented just 19% of Community consumption of seamless OCTG and line pipe and that welded pipes could meet part of the demand for seamless pipes given the technological progress in their manufacture.

265 Thus, in [point] 162 [of the grounds of] the contested decision, after characterising that infringement as "very serious", the Commission pointed out, on the basis of the factors listed in [point] 161, the relatively low volume of sales of the products in question in the four Member States concerned by the addressees of the contested decision (EUR 73 million per year). That

reference to the size of the market affected corresponds to the assessment of the limited impact of the infringement on the market in [point 160 of the grounds of] the contested decision. The Commission therefore decided to impose an amount to reflect gravity of just EUR 10 million. The Guidelines provide in principle for an amount "above [EUR] 20 million" for an infringement in that category.'

136 It follows from the Commission's analysis, as summarised above, that the three criteria set out at point 1A of the Guidelines were taken into account in determining the gravity of the infringement. The Court of First Instance was therefore correct to observe, at paragraph 260 of the judgment under appeal, that 'whilst the Commission did not refer expressly to the Guidelines in the contested decision, when determining the amount of the fine imposed on the applicant it none the less applied the method of calculation which it imposed on itself in the Guidelines'.

137 At paragraphs 266 to 271 of the judgment under appeal, the Court of First Instance considered 'whether the Commission's approach [as] set out [at paragraphs 263 to 265 of the judgment] is unlawful in the light of the criticisms put forward by Dalmine', as follows:

'267 As regards Dalmine's arguments in relation to the relevant markets, [points] 35 and 36 [of the grounds of] the contested decision represent the definition of the relevant geographic markets as they ought to normally exist were it not for unlawful agreements having the object or effect of artificially dividing them. Further, it is clear from the contested decision read as a whole, in particular [points] 53 to 77 [of the grounds], that the conduct of the Japanese and European producers in each domestic market or, in certain

cases, in the market for a certain region of the world was determined by specific rules which varied from one market to another and were the result of commercial negotiations within the Europe-Japan Club.

268 Thus, Dalmine's arguments concerning the small percentage of the worldwide and European markets for standard OCTG and project [line pipe] represented by the sales of those products by the eight addressees of the contested decision must be rejected as irrelevant. It is the fact that the infringement found in Article 1 of the contested decision had the object and, at least to a certain extent, the effect of excluding each of the addressees from the domestic markets of the other undertakings, including the market of the four largest Member States of the European Communities in terms of consumption of steel pipes, that constitutes a "very serious" infringement according to the assessment made in the contested decision.

269 Dalmine's argument concerning the small volume of sales of standard OCTG and the significant extent to which welded pipes competed with project line pipe on its own domestic market is irrelevant, since its participation in the market-sharing infringement is the consequence of the undertaking it gave not to sell the products covered by the contested decision in other markets. Thus, even if the circumstances on which it relies were established to the requisite legal standard, they would not undermine the Commission's conclusion as to the gravity of the infringement committed by Dalmine.

270 It should, moreover, be noted that the fact, referred to by Dalmine, that the infringement found in Article 1 of the contested decision concerns just two specific products, namely standard OCTG and project line pipe and not all OCTG and line pipe, was expressly mentioned by the Commission in [point]

160 [of the grounds of] the contested decision as a factor which limited the specific impact of the infringement on the market (see paragraph 264 above). Similarly, in the same [point], the Commission refers to the increasing competition from welded pipes (see also paragraph 264 above). It must therefore be held that the Commission has already taken those factors into account in its assessment of the gravity of the infringement in the contested decision.

271 In the light of the foregoing, it must be considered that the reduction referred to at paragraph 265 above of the amount fixed to reflect gravity to 50% of the minimum amount ordinarily imposed in the case of a "very serious" infringement takes sufficient account of the limited impact of the infringement on the market in the present case.'

138 It must be held that, by those considerations, the Court of First Instance adjudicated reasonably and coherently on the essential factors used in evaluating the gravity of the infringement and that it responded to the requisite legal standard to Dalmine's arguments. Contrary to the appellant's contention, the Court of First Instance did not confine itself to taking note of the Commission's findings, but examined in detail the question, raised by Dalmine, whether, for the purpose of assessing the gravity of the infringement, the Commission correctly estimated the effects of the infringement on the relevant market. Furthermore, in finding that the infringement established in Article 1 of the contested decision was in any event 'very serious', since it had as its object and, at least to a certain extent, as its effect, to exclude each of the eight addressees of the contested decision from the domestic markets of the other undertakings to which the decision was addressed, the Court of First Instance properly emphasised the significant intrinsic gravity of infringements consisting in sharing domestic markets in the Community.

139 Furthermore, as the Court of First Instance also correctly observed, the limited impact of the infringement on the market in the present case had already been sufficiently taken into account, as the Commission had set the amount of the fine by reference to the gravity of the infringement at just EUR 10 million.

140 By the last complaint which it puts forward in the context of this plea, the appellant criticises the Court of First Instance for not having taken into account the individual size of the addressees of the contested decision.

141 As the Court of Justice has already held, the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertaking concerned. It is permissible for the Commission to take account of the turnover of the undertaking concerned in order to assess the gravity of the infringement when determining the amount of the fine, but disproportionate importance must not be attributed to that turnover by comparison with other relevant factors (*Dansk Rørindustri and Others* v *Commission*, paragraphs 255 and 257).

142 The sixth paragraph of point 1A of the Guidelines corresponds to that case-law. It states that 'it might be necessary in some cases to apply weightings to the amounts determined ... in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'.

143 The Court of First Instance correctly stated at paragraph 282 of the judgment under appeal that it follows from the use of the expression 'in some cases' and the term 'particularly' in that paragraph of the Guidelines that a weighting according to the individual size of the undertakings is not a systematic step in the calculation which the Commission is required to take, but an option of which it may avail itself in appropriate cases, by reference, in particular, to the particular circumstances of the case. That discretion is also reflected, moreover, in the expression 'it might be necessary' in the same paragraph.

144 The Court of First Instance correctly inferred from those considerations, at paragraph 283 of the judgment under appeal, that 'the Commission has retained a certain margin of discretion as to whether it is appropriate to weight the fines according to the size of each undertaking. Thus, in determining the amount of the fines, the Commission is not required, where fines are imposed on several undertakings involved in the same infringement, to ensure that the final amount of the fines reflects the difference in overall turnover of the undertakings concerned ...'.

145 That assessment was all the more appropriate because all the addressees of the contested decision were large undertakings, a circumstance which led the Commission not to differentiate between the amounts adopted for the fines (see point 165 of the grounds of the contested decision). In that regard, the Court of First Instance made the following relevant observations:

'284 ... Dalmine disputes that analysis and points out that it is one of the smallest of the undertakings to which the contested decision was addressed, its turnover in 1998 being just EUR 667 million. In fact the difference in overall turnover in all products between Dalmine and the largest of the undertakings concerned, Nippon [Steel Corp.], whose turnover for 1998 was EUR 13 489 million, is substantial.

285 However, the Commission emphasised in its defence, without being contradicted by Dalmine, that Dalmine is not a small or a medium-sized undertaking. Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996 L 107, p. 4), which applied when the contested decision was adopted, states, inter alia, that such undertakings must have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or a balance-

sheet total not exceeding EUR 27 million. In Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36), those two thresholds were revised upwards to EUR 50 million and EUR 43 million respectively.

286 The Court does not have any figures for the number of people employed by Dalmine or for its balance-sheet total, but Dalmine's turnover for 1998 was more than 10 times higher than the limit laid down in the Commission's successive recommendations concerning that criterion. Thus, on the basis of the information provided to the Court, it must be found that the Commission did not err in finding, in [point] 165 [of the grounds of] the contested decision, that all the undertakings to which the contested decision was addressed were large.'

146 In so far as, for the purposes of demonstrating that the fine is disproportionate, the appellant also relies on the fact that the basic amount of the fine is equivalent to 16% of its sales of the relevant products in 1998 on the world market, 38% of such sales on the Community market and 95% of such sales during the infringement period in Germany, France, Italy and the United Kingdom, it must be borne in mind that the maximum limit of 10% referred to in Article 15(2) of Regulation No 17 relates to the global turnover of the undertaking concerned, and that only the final amount of the fine must observe that limit (*Dansk Rørindustri and Others* v *Commission*, paragraph 278, and *SGL Carbon* v *Commission*, paragraph 82). As Dalmine has not challenged the finding, at paragraph 287 of the judgment under appeal, that the amount of the fine imposed in the contested decision, namely EUR 10.8 million, represented only around 1.62% of its global turnover, which in 1998 was EUR 667 million, it cannot claim that the fine was manifestly disproportionate to the size of its undertaking.

147 As none of the complaints raised by the appellant can be accepted, the ninth plea must be rejected.

J — *Tenth plea, alleging errors of law and defective reasoning in relation to the duration of the infringement and the attenuating circumstances*

1. Arguments of the parties

148 Dalmine claims that a number of attenuating circumstances, such as its minor and passive role in implementing the infringement found in Article 1 of the contested decision and the fact that the infringement ceased as soon as the Commission first intervened, ought to have been taken into account. Even if those circumstances ought not automatically to have been taken into account, the Commission should have stated its reasons for not reducing the amount of the fine on that basis. The Court of First Instance ought to have established and penalised that failure to state reasons.

149 The appellant maintains that it follows from the second attenuating circumstance on which it relies that the duration of the infringement which it committed was less and that the judgment under appeal is inconsistent in that regard.

150 Last, Dalmine claims that there has been a breach of the principle of equal treatment, in that its cooperation during the administrative procedure was not evaluated in the same way as Vallourec's.

151 The Commission observes that, in regard to fines, the Court of First Instance has unlimited jurisdiction and that in this case it made proper use of its power by stating in the judgment under appeal the reasons why the attenuating circumstances on which Dalmine relied could not be accepted. In the relevant paragraphs of the

judgment, the Court of First Instance, in particular, correctly found that Dalmine had not put an end to the infringement following the Commission's intervention and that the level of cooperation provided by Dalmine was not the same as that provided by Vallourec.

2. Findings of the Court

152 As regards, first of all, the alleged discrimination between Dalmine and Vallourec in setting the fine, it must be borne in mind that while, in the context of an appeal, it is not open to the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law, the exercise of that jurisdiction in respect of the determination of those fines cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 81(1) EC (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 96 and 97, and *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 617).

153 However, the appeal must indicate the legal arguments specifically advanced in support of the plea alleging breach of the principle of equal treatment, failing which the plea is inadmissible (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 618).

154 In the present case, as observed at paragraph 19 of this judgment, the Commission applied a reduction of 40% of the amount of the fine imposed on Vallourec and a reduction of 20% of the amount of the fine imposed on Dalmine to take account of the fact that both of those undertakings had cooperated with the Commission at the stage of the administrative procedure.

155 It must be held that, in so far as the appellant disputes the Court of First Instance's finding, at paragraph 344 of the judgment under appeal, that 'whilst Dalmine's answers to the questions were of some use to the Commission, they merely confirm, albeit less precisely and less explicitly, some of the information already provided by Vallourec in the form of Mr Verluca's statements', its arguments are factual in nature and must therefore be rejected as inadmissible. It is therefore not open to the Court of Justice, in the context of the present appeal, to review the finding made by the Court of First Instance at paragraph 345 of the judgment under appeal that 'the information provided by Dalmine to the Commission before the [statement of objections] was sent is not comparable to that provided by Vallourec and is not sufficient to justify a reduction in the fine imposed on Dalmine over and above [the] 20% reduction granted to it for not contesting the facts. Although its decision not to contest the facts may have made the Commission's task significantly easier, the same cannot be said of the information provided by Dalmine before the [statement of objections] was issued'.

156 As regards, next, the appellant's argument relating to its minor and passive role in implementing the infringement found in Article 1 of the contested decision, the Court of First Instance referred, at paragraph 327 of the judgment under appeal, to the analysis carried out at paragraphs 280 to 297 of that judgment, according to which, in particular:

> '288 ... it should be pointed out ... that Dalmine's argument regarding the small volume of sales of standard OCTG and the significant extent to which welded pipes competed with project line pipe on its own domestic market is irrelevant, since its participation in the infringement consisting in a market-sharing agreement is the consequence of the undertaking it gave not to sell the products in question on other markets ... Thus, even if the facts it relies upon were established to the requisite legal standard, they could not undermine the Commission's conclusion as to the gravity of the infringement committed by Dalmine.

...

290 Since Dalmine is the only Italian member of the Europe-Japan Club, it must be found that its participation in that agreement was sufficient to extend its geographical scope to the territory of a Member State of the Community. It must therefore be found that its participation in the infringement had an appreciable impact on the Community market. That circumstance is much more relevant, for the purposes of assessing the specific impact of Dalmine's participation in the infringement found in Article 1 of the contested decision on the markets for the products referred to in that article, than a mere comparison of the overall turnover of each of the undertakings.

...

294 Similarly, as regards the argument that Dalmine played a passive role in the cartel and that its conduct in doing so constitutes an attenuating circumstance under the first indent of point 3 of the Guidelines, Dalmine does not deny having participated in the meetings of the Europe-Japan Club.

295 In the present case, Dalmine does not even claim that its participation in the meetings of the Europe-Japan Club was more sporadic than that of the other members of that club, which, according to the case-law might have justified a reduction in its favour ... Nor does it put forward any specific

circumstance or evidence apt to show that its approach at the meetings in question was purely passive or "follow-my-leader". On the contrary, as stated in paragraph 290 above, the Italian market was included in the market-sharing agreement only because of Dalmine's membership of the Europe-Japan Club. ...'

157 As that analysis is not vitiated by any error of law, the Court of First Instance was correct to consider that Dalmine's role in implementing the infringement found in Article 1 of the contested decision was neither minor nor exclusively passive or 'follow-my-leader' and that no attenuating circumstance could therefore be taken into account in that regard.

158 As regards, last, the alleged termination of the infringement as soon as the Commission intervened, the Court of First Instance correctly observed at paragraphs 328 and 329 of the judgment under appeal that '"termination of the infringement as soon as the Commission intervenes", as stated in point 3 of the Guidelines, can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive conduct by the interventions in question' and that 'the fine cannot be reduced on that basis where the infringement has already come to an end before the date on which the Commission first intervenes or where the undertakings concerned have already taken a firm decision to put an end to it before that date'.

159 In the present case, as stated at paragraph 6 of this judgment, the Commission decided to initiate an investigation in November 1994 and carried out the first inspections in December 1994.

160 At paragraphs 331 and 332 of the judgment under appeal, the Court of First Instance found that the infringement giving rise to the fine imposed on Dalmine, namely the infringement set out in Article 1 of the contested decision, had ceased or at least was in the process of coming to an end when the Commission carried out its investigations on 1 and 2 December 1994. The Court of First Instance therefore correctly concluded that the termination of the infringement could not constitute an attenuating circumstance for the purpose of setting the fine.

161 It follows from all of the foregoing that the tenth plea must be rejected.

162 Since none of the pleas in law raised by Dalmine can be upheld, the appeal must be dismissed.

V — Costs

163 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2) of those Rules of Procedure, which, pursuant to Article 118 thereof, is applicable to the procedure on appeal, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has requested that Dalmine be ordered to pay the costs and as Dalmine has been unsuccessful, it must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Dalmine SpA to pay the costs.

[Signatures]