JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

16 June 2011 *

In Case T-186/06,

Solvay SA, established in Brussels (Belgium), represented initially by O.W. Brouwer, D. Mes, lawyers, M. O'Regan and A. Villette, Solicitors, and subsequently by O.W. Brouwer, A. Stoffer, lawyer, M. O'Regan and A. Villette,

applicant,

v

European Commission, represented initially by F. Arbault, and subsequently by V. Di Bucci and V. Bottka, acting as Agents, and by M. Gray, Barrister,

defendant,

ACTION for partial annulment of Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen peroxide and perborate) and for annulment or reduction of the fine imposed on the applicant,

* Language of the case: English.

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of V. Vadapalas (Rapporteur), acting for the President, A. Dittrich and L. Truchot, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 March 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, Solvay SA, is a company incorporated under Belgian law which at the material time manufactured, inter alia, hydrogen peroxide ('HP') and sodium perborate ('PBS').

2 On 7 May 2002 the applicant acquired 100 % ownership of Ausimont SpA (now Solvay Solexis SpA), which at the material time was 100 % controlled by Montedison SpA (now Edison SpA).

3 In November 2002 Degussa AG informed the Commission of the European Communities of the existence of a cartel in the HP and PBS markets and requested the application of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the Leniency Notice').

4 Degussa supplied to the Commission material evidence which enabled it to carry out investigations on 25 and 26 March 2003 at the premises of three undertakings, including those of the applicant.

5 Following those investigations, several undertakings, including EKA Chemicals AB, Arkema SA (formerly Atofina SA) and the applicant, requested the application of the Leniency Notice and sent to the Commission evidence relating to the cartel in question.

6 On 26 January 2005 the Commission sent a statement of objections to the applicant and to the other undertakings concerned.

7 By letters of 29 April and 27 June 2005, the applicant requested access, first, to the non-confidential versions of the replies given by the other undertakings concerned to the statement of objections and, second, to certain confidential documents in the case provided by Degussa.

8 By letters of 4 May and 20 July 2005, the Commission refused access to the replies to the statement of objections and partially disclosed the documents provided by Degussa.

9 After the hearing of the undertakings concerned, which took place on 28 and 29 June 2005, the Commission adopted Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals, Degussa, Edison, FMC Corp., FMC Foret SA, Kemira Oyj, L'Air liquide SA, Chemoxal SA, SNIA SpA, Caffaro Srl, the applicant, Solvay Solexis, Total SA, Elf Aquitaine SA and Arkema (Case COMP/F/38.620 — Hydrogen peroxide and perborate) ('the contested decision'), a summary of which is published in the *Official Journal of the European Union* of 13 December 2006 (OJ 2006 L 353, p. 54). It was notified to the applicant by letter of 8 May 2006.

The contested decision

10 The Commission stated in the contested decision that the addressees thereof had participated in a single and continuous infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA), regarding HP and the downstream product, PBS (recital 2 of the contested decision).

11 The infringement found consisted mainly of competitors exchanging commercially important and confidential market and company information, limiting and controlling production as well as potential and actual production capacities, allocating market shares and customers and fixing and monitoring adherence to target prices.

12 To calculate the amounts of the fines, the Commission applied the methodology set out in 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').

13 The Commission determined the basic amounts of the fines according to the gravity and duration of the infringement (recital 452 of the contested decision), which was categorised as very serious (recital 457 of the contested decision).

14 As part of a differentiating approach, the applicant, as the largest market operator on the markets concerned in the EEA, was placed in the first category, in respect of which the starting amount was EUR 50 million (recital 460 of the contested decision).

15 In order to ensure a sufficient deterrent effect, a multiplier of 1.5 was applied to that starting amount, in view of the applicant's high turnover (recital 463 of the contested decision).

16 Since, according to the Commission, the applicant participated in the infringement from 31 January 1994 until 31 December 2000, namely a period of six years and 11 months, the starting amount of its fine was increased by 65 % (recital 467 of the contested decision).

17 In view of the aggravating circumstances, the basic amount of the fine was increased by 50 % on account of repeated infringement (recital 469 of the contested decision).

18 The Commission found that the applicant was the third undertaking to have satisfied the requirements of point 21 of the Leniency Notice and on that basis granted it a reduction in the fine of 10 % (recitals 501 to 524 of the contested decision).

19 Article 1(m) of the contested decision states that the applicant infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in the infringement from 31 January 1994 until 31 December 2000.

20 The final amount of the fine imposed on the applicant under Article 2(h) of the contested decision is EUR 167 062 million.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court on 17 July 2006, the applicant brought the present action.

22 The composition of the Chambers of the Court having been altered, the Judge-Rapporteur was assigned to the Sixth Chamber, and, after the parties had been heard, the case was referred to the Sixth Chamber (Extended Composition).

23 By way of measures of organisation of procedure of 22 July 2009 and 6 January 2010, the Court put to the parties written questions, to which the parties replied on 15 September 2009 and 29 January 2010.

24 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 3 March 2010.

25 In accordance with Article 32 of the Rules of Procedure of the General Court, since two members of the chamber were prevented from attending the deliberations, the deliberations of the General Court were conducted by the three Judges who signed this judgment.

26 The applicant claims that the Court should:

— annul the contested decision, in full or in part, in particular in so far as the Commission found therein that the applicant participated in the infringement (a) between 31 January 1994 and August 1997 and (b) between 18 May and 31 December 2000;

— annul or substantially reduce the fines imposed on the applicant and on Solvay Solexis SpA;

— order the Commission to pay the costs, including the costs incurred in providing a bank guarantee relating to payment of the fine.

27 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

28 By document of 15 September 2009, the applicant withdrew in part its second head of claim, in so far as that head of claim sought the annulment or reduction of the fine imposed on Solvay Solexis. That withdrawal was confirmed at the hearing, and was noted in the minutes.

Law

29 In support of its action, the applicant relies on five pleas in law, alleging errors of law and in assessment of the facts in relation to, first, the finding of its participation in the infringement for the period from 31 January 1994 until August 1997, second, the finding of its participation in the infringement for the period from 18 May to 31 December 2000, third, the application of the Leniency Notice, fourth, the determination of the amount of the fine and, fifth, the refusal of access to certain material in the file.

30 It is apparent from the applicant's arguments that the pleas relating to the duration of its participation in the infringement (first and second pleas) and to access to the file (fifth plea) are submitted in support of its application for annulment of the contested decision, whereas the pleas relating to the determination of the amount of the fine (fourth plea) and the reduction thereof pursuant to the Leniency Notice (third plea) are put forward in support of its application for annulment of the fine or the reduction in the amount thereof.

31 It is therefore appropriate to examine the pleas in that order.

The duration of the applicant's participation in the infringement

Arguments of the parties

32 By the first and second pleas, the applicant contests the finding that it participated in the infringement during the initial and final periods of the cartel, from 31 January 1994 until August 1997, and from 18 May until 31 December 2000, respectively.

— The period from 31 January 1994 until August 1997

33 The applicant disputes the Commission's conclusion that it participated in the infringement between 31 January 1994 and August 1997. The applicant distinguishes the period prior to May 1995 from the period between May 1995 and August 1997.

34 As regards the period between 31 January 1994 and May 1995, the applicant claims that the Commission did not prove that it took part in any discussions or exchanges of information with competitors.

35 First, in relation to the Stockholm meeting between EKA Chemicals and Kemira on 31 January 1994, the date determined as the start of the infringement, it was not clearly established that the meeting had actually taken place, since Kemira did not confirm it.

36 Moreover, the notes made by EKA Chemicals at that meeting, referring to Kemira's discussions with other undertakings, including the applicant, did not establish that those discussions were illicit. That piece of evidence is not corroborated by any other evidence from which a link can be established between the bilateral cartel of EKA Chemicals and Kemira in the Scandinavian market and the alleged Europe-wide cartel.

37 Since the notes by EKA Chemicals indicated that the results of discussions with Air Liquide were 'not so good' and that the discussions with the applicant were 'going better', they demonstrated that Kemira had not reached an agreement either with Air Liquide or with the applicant. Since the Commission found that Air Liquide had not been party to the infringement at that time, it ought to have come to the same conclusion as regards the applicant.

38 Second, the meeting in Gothenburg on 2 November 1994 did not have any anti-competitive purpose. The Commission's argument that commercial data was exchanged during that meeting is not supported by the evidence produced by EKA Chemicals, and is contradicted by the information supplied by the applicant.

39 Third, as regards the contacts which allegedly took place on the fringes of the European Chemical Industry Council (CEFIC) meetings on 29 April 1994 in Rome and on 25 November 1994 in Zaventem, the statements by Degussa alone on the exchange of 'competition sensitive data' are not sufficient to prove that those contacts were unlawful.

40 As regards the period between May 1995 and August 1997, the applicant admits that it exchanged information with competitors, but claims that those exchanges cannot be classified as either an agreement or as a concerted practice.

41 The mere wish to restrict competition does not constitute an infringement of Article 81 EC. The Commission should have proved the existence of an agreement, resulting from a common wish by parties to conduct themselves on the market in a specific way. All the meetings described in the contested decision which took place prior to August 1997 ended without the undertakings having come to any agreement on even a single form of unlawful conduct to be adopted.

42 Thus, contrary to the requirements arising from the case-law relied on in recital 305 of the contested decision, the Commission did not prove that the undertakings concerned were in agreement on any specific line of conduct likely to restrict competition.

43 Nor did the Commission establish that the exchanges of information during the period at issue constituted a concerted practice.

44 According to the applicant, a concerted practice requires the existence of an agreement by competitors to behave in a certain manner, contacts between the undertakings enabling them to remove any uncertainty as to each other's conduct, and an effect on their behaviour on the market.

45 In the applicant's submission, the case-law, relied on in recital 298 of the contested decision, that the possibility that exchange of information by way of preparation for a cartel may be deemed to be a concerted practice, applies only where an agreement has already been concluded and where the exchange takes place in order to effect its implementation. In the present case, there was no agreement or concerted practice prior to the exchange of information in question.

46 The disagreements of opinion among the participants in the meetings in question were so severe that there could not be any practical cooperation between them or, therefore, any concerted practice.

47 Furthermore, the information exchanged was not such as to influence the conduct of competitors or substantially to reduce uncertainty as to the conduct of other undertakings on the market.

48 During the period concerned, the focus of the discussions was upon the capacities and volumes of different suppliers, how to deal with the problem of new capacity and how to allocate additional demand. The exchange of information related to production volumes and was intended to develop models as to how to allocate those volumes to ensure reasonable levels of capacity utilisation, and not to allocation of market share. That information was not of a nature to enable the undertakings to adapt their commercial behaviour.

49 Since the Commission failed to consider whether the information exchanged could have been used for anti-competitive purposes, it failed to establish the causal link between the alleged concerted practices and market conduct.

50 Degussa's statement on the exchange of 'competition sensitive data' is not sufficient proof of its unlawfulness.

51 Degussa mentioned, in its leniency application and in its reply of 5 September 2003 to the Commission's request for information, contacts with competitors which allegedly took place over many years, without providing any detail of the content of the

information exchanged. The assessment of that information, provided in the context of a leniency application, requires caution. Degussa's statements are ambiguous and of dubious probative value, since they do not date from the material time and do not make it possible to identify individual witnesses. Given that they are not confirmed by other evidence in the file, they are not sufficient proof of the infringement.

52 Degussa itself did not acknowledge having committed an infringement before 'mid-1997'. Degussa explained that the 'term "exchange of market sensitive information" characterised the typical content of a discussion between sales personnel of competing undertakings' and did 'not relate to an active concertation of conduct between competing undertakings'. Degussa added that such exchanges 'were only aimed at extending the information basis for future decisions of the undertakings'. They therefore had no other purpose than to create a 'climate' within which it might have been possible to take decisions in the future.

53 Degussa's statements were not corroborated by the other undertakings. The documents supplied by EKA Chemicals confirmed solely that it and Kemira had exchanged information. Arkema referred only to unsuccessful discussions about a model that might be used to allocate production 'tonnage'. It follows that, even by early 1997, the producers had come to no agreement or understanding on how to 'establish a European market order', despite attempts to do so.

54 The lack of any agreement or concerted practice is confirmed, first, by Degussa's conduct at the time, notably its 'WAR' plan intended to increase its sales regardless of price and, secondly by the failure of discussions at the meeting in Seville in May 1997, described by Degussa and Arkema as having come 'to a dead end' because of the lack of confidence among the producers. The Commission itself acknowledged, in recital

164 of the contested decision, that no agreement had been reached at that meeting, when the applicant's representative had 'stormed out of the room'.

55 Since the Commission had not established the existence of concertation, it was not entitled to presume that the undertakings had taken account of information which other undertakings had disclosed to them. Unlike in Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 161 and 162, in the present case, the undertakings concerned had found it impossible to reach an agreement on any aspect of their commercial behaviour and, in any event, the information exchanged was not capable of being taken into account to implement any concerted practice.

56 The lack of a concerted practice is also corroborated by the fact that the HP market was very competitive prior to August 1997. In particular, HP prices fell markedly in late 1996 and early 1997, falling below the level of variable costs in some cases.

57 The evidence provided by several undertakings during the administrative procedure demonstrates that the market was very competitive throughout the period concerned. In view of that evidence, the Commission was obliged to establish that the exchange of information had indeed influenced the undertakings' market behaviour.

58 Lastly, as regards PBS, there is no evidence to prove that the applicant committed an infringement prior to the meeting at Évian-les-Bains on 14 May 1998. Before that date no agreement had been reached and the producers had not exchanged any commercially sensitive information.

59 The Commission contends that it established to the requisite legal standard that the applicant's conduct, from as early as 31 January 1994, fell within the prohibition laid down in Article 81(1) EC.

60 The Commission established that, during the period from 31 January 1994 to August 1997, the undertakings concerned had exchanged sensitive information with the specific aim of allowing them to anticipate each other's conduct on the market, as regards production volumes, their possible reduction and the possible prevention of new capacity being brought onto the market (recitals 104 to 170 and 304 of the contested decision).

61 Degussa's statements demonstrated that during the 1990s the undertakings exchanged 'competition sensitive data'. It is clear from the description provided by Degussa that the information disclosed related to intended conduct on the market, namely 'volume and price developments' and 'entry or exit of competitors' (recital 104 of the contested decision).

62 That evidence is corroborated by documentary evidence provided by EKA Chemicals, which referred to 'an understanding that existed between suppliers not to enter each other's market'. EKA Chemicals drew up a list of meetings during which it stated that there was collusive behaviour. The notes made by EKA Chemicals at a bilateral meeting with Kemira on 31 January 1994 in Stockholm were a report of discussions with, inter alia, the applicant. It is evident from the content of that information that the producers were mutually controlling the behaviour of their competitors and that, in that context, Air Liquide was lacking discipline whereas the applicant was meeting the others' expectations. EKA Chemicals also referred to a bilateral meeting between itself and the applicant on 2 November 1994 in Gothenburg (recitals 106 to 108 and 111 of the contested decision).

63 Contrary to what is claimed by the applicant, Kemira did not dispute that it participated in the meeting with EKA Chemicals on 31 January 1994 but acknowledged, on the contrary, its participation in the infringement from that date. Since the purpose of that bilateral meeting was illegal, it was obvious that the negotiations with other competitors, including the applicant, described in the notes made by EKA Chemicals were also illegal.

64 The applicant wrongly claims that there is no evidence that its meeting with EKA Chemicals on 2 November 1994 in Gothenburg was illegal. In fact, it is clear from information provided by EKA Chemicals that commercial data was exchanged during that meeting (recital 113 of the contested decision).

65 Degussa stated that the exchange of 'competition sensitive data' also took place on the fringe of CEFIC meetings on 29 April 1994 in Rome and on 25 November 1994 in Zaventem (recital 114 of the contested decision).

66 Those facts are corroborated by Arkema's statements that, in April or June 1995, the applicant took part in discussions on 'market trend and new entrances', in relation to which 'Degussa and [the applicant] aimed to keep the market and their existing respective positions as stable as possible', and 'a model for sharing out among producers [was] being discussed probably since 1994-1995' (recitals 115 and 116 of the contested decision).

67 Moreover, in its reply to the statement of objections, the applicant admitted to contacts with competitors and to having shared market information from May 1995 onwards.

68 Those contacts, which occurred during the initial period of the cartel, had the objective of restricting competition and led to the conclusion of an agreement on prices and market allocation, are subject to the prohibition laid down in Article 81(1) EC (recital 305 of the contested decision). Those contacts can be regarded as forming part of the same collusive scheme.

69 The Commission accepts that no 'firm' agreement was reached on the model for market allocation, discussed at Milan on 31 October 1995 and at Seville in May 1997, but contends that the fact that such a model was proposed and discussed is sufficient to warrant the conclusion that there was an infringement of Article 81(1) EC.

70 The mere fact that, during the period in question, there were discussions relating to volumes, prices and models for sharing-out customers demonstrated a common wish to restrict competition. Contrary to what is claimed by the applicant, there was not only a 'mere intent', but a common scheme with the aim of reaching an agreement which would influence their conduct on the market.

71 Alternatively, the Commission contends that the competitors' behaviour during the period in question constitutes a concerted practice within the meaning of Article 81(1) EC. Consequently, it could be characterised as falling under the prohibition of Article 81(1) EC, even if it had not reached the stage where 'an agreement properly so-called was concluded' (recital 309 of the contested decision).

72 During that period, the competitors exchanged information on sales volumes, prices and customers, which was such as to allow them to adapt their market behaviour (recital 308 of the contested decision and recitals 120, 127 and 144 thereof).

73 The information exchanged was sufficient to reduce uncertainty about the conduct of competitors on the market. The applicant has itself admitted sharing confidential information with its competitors, from May 1995 onwards, and stated that '[t]he participants discussed potential options to improve the market situation and anticipate the increase in capacities on the market'. The question was 'whether it would be possible to come to any understanding' (paragraphs 130 and 133 of the applicant's reply to the statement of objections, and recitals 317 to 319 of the contested decision). That statement confirmed that the exchanges in question had the effect of putting competitors in a position to adapt their market behaviour. Furthermore, those exchanges served to 'prepare the ground' for price increases and market sharing practices.

74 Consequently, viewed as a whole, the body of evidence relied on in the contested decision met the requirements of being sufficiently precise and consistent to support the firm conviction that the applicant had committed the infringement from 31 January 1994.

— The period from 18 May until 31 December 2000

75 The applicant claims that the Commission erred in law and in the assessment of the facts, by finding that the cartel had continued after 18 May 2000.

76 First, the Commission has not proved that at the meeting on 18 May 2000 in Turku the participants had decided to continue the implementation of an agreement or concerted practice.

77 The Commission relied solely on evidence from Arkema, which is not decisive and uncorroborated by other evidence. The evidence from Arkema is contradictory, since Arkema also asserted that the meeting in question was 'the opportunity for certain producers to indicate that times had changed' and 'to signal an interruption of the cooperation'. Its evidence of a 'consensus' which emerged at the meeting in question is contradicted by other undertakings.

78 Before the meeting of 18 May 2000, at a bilateral meeting in Krefeld, the applicant informed Degussa that it had no further interest in the cartel. The Commission stated, wrongly, that the meeting at Krefeld post-dated that at Turku.

79 As regards bilateral contact between the applicant and FMC Foret in late 2000, that one-off contact, concerning PBS, was not capable of proving the continuation of the cartel relating to HP. The cartel relating to PBS had already come to an end, and FMC Foret had ended its participation in the cartel at the end of 1999 in relation to HP.

80 Second, the Commission wrongly relied on a presumption that the effects of the cartel continued after May 2000. In order to establish the continuing effects of an agreement which was no longer in force, the Commission should have demonstrated its effects on prices.

81 In particular, the Commission disregarded the evidence that the market was competitive after May 2000. In relation to the movement of prices, the Commission relied solely on a document from Arkema, from which it emerged that its average prices had remained relatively stable throughout 2000. However, other documents from Arkema indicated that its prices had fallen in 2000 in the European Union and that the average price was not calculated only on the basis of EEA sales. In addition, even if prices remained stable, that might be due to a strong increase in demand and rising costs.

82 In so far as it stated that the applicant had not clearly distanced itself from the cartel after 18 May 2000, the Commission disregarded the fact that the cartel had 'collapsed' on that date and thus reversed the burden of proof, in breach of the principle of the presumption of innocence.

83 The Commission disputes the applicant's arguments, referring in particular to the reasoning set out in recitals 355 to 360 of the contested decision.

Findings of the Court

84 Article 81(1) EC provides that the following are to be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

85 In order for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and Case T-9/99 *HFB Holding and Others* v *Commission* [2002] ECR II-1487, paragraph 199).

86 An agreement within the meaning of Article 81(1) EC can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (see, to that effect, *HFB Holding and Others* v *Commission*, paragraph 85 above, paragraphs 151 to 157 and 206).

87 The concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 115, and *Hüls* v *Commission*, paragraph 55 above, paragraph 158).

88 In this respect, Article 81(1) EC precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to restrict competition (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 87 above, paragraphs 116 and 117).

89 The disclosure of information to one's competitors in preparation for an anti-competitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 81 EC (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 82, and Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 178).

90 According to settled case-law, the concepts of agreement and concerted practice within the meaning of Article 81(1) EC are intended to catch forms of collusion having the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves (*Commission* v *Anic Partecipazioni*, paragraph 87 above, paragraphs 131 and 132, and *HFB Holding and Others* v *Commission*, paragraph 85 above, paragraph 190).

91 In the context of a complex infringement which involved many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, as an agreement or concerted practice, as in any event both those forms of infringement are covered by Article 81 EC (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 87 above, paragraphs 111 to 114, and 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 696).

92 The twofold characterisation of the infringement as an agreement 'and/or' concerted practice must be understood as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 81(1) EC, which lays down no specific category for a complex infringement of this type (*Hercules Chemicals* v *Commission*, paragraph 85 above, paragraph 264, and *HFB Holdings and Others* v *Commission*, paragraph 85 above, paragraph 187).

93 In relation to adducing evidence of the infringement, it should be pointed out that it is incumbent on the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement of Article 81(1)(EC) (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58).

94 The Commission must produce precise and consistent evidence in this respect (see Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited).

95 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement (see 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 180 and the case-law cited).

96 The items of evidence on which the Commission relies in the Decision in order to prove the existence of an infringement of Article 81(1) EC by an undertaking must not be assessed separately, but as a whole (see *BPB* v *Commission*, paragraph 89 above, paragraph 185 and the case-law cited).

97 It is also necessary to take account of the fact that anti-competitive activities take place clandestinely, and accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (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 55 to 57).

98 As regards the scope of review by the Court, according to settled case-law, where the Court is faced with an application for the annulment of a decision applying Article 81(1) EC, it must undertake in a general manner a comprehensive review of the question whether or not the conditions for the application of Article 81(1) EC are met (see Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 62 and the case-law cited).

99 Any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed, in accordance with the principle of the presumption of innocence, which, as a general principle of European Union law, applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hüls* v *Commission*, paragraph 55 above, paragraphs 149 and 150, and Joined Cases T-44/02 OP, T-54/02 OP and T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 60 and 61).

100 The question whether, in the present case, the Commission has established to the requisite legal standard that, during the periods at issue, the applicant's conduct amounted to an infringement of Article 81(1) EC must be examined in the light of those considerations.

— The period from 31 January 1994 until May 1995

101 The applicant essentially submits that the Commission erred in assessing the facts in taking 31 January 1994 as the starting date of the infringement. The applicant claims that it has not been established that, prior to May 1995, it engaged in any contact with competitors which might infringe Article 81(1) EC.

102 It is apparent from recitals 104 to 114 and 351 of the contested decision that the Commission took 31 January 1994 as the starting date of the applicant's participation in the infringement, on the basis of Degussa's statements made in its application for immunity, which were backed up by documentary evidence from EKA Chemicals and by Arkema's statements.

103 First of all, the Commission observed that, according to Degussa's statements, in the course of the 1990s, the competitors had increasingly exchanged 'competition sensitive data', or even 'market related information'. According to those statements, 'the term "exchange of market related information" characterise[d] the typical content of a discussion between sales personnel of competing undertakings'. The Commission added that, according to those statements, '[t]he information which was orally communicated concerned volume and price developments, the market position of competitors and customers, the entry or exit of competitors, changes in production capacity, product innovation on the supply and demand side, and comparable matters' (recital 104 of the contested decision). According to Degussa, the competitors engaged in such discussions in order inter alia to identify and verify competitors' market shares and to find out about customer behaviour (recital 105 of the contested decision).

104 Next, as regards the precise starting date of the infringement, the Commission stated that the first evidence confirming Degussa's statements, implicating inter alia the applicant, concerned the Stockholm meeting of 31 January 1994 between EKA Chemicals and Kemira, and the meeting of the same date between Degussa and EKA Chemicals. According to the Commission, that evidence shows that 'EKA [Chemicals], Kemira, Degussa and [the applicant had] participated in collusive behaviour at least from the beginning of 1994' (recitals 106 to 108 and 351 of the contested decision).

105 Lastly, the Commission stated that other illicit contacts took place in 1994 and 1995, which were recounted by EKA Chemicals (recitals 110 and 111 of the contested decision), by Degussa (recital 114) and by Arkema (recital 115 of the contested decision).

106 In this respect, the Court would point out, first of all, that Degussa's statements, whose content is contested by the applicant, cannot, in themselves, constitute adequate proof of the applicant's participation in the infringement.

107 According to settled case-law, a statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by undertakings which have been similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (*JFE Engineering and Others* v *Commission*, paragraph 95 above, paragraph 219, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 285).

108 That consideration applies *a fortiori* in the circumstances of this case, in view of the general nature of the wording used by Degussa, which refers to all the meetings that took place during the initial period of the cartel, between 1994 and 1996. Those statements cannot therefore suffice in themselves to place the start of the applicant's participation in the infringement at the beginning of 1994.

109 In so far as the Commission refers to statements by Degussa, according to which 'competition sensitive data' was exchanged during multilateral contacts on the fringes of the CEFIC meetings of 29 April and 25 November 1994 (recital 114 of the contested decision), the Court notes that that reference, which does not explicitly mention

the applicant, forms part of the abovementioned statements of Degussa and cannot therefore be regarded as evidence capable of corroborating those statements.

110 Next, as regards the evidence adduced by the Commission to substantiate Degussa's statements relating to the period concerned, it is common ground that the applicant did not participate in the meetings referred to in recital 351 of the contested decision, namely the Stockholm meeting of 31 January 1994 between EKA Chemicals and Kemira and the meeting of the same date between EKA Chemicals and Degussa.

111 In the context of those meetings, the Commission only referred to a document of EKA Chemicals, contemporaneous with the facts, according to which, in the meeting of 31 January 1994, EKA Chemicals and Kemira had exchanged information relating to the Scandinavian market and Kemira '[had] announced that [it had been] negotiating with [Air Liquide], but that the results of these discussions [were] not so good'. In the Commission's view, according to that document, '[d]iscussions with [Degussa] and [the applicant], on the other hand, [were] going better' (recital 106 of the contested decision).

112 Although that document reports, first, exchanges of information between the Scandinavian producers, Kemira and EKA Chemicals and, second, discussions between those two producers and certain producers on the 'continental marketplace', the reference made to the applicant in that context does not constitute adequate proof of its participation in illicit contacts surrounding the meeting concerned.

113 It is indirect evidence, which originates from an undertaking that did not participate in the alleged discussions with the applicant and which was not confirmed by Kemira. Moreover, the information in the document in question does not make it possible to identify the subject-matter of the discussions in question.

114 In this respect, the Commission was wrong to consider that it had 'no reason to doubt that the information in the document is a true reflection of what was discussed at the time' and formed part of the cartel in which the applicant is alleged to have participated (recital 317 of the contested decision).

115 With respect to other bilateral contacts in 1994, recounted by EKA Chemicals, the Commission refers to the meeting between EKA Chemicals and the applicant on 2 November 1994 in Gothenburg, at which, according to EKA Chemicals, the participants had 'discussed HP in Europe' (recital 111 of the contested decision).

116 However, the Court would point out that that reference alone, which is framed in general terms, does not suffice to establish the illegal nature of the meeting concerned, since the illegal nature of the meeting is contested by the applicant. Nor can the illegal object of that meeting be proved by the Commission's reference to other statements of EKA Chemicals, since those statements do not relate explicitly to that meeting, but refer only to the fact that, '[f]rom the 1990s onwards, meetings between EKA [Chemicals] and [the applicant] had mainly taken place with regard to general market issues, such as price information, market prognosis, etc.' (recital 113 and footnote 84 of the contested decision).

117 Lastly, although the Commission found that Degussa's statements were substantiated by Arkema's statements relating to the meetings that took place during 1995, according to which, inter alia, 'a model for sharing out among producers [had been] discussed probably since 1994-1995' (recitals 104 and 115 of the contested decision), the Court none the less observes that Arkema's statements relate to the multilateral meetings of 'April or May 1995' (recital 115 of the contested decision), and to subsequent

contacts, and could not therefore be used as evidence corroborating Degussa's statements in relation to the applicant's participation in the infringement during earlier periods.

118 It follows from all the foregoing that the evidence set out in recitals 104 to 115 and 351 of the contested decision, viewed as a whole, does not constitute a body of evidence sufficient to warrant the Commission's finding that the applicant participated in the infringement during the period from 31 January 1994 until May 1995.

119 First, Degussa's statements, relied on in recitals 104 and 105 of the contested decision, do not suffice in themselves to establish that the applicant took part in collusive action from as early as 1994 and, second, the other evidence relied on in recitals 106 to 115 and 351 of the contested decision is not a sufficient corroboration of those statements as regards the applicant's participation in illicit contacts prior to May 1995.

120 The applicant's complaint alleging an error of assessment of the facts in relation to its participation in the infringement from 31 January 1994 until May 1995 must therefore be upheld.

— The period from May 1995 until August 1997

121 In the contested decision, the Commission found that the undertakings to which the decision was addressed, including the applicant, had participated in a complex cartel which consisted in a complex of agreements and concerted practices having as its object the restriction of competition within the meaning of Article 81(1) EC. Its principal aspects included exchange of market-relevant information, limitation

of production and production capacities, the allocation of markets and the fixing of prices (recital 337 of the contested decision).

122 As regards specifically the initial period of the cartel, the Commission stated inter alia that at least as from 31 January 1994 the cartel participants met on a regular basis to exchange market-sensitive information and to discuss production volumes, their possible reduction or the prevention of new capacity being brought onto the market (recital 304 of the contested decision), and that those collusive contacts, which led to a firm agreement on prices and market allocation, could be regarded as forming part of the same collusive scheme (recital 305 of the contested decision).

123 Moreover, the Commission found that the exchanges of information on sales volumes, prices and customers during the initial period of the cartel were of such a nature as to allow the undertakings in question to take account of this information when determining their own behaviour on the market and that, consequently, it could be presumed that those undertakings had taken account of the information exchanged with their competitors in determining their own conduct on the market (recital 308 of the contested decision).

124 Thus, the Commission found that, 'even if during the earlier period of the infringement it had not reached the stage where an agreement properly so-called was concluded, [the behaviour in question could] at least be characterised … as falling under the prohibition laid down in Article 81(1) [EC] … [since] the complex of collusive behaviour in its various forms [presented] all the characteristics of an agreement and/or a concerted practice' (recital 309 of the contested decision).

125 In support of those findings, as regards the period from May 1995 to August 1997, the Commission referred inter alia to the following events:

— the multilateral meeting of April or May 1995 in Paris was organised with the purpose of establishing steady contact between the competitors, Degussa and the applicant having expressed their intention to stabilise, as far as possible, the existing positions on the market (recitals 115 to 117 of the contested decision);

— bilateral contacts on the fringe of the CEFIC assembly of 11 or 12 May 1995 in Dresden related to the issue of an expected price decline owing to the completion of new production facilities (recitals 118 and 119 of the contested decision);

— the bilateral meetings of June 1995 between Atofina and Air Liquide (recital 120 of the contested decision), between Atofina and Degussa (recital 121 of the contested decision) and between Degussa and EKA Chemicals (recital 122 of the contested decision) were devoted to discussions on overcapacity on the HP market and to the possibilities of cooperation between the producers, on the basis of a table presenting a detailed overview on a per customer and a per producer basis, which included the applicant's data;

— generally, around 1995, several proposals relating to sales quotas and control of overcapacity 'circulated' for over a year and were the subject of discussions between Atofina, Degussa and the applicant (recitals 123 and 124 of the contested decision);

— the meeting between Atofina, Degussa and Chemoxal in Paris on 23 October 1995 related inter alia to a detailed proposal on limiting new capacity, including that from a new plant of the applicant's, and to a proposed agreement on prices (recitals 126 and 127 of the contested decision);

— the producers were split into two groups, 'A' and 'B ', which were coordinated by the applicant and Degussa, respectively. Group 'B' was supposed to share amongst themselves the market shares defined by group 'A'; group 'A' brought together the 'market leaders', namely Degussa and the applicant, and the Scandinavian undertakings, EKA Chemicals and Kemira (recitals 130 and 131 of the contested decision);

— the meeting of group 'B' of 31 October 1995 in Milan related to '[the constitution of] a model laying out how the extra market growth would be shared' and the notes taken on that occasion refer inter alia to information relating to the applicant (recitals 132 and 133 of the contested decision);

— bilateral contacts, including also the applicant, surrounding the CEFIC meeting of 21 and 22 November 1995 in Brussels, and the meeting in Italy involved the exchange of market information and the definition of HP price levels for the following year, although those prices were not respected (recitals 134 to 136 of the contested decision);

— the bilateral meeting between Atofina and the applicant, at the beginning of 1996 in Paris, had the objective of comparing the views of groups 'A' and 'B' (recital 139 of the contested decision);

— meetings surrounding CEFIC assemblies in which the applicant participated, on 24 May 1996 in Gothenburg and on 27 November 1996 in Brussels, related to detailed proposals on market allocation and pricing, without however leading to a specific agreement (recitals 141 to 145 of the contested decision);

— a number of bilateral contacts in 1996 and 1997, including the meeting between EKA Chemicals and the applicant, in April or May 1997 in Copenhagen, in which the applicant asked whether EKA Chemicals would join the other producers in the coordinated efforts to reduce capacity, show that there were plans to reduce capacities (recitals 154 and 155 of the contested decision);

— the meetings of 28 or 29 May 1997, surrounding the CEFIC meeting in Seville, brought together groups 'A' and 'B' and related to a model based on the division of the HP market, although no final agreement was reached and the discussions were postponed until August 1997 (recitals 156 to 167 of the contested decision);

— bilateral contacts between the applicant, EKA Chemicals and Degussa followed those meetings during summer 1997 (recitals 168 to 170 of the contested decision).

126 The applicant does not contest either the fact that those contacts took place or the content of the discussions set out in the abovementioned recitals of the contested decision.

127 It none the less submits that those facts do not lead to the conclusion that there was an agreement or a concerted practice prior to the date of the multilateral meeting of August 1997 in Brussels, which led to a firm agreement on an HP price increase

(recitals 171 to 174 of the contested decision) and is acknowledged by the applicant as the beginning of its participation in the infringement.

128 First, the applicant claims, referring to the material in recitals 115 to 170 of the contested decision, that, until that meeting of August 1997, the participants in the relevant discussions were not able to conclude an agreement on the allocation of markets or prices and did not engage in concerted practices.

129 In this respect, the applicant claims that Commission relied on an incorrect interpretation of the concepts of agreement and concerted practice within the meaning of Article 81(1) EC and erred in assessing the facts.

130 As regards the alleged error of law, it should be borne in mind that, in the context of a complex infringement, the Commission is not required to classify each of the infringements established as an agreement or concerted practice within the meaning of Article 81(1) EC, since they are forms of collusion having the same nature. Moreover, the Commission cannot be expected to classify the infringement precisely, as an agreement or concerted practice, as in any event both those forms of infringement are covered by Article 81(1) EC (see paragraphs 90 and 91 above).

131 In the present case, the Commission cannot therefore be criticised in law for having defined the complex of conduct in question as displaying all the constituent features of 'an agreement and/or a concerted practice' in so far as it could be regarded as falling within one or another of those forms of collusion covered by Article 81(1) EC.

132 As regards the alleged error of assessment of the facts, the applicant submits, in essence, that, prior to August 1997, the competitors, first, did not reach an agreement on specific conduct on the market and, second, did not adopt a form of coordination which could be characterised as a concerted practice.

133 The applicant refers in particular to the information in the contested decision, according to which, in 1996, discussions '[had been] going around in circles for one year' and seemed 'to have come to a dead end'. It states that, still in May 1997, '[a] lacking confidence was a concurrent reason for not reaching an agreement about the retention of a status quo of market shares', 'the smallest manufacturers … [having] voted against the fixing of market shares' (recitals 140, 142 and 164 of the contested decision).

134 Although the material relied on by the applicant indicates that the producers which participated in the meetings between May 1995 and August 1997 did not manage to conclude an agreement 'properly so called' on the allocation of the market, which the Commission itself found in recital 309 of the contested decision, the fact remains that they had regular discussions over an extended period on the scheme of such an agreement.

135 It is apparent from facts which have not been contested by the applicant that, following repeated invitations from Degussa and the applicant to their competitors on the HP market, meetings took place during May 1995 with the purpose of establishing a steady contact between the competitors. The participants discussed market trends and new entrances on the European HP market; Degussa and the applicant aimed to keep the existing positions on the market as stable as possible (recitals 115 to 117 of the contested decision).

136 Between May 1995 and August 1997, regular discussions took place the subject of which were proposals on sales quotas and control of overcapacity (recitals 123 and 124 of the contested decision), a detailed proposal to limit new capacities, including those of the applicant, and a proposed agreement on prices (recitals 126 and 127 of the contested decision), '[the constitution of] a model laying out how the extra market growth would be shared' (recitals 132 and 133 of the contested decision), detailed proposals on market allocation and a price agreement (recitals 143 to 145 of the contested decision), coordinated efforts to reduce capacity (recitals 154 and 155 of the contested decision) or an articulate model on division of the HP market (recitals 159 to 167 of the contested decision).

137 The content of the discussions, which has not been called in question by the applicant, demonstrates that there was a common intention to restrict competition.

138 That series of regular meetings at which the undertakings met to discuss proposals for limiting new capacity, the allocation of market shares and an agreement on prices would not have been possible had there not been at the material time a common intention among those participating in the meetings to stabilise the market by measures restricting competition (see, to that effect, Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 46).

139 Since the discussions in question were clearly guided by a common intention of the participants to agree on the very principle of a restriction of competition, that consideration cannot be undermined by the fact that the specific features of the restriction envisaged were the subject of negotiations between the participants until August 1997 and that the modalities of the firm agreement of August 1997 concerning a coordinated increase in HP prices differed from those discussed at the earlier meetings.

140 The applicant's involvement in those collusive contacts is indeed clearly apparent from its active participation in the discussions. It participated in most of the meetings during the period concerned, having 'synthesize[d]' the proposals (recitals 123 and 124 of the contested decision) and coordinated the group composed of the 'market leaders' (recitals 130 and 131 of the contested decision).

141 In this respect, the applicant's reference to the fact that, at a meeting in May 1997 (recital 162 of the contested decision), its representative 'stormed out of the room, … irritated by small producers' counterrequests' does not constitute evidence to establish that its participation in the meeting concerned, or *a fortiori* in all the contacts in question, was without any anti-competitive intention.

142 In the light of those considerations, the Commission was entitled to find that, since the conduct in question fell within an initial stage of the cartel and the applicant took part in that conduct, it was part of the same anti-competitive scheme and was therefore caught by the prohibition laid down in Article 81(1) EC.

143 First, it should be borne in mind that an agreement within the meaning of Article 81(1) EC can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (see paragraph 86 above).

144 In the present case, the applicant cannot therefore reasonably claim that, in so far as the undertakings did not agree to adopt specific courses of conduct on the market, the conduct in question amounts, at most, to a mere intention to restrict competition, which does not fall with the forms of collusion covered by Article 81(1) EC.

145 In so far as the material set out above shows that the competitors already had a common scheme whose objective was to arrive at an anti-competitive agreement, those discussions must be regarded as going beyond a mere intention or an attempt to conclude an agreement.

146 Second, the Court would point out that the contacts during the period in question could, in any event, be characterised as falling within Article 81(1) EC as a concerted practice.

147 It should be recalled that, according to settled case-law, the disclosure of information to one's competitors in preparation for an anti-competitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 81 EC (see paragraph 89 above).

148 In this respect, even if the Commission does not succeed in showing that the undertakings concluded an agreement, in the strict sense of the term, it is sufficient, in order to find an infringement of Article 81(1) EC, that the competitors have made direct contact with a view to 'stabilising the market' (see, to that effect, *BPB* v *Commission*, paragraph 89 above, paragraph 170).

149 In the light of those considerations, it is necessary to reject the applicant's contention that the disclosure of information to competitors may be deemed to be a concerted practice only where an anti-competitive agreement has already been concluded and negotiations take place only in order to effect its implementation.

150 In the present case, the Commission established that the applicant had participated in a number of meetings with its competitors and that, during those meetings, information on market conditions was exchanged, price levels were discussed and the

participants set out the commercial strategy that they intended to adopt on the market. It is also established that the information in question was exchanged with the purpose of preparing an agreement on the allocation of the market or on prices, its object thus being manifestly anti-competitive.

151 The Commission was therefore entitled to find that the applicant had taken part in a concerted practice which had the object of restricting competition.

152 That finding is not called into question by the applicant's argument that, given the lack of mutual trust between the competitors, it was inconceivable that they could have engaged in concerted practices.

153 The different views of the participants, or the lack of trust between them, are not in themselves sufficient to preclude the existence of concertation capable of being categorised as a concerted practice. The applicant's arguments do not tell against the facts established by the Commission, from which it is apparent that, despite a certain lack of trust between them, the competitors met regularly in the period concerned and exchanged information on market conditions and their commercial strategy with the aim of preparing an anti-competitive agreement.

154 Contrary to the applicant's claim, it cannot be alleged that the Commission did not establish that the information exchanged, in view of its content, was capable of being used for anti-competitive purposes.

155 The anti-competitive object of the conduct in question is clear from the nature of the information exchanged at the meetings during the period concerned, since that information included sales figures relating to previous years and forecasts for the future (recital 120 of the contested decision), as well as from the content of the proposals discussed, which related to the retention of the status quo on the market, the allocation of new production capacity and the definition of HP price levels (see, for example, recitals 115, 127, 133, 136 and 144 of the contested decision).

156 The Commission therefore established to the requisite legal standard that, since the exchange of information in question served to 'prepare the ground' for the price increases and market sharing practices resulting from that exchange, it constituted a form of collusion covered by Article 81(1) EC.

157 It follows from those considerations that the Commission was entitled to find that the conduct at issue could be considered to fall within the prohibition laid down in Article 81(1) EC, inasmuch as it was part of a complex displaying the constituent features of an agreement 'and/or' a concerted practice (recitals 308 and 309 of the contested decision).

158 As regards the applicant's argument that the HP market remained competitive until August or September 1997, HP prices having diminished considerably at the beginning of 1997, it should be borne in mind that, according to settled 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 or a concerted practice once it appears that the infringement had as its object the prevention, restriction or distortion of competition within the common market (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 140, and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29).

159 In the present case, since the Commission found that the applicant had taken part in an anti-competitive agreement and/or concerted practice which had as its object the restriction of competition on the HP market, it was not required to take account of the actual effects of the conduct in question.

160 In any event, as regards specifically a concerted practice, according to settled case-law, the presumption must be that — subject to proof to the contrary, which it is for the economic operators concerned to adduce — the undertakings taking part in the concerted arrangements and who remain active on the market take account of the information exchanged with their competitors when determining their conduct on that market (*Commission* v *Anic Partecipazioni*, paragraph 87 above, paragraphs 118 and 121, and *Hüls* v *Commission*, paragraph 55 above, paragraphs 161 and 162).

161 In this respect, even it were established that that conduct had no influence on prices during the period concerned, that would not call into question the legality of the Commission's findings.

162 In particular, the fact that a concerted practice has no direct effect on price levels does not preclude a finding that it limited competition between the undertakings concerned, inter alia by eliminating competitive pressures (see, to that effect, *Dansk Rørindustri* v *Commission*, paragraph 138 above, paragraphs 139 to 140).

163 Accordingly, the applicant's argument that the Commission failed to have regard to the fact that the market remained competitive during the period concerned cannot succeed.

164 As regards the applicant's argument that the facts relied on in the contested decision concerning the period in question relate predominantly to the HP market, and not the PBS market, it should be recalled that the contested decision is based on the finding of a single infringement relating to the two markets concerned (recital 328 et seq. of the contested decision), a categorisation which the applicant does not contest in the present case.

165 Since the Commission categorised the cartel in question as a single infringement, it was not required to establish, as part of that categorisation, the various durations of the acts which related to the PBS market alone. Moreover, given that this case does not concern separate infringements, the Commission was not required to take account of that difference when determining the duration of the infringement as a whole.

166 It would be artificial to split up continuous conduct, characterised by a single purpose, into a number of separate infringements on the ground that the collusive practices varied in their intensity according to the market concerned. Those factors must be taken into consideration only when the gravity of the infringement is assessed and when determining the amount of the fine (see, by analogy, *Commission* v *Anic Partecipazioni*, paragraph 87 above, paragraph 90).

167 In the present case, in accordance with those considerations, the Commission stated that, when setting the fine, it had taken account of the fact that the collusion regarding PBS had commenced later than that regarding HP and had ceased earlier (recital 331 of the contested decision).

168 The applicant's argument alleging insufficient proof of anti-competitive acts on the PBS market with respect to the period in question cannot therefore succeed.

169 Lastly, since the applicant has not demonstrated that the contested decision was vitiated by an error of law in the application of Article 81(1) EC, it is also necessary to reject its argument, based on essentially the same premiss, that the Commission interpreted that provision too broadly, in breach of the principle that penalties must have a proper legal basis.

170 In the light of all the foregoing, the Court rejects the complaint relating to the finding of the infringement for the period from May 1995 to August 1997.

— The period from 18 May until 31 December 2000

171 With respect to the final period of the infringement, the Commission observed, in recital 356 of the contested decision, that Article 81(1) EC applies to a cartel which continues to produce its effects after it has been formally brought to an end and that that is the case in particular where undertakings do not cease applying the reference prices agreed at the cartel meetings.

172 Applying those considerations to the circumstances of this case, the Commission stated that, according to Arkema's statements, which were consistent with other evidence, at the multilateral meeting in Turku on 18 May 2000, there was a general consensus on maintaining the price levels throughout 2000 and that, accordingly, it could be considered that the effect on prices had continued at least during the second half of 2000 (recital 357 of the contested decision). 31 December 2000 was therefore taken as the relevant date for the end of the infringement, inter alia in the applicant's case (recital 360 of the contested decision).

173 The applicant submits, in essence, that the Commission committed an error of law and in assessment of the facts in finding that the cartel had continued after the meeting of 18 May 2000.

174 In this respect, it should be borne in mind that, according to settled case-law, Article 81 EC also applies to agreements which continue to produce effects after the agreements have formally ceased (Case 243/83 *Binon* [1985] ECR 2015, paragraph 17, and Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 231).

175 In particular, the Commission may lawfully find that a cartel continues to produce its effects after collusive meetings have formally ceased in so far as the price increases planned during those meetings are to be applied at a later time (see, to that effect, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 186).

176 In the present case, since the Commission established that the meeting of 18 May 2000 had led to a general consensus on maintaining price levels for the second half of 2000, it was entitled to conclude that the cartel continued to produce effects until 31 December 2000.

177 That conclusion is not called into question by the applicant's arguments alleging, first, that the evidence put forward by the Commission was inadequate.

178 The Court would point out that the applicant does not dispute that the informal meeting in question took place, or that it participated in that meeting. In this respect, the applicant is wrong to submit that Arkema's statements, referring to a 'consensus',

do not mean that there was a common intention of the participants to continue to produce the effects of the agreement. That argument is contradicted by the wording of those statements, which refer to the existence of 'final discussions' on prices to apply on 1 January 2001 and of a 'general consensus' on maintaining their levels (recital 282 of the contested decision).

179 The applicant is also incorrect to rely on an alleged contradiction between Arkema's evidence on the consensus on prices and its other statements, according to which the Turku meeting had been 'the opportunity for certain producers to indicate that times had changed' and 'to signal an interruption of the cooperation and thus end the controlled regulation of the market'. Those statements, which report the intention to bring to an end the anti-competitive conduct and therefore signal that the cartel had formally ceased to be in force, are not inconsistent with the existence of a consensus on maintaining its effects until the end of the year.

180 In addition, contrary to the applicant's claim, Arkema's statements are consistent with other material in the file, in particular, with the information, confirmed by several undertakings and undisputed by the applicant, that, in meetings which took place on the fringes of the bi-annual CEFIC assemblies, prices were usually established for the subsequent six months (recital 357 of the contested decision).

181 The Court would point out, in this respect, that, where there is a consistent body of evidence demonstrating the existence of the cartel, there needs to be a particularly good explanation in order to demonstrate that, during a particular meeting, things occurred which were completely different from what had transpired at earlier meetings when all those meetings were attended by the same people, took place under

similar external conditions and indisputably had the same purpose (Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, II-954).

182 In any event, the evidence that several competitors continued the collusion until at least the end of 2000, despite its formal cessation, was supported by the existence of certain bilateral contacts subsequent to the meeting of 18 May 2000 (recital 357 of the contested decision).

183 The applicant's argument seeking to establish that one of those contacts was lawful, namely its meeting with FMC Foret, is in this respect not capable of calling into question the Commission's finding that the cartel continued to produce effects, since that finding is not based on that isolated fact, which is merely a secondary item of evidence in the body of evidence relied on by the Commission.

184 Nor can the applicant succeed in arguing that it stated at a bilateral meeting with Degussa, in May or June 2000 (recitals 283 to 285 of the contested decision), that 'further discussions among producers on market, capacity shares as well as the reallocation thereof, were no longer the way to go forward'.

185 It is sufficient to note in that regard that that view expressed by the applicant during a bilateral contact, which could indeed be interpreted as an illustration of the difficulties of maintaining the cartel, does not show that it publicly distanced itself from the infringement, thus putting an end to its participation in the cartel.

186 It follows from those considerations that the Commission established to the requisite legal standard that the meeting of 18 May 2000 had led to a general consensus on maintaining price levels and, therefore, that the cartel had continued to produce effects during the second half of 2000.

187 That conclusion is not invalidated by the applicant's arguments alleging, second, a lack of analysis of the actual prices charged on the market during the period concerned and the presence, in the file, of evidence that the market was competitive.

188 In so far as the Commission established that the price levels which were the subject of a general consensus during the meeting in question were to apply during the second half of 2000, it was entitled to find that the cartel had continued to produce effects during that period, and was not required to establish that the cartel had had an actual effect on prices charged (see, to that effect, *Bolloré and Others* v *Commission*, paragraph 175 above, paragraph 186).

189 Contrary to the applicant's claim, since that finding is based on the view, which is established to the requisite legal standard, that there was a common intention of the parties to prolong the effects of the cartel despite its having formally ceased to be in force, it does not stem from a reversal of the burden of proof and cannot therefore be contrary to the principle of the presumption of innocence.

190 In the light of the foregoing, the Court finds that the applicant's arguments have not called in question the Commission's finding that the infringement continued until 31 December 2000.

191 The Court therefore also rejects that complaint.

192 Following examination of the first and second pleas, the Court finds that the Commission did not establish to the requisite legal standard that the applicant had taken part in the infringement during the period from 31 January 1994 until May 1995.

193 The Court dismisses the first and second pleas as to the remainder.

194 Consequently, it is necessary to annul Article (1)(m) of the contested decision, in so far as the Commission found therein that the applicant participated in the infringement during the period prior to May 1995, and to adjust the amount of the fine imposed on the applicant in Article 2(h) of the contested decision, so as to take account of the reduced period of its participation in the infringement. The practical consequences of that adjustment will be set out in paragraphs 440 and 441 below.

The alleged infringement of the rights of the defence

Arguments of the parties

195 In the fifth plea, the applicant claims that the Commission refused it access (i) to some of the documents in the file provided by Degussa and (ii) to the replies to the statement of objections submitted by the other undertakings concerned. That refusal constitutes an infringement of the applicant's rights of defence, and Article 27(2) 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).

196 First, the applicant states that it has had restricted access to the documents provided by Degussa, containing its internal monthly reports relating to the HP market for the year 2000. The Commission committed an error of law and an error of assessment by refusing the applicant full access to those documents.

197 The information in question could not objectively be regarded as confidential, because it consisted of reports at least five years old, reflecting short term strategies. In relation to comparable information from the applicant, the Commission took the view that it could no longer be regarded as confidential after three years.

198 Furthermore, the confidentiality of a document is not an absolute bar to its disclosure. The applicant's rights of defence should have prevailed over the confidentiality of data. It was possible to take appropriate measures to protect the confidentiality of information.

199 The Degussa document was relevant to determining whether an infringement had been committed after the meeting on 18 May 2000 in Turku and, consequently, was indispensable to the applicant's defence. The extracts from the Degussa documents relating to the year 2000 indicated that the market was competitive, and that might have made it possible to refute the existence of the infringement during that period.

200 Second, the applicant submits that the Commission infringed Article 27(2) of Regulation No 1/2003 and its rights of defence by refusing it access to the replies to the statement of objections given by the other undertakings concerned.

201 The Commission was wrong to state that such access was not a requirement of Community law. The Commission has disclosed replies to a statement of objections in previous proceedings. Paragraph 27 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7) is unlawful, to the extent that that provision excludes, as a rule, access to the replies in question.

202 The applicant claims that the replies of the other undertakings to the statement of objections might have corroborated its position on the duration of the infringement, since those other undertakings also disputed the starting and end dates of the cartel and, in particular, the continuation of the infringement from 18 May until 31 December 2000.

203 The Commission contests the applicant's arguments.

Findings of the Court

204 According to Article 27(2) of Regulation No 1/2003:

'The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets …'

205 According to settled case-law, the right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that may be relevant for its defence (Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraphs 125 to 128, and Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 81).

206 Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (*Aalborg Portland and Others* v *Commission*, paragraph 97 above, paragraph 68).

207 As regards incriminating evidence, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if that uncommunicated document had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 97 above, paragraphs 71 to 73).

208 By contrast, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 318, and *Hercules Chemicals* v *Commission*, paragraph 85 above, paragraph 81), by showing in particular that it would have been able to invoke evidence which was not consistent

with the Commission's assessments at the stage of the statement of objections and therefore could have had an influence, in any way at all, on its assessments in the decision (*Aalborg Portland and Others* v *Commission*, paragraph 97 above, paragraph 75).

209 In the first plea, the applicant claims that it did not have access, first, to some of the documents in the Commission's file provided by Degussa and, second, to the replies of the other undertakings concerned to the statement of objections.

— Access to Degussa's documents

210 It is apparent from the file that, during the administrative procedure, the applicant sought access to the reports of Degussa's sales service relating to the period of the infringement.

211 The Commission granted full access to the documents relating to the years 1996 to 1999, but disclosed only extracts of the documents relating to the years 2000 and 2001, which were deemed confidential, at Degussa's request.

212 In this plea, the applicant criticises the refusal of access to the complete version of the documents relating to the year 2000, and alleges, first, infringement of Article 27(2) of Regulation No 1/2003 and, second, infringement of the rights of the defence.

213 It should be borne in mind that the right of access to the file provided for in Article 27(2) of Regulation No 1/2003 is one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively.

214 Thus, access to the file is not an end in itself but is intended to protect the rights of the defence (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 156).

215 It follows that the applicant may, in pleading refusal of full access to the documents in question, rely on infringement of Article 27(2) of Regulation No 1/2003 only in so far as those documents might have been relevant to its defence, which it is for the applicant to demonstrate.

216 In this respect, the applicant claims that the documents in question might have contained evidence of the competitive nature of the HP market during the second half of 2000, capable of amounting to exculpatory evidence as regards the continuation of the infringement during that period. It states that extracts of those documents disclosed already show that the HP market was competitive in 2000, since production costs had increased and prices had remained unchanged.

217 However, as was held in paragraph 188 above, since the Commission established, to the requisite legal standard, that, at the meeting in Turku, there was a general consensus on maintaining price levels during the second half of 2000, it was entitled to conclude that the cartel had continued to produce effects until the end of that period,

and was not required to take into consideration any evidence that it had not been possible to achieve the objectives of that consensus.

218 Accordingly, the evidence relating to the situation on the market during the second half of 2000, and in particular to the prices charged by the undertakings concerned, was not capable of influencing in any way the Commission's finding that the infringement continued until the end of 2000. That evidence cannot therefore constitute exculpatory evidence as regards the continuation of the cartel during that period.

219 Consequently, since the applicant has failed to show that it could have relied on evidence derived from the documents in question for its defence, this complaint must be rejected, and there is no need to examine its arguments based on an alleged error by the Commission in the assessment of the confidential nature of those documents.

— Access to the replies of the other undertakings to the statement of objections

220 It is apparent from the file that, during the administrative procedure, the Commission rejected the applicant's request for access to the non-confidential versions of the replies to the statement of objections given by the other undertakings to which that statement was addressed.

221 The applicant submits that that refusal of access infringed its rights of the defence, since the replies in question might have contained exculpatory evidence.

222 It should be pointed out that the statement of objections is a document whose aim is to delimit the scope of the procedure initiated against an undertaking and to ensure that the rights of the defence may be exercised effectively (T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 80 and the case-law cited).

223 It is from that aspect that the addressees of the statement of objections benefit from procedural safeguards, pursuant to the principle of respect for the rights of the defence, one of which is the right of access to documents in the Commission's file.

224 The replies to the statement of objections are not part of the investigation file proper (*Cimenteries CBR and Others* v *Commission*, paragraph 214 above, paragraph 380).

225 Since they are documents which are not part of the file compiled at the time of notification of the statement of objections, the Commission is required to disclose those replies to other parties concerned only if it transpires that they contain new incriminating or exculpatory evidence.

226 In this respect, concerning, first, new incriminating evidence, it is settled case-law that, if the Commission wishes to rely on evidence from a reply to a statement of objections in order to prove the existence of an infringement, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such new evidence (*Cimenteries CBR and Others* v *Commission*,

paragraph 214 above, paragraph 386, and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 50).

227 As regards, second, new exculpatory evidence, according to the same line of case-law, the Commission is not obliged to make it available of its own initiative. If, during the administrative procedure, the Commission has rejected an applicant's request for access to documents which are not in the investigation file, an infringement of the rights of the defence may be found only if it is proved that the outcome of the administrative procedure might have been different if the applicant had had access to the documents in question during that procedure (*Cimenteries CBR and Others* v *Commission*, paragraph 214 above, paragraph 383).

228 Moreover, the applicant may not rely on the argument, based on *Aalborg Portland and Others* v *Commissio*n, paragraph 97 above (paragraph 126), that it cannot be for the Commission alone to determine the documents of use in the defence of the undertaking concerned. That argument, relating to documents within the Commission's file, cannot apply to the replies given by other parties concerned to the statement of objections.

229 Accordingly, contrary to the applicant's claim, considerations based on respect for the principle of equality of arms and respect for the rights of the defence cannot, as a rule, lead to an obligation on the Commission to disclose the replies in question to other parties, so that they can ascertain that there is no exculpatory evidence.

230 In so far as an applicant relies on the existence of the alleged exculpatory evidence in replies which have not been disclosed, it is for the applicant to provide *prima facie* evidence of the relevance of those documents for its defence.

231 An applicant must in particular indicate the potential exculpatory evidence in question or adduce evidence that it exists and therefore of its relevance for the purposes of the case (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 351 to 359).

232 In the present case, the applicant claims that the replies of the other undertakings to the statement of objections might have corroborated its arguments seeking to demonstrate the shorter duration of the infringement. It states, inter alia, that certain other undertakings contested the starting and end date of the cartel, calling into question in particular the Commission's analysis that the cartel continued until the end of 2000. It also claims that the replies in question might have contained evidence of such a nature as to cast a different light on the existence of the infringement during the second half of 2000, in view in particular of the absence of evidence of an effect on prices during that period.

233 However, it is settled case-law that the mere fact that the other undertakings concerned put forward substantially the same arguments as the applicant as regards the duration of the infringement is not sufficient to regard those arguments as exculpatory evidence (see, to that effect, *Jungbunzlauer* v *Commission*, paragraph 231 above, paragraphs 353 and 355).

234 Equally, the fact that some undertakings had succeeded in their replies to the statement of objections in showing that there was no adequate proof of their participation in the alleged infringements does not mean that those replies contained evidence of such a nature as to cast a different light on the specific documentary evidence on which the Commission relied in respect of other undertakings (*Cimenteries CBR and Others* v *Commission*, paragraph 214 above, paragraph 405).

235 That is *a fortiori* the case where, as in the present case, the arguments relied on by the other undertakings in their replies to the statement of objections were rejected by the Commission in the contested decision. In those circumstances, any comments that the applicant might have been able to make on the basis of those replies could have contained only evidence which had already been fully taken into account by the Commission, and could not have changed the outcome of the procedure.

236 Moreover, as was already observed in paragraphs 188, 217 and 218 above, any evidence as regards the competitive nature of the market and the prices charged between 18 May and 31 December 2000, during the final period of the cartel, was not capable of influencing the Commission's finding that the cartel had continued during that period and, therefore, could not be regarded as exculpatory evidence.

237 It follows from those considerations that the applicant's arguments do not provide *prima facie* evidence of the usefulness, for its defence, of the replies of the other undertakings concerned to the statement of objections.

238 The Court therefore holds that the applicant has not established that the fact that it did not have access to those replies was liable to have harmed its defence.

239 In so far as the applicant pleads incorrect application of paragraph 27 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 EC and 82 EC, Articles 53, 54 and 57 of the EEA Agreement and Regulation No 139/2004 or, in the alternative, its unlawfulness, it is sufficient to note that the notice in question, which is not in fact relied on in the contested decision, was published in the *Official Journal of the European Union* on 22 December 2005 and

could not therefore apply *ratione temporis* to the disputed refusal of access, which occurred on 4 May 2005.

240 The applicant's arguments in relation to that notice are therefore ineffective.

241 In the light of all the foregoing, the Court rejects as unfounded the complaint based on refusal of access to the replies of the other undertakings to the statement of objections, and this plea in its entirety.

The alleged errors in the determination of the basic amount of the fine

Arguments of the parties

242 The fourth plea consists of four complaints, relating to the Commission's findings when determining the amount of the fine, as regards, first, the gravity of the infringement, second, its duration, third, the deterrent effect of the fine and, fourth, the failure to take account of the applicant's cooperation as an attenuating circumstance.

243 First, the applicant claims that the Commission committed errors of law and of assessment of the facts in assessing the gravity of the infringement. The basic amount of the fine was consequently excessive and disproportionate.

244 When determining the starting amount, the Commission failed to take into account that the duration of the cartel relating to PBS was shorter than that relating to HP. The starting amount was established according to the size of the combined markets of HP and PBS in the EEA in 1999, without regard to the fact that the cartel relating to PBS had been shorter. Since the HP market represented between 60 % and 65 % of the combined markets in the two products, the Commission should have reduced the starting amount to reflect the periods of infringement in which the HP market was the only one affected.

245 Moreover, the Commission failed to assess the impact of the cartel on the market. Such an assessment was necessary for all periods other than those in which the price agreements had in fact been implemented, namely between August 1997 and 18 May 2000 in respect of HP, and between 14 May 1998 and 19 December 1999 in respect of PBS. In the contested decision, the Commission stated that it was not possible to measure the actual impact of the infringement (recital 455 of the contested decision), but did not set out the reasons for that finding.

246 In so far as the Commission did not establish that the infringement had had an impact on prices in the initial and final periods of the cartel, it ought as a consequence to have reduced the amount of the fine. The Commission erred in law because it did not investigate whether the anti-competitive practices had been implemented, and did not attempt to quantify their effects on the market.

247 Furthermore, the contested decision is vitiated by a failure to state reasons in relation to the determination of the starting amount of EUR 50 million. The Commission confined itself to stating that that was the 'appropriate' amount. That amount is disproportionate having regard to the Guidelines and earlier Commission decisions.

248 Second, the applicant submits that, when determining the amount of its fine, the Commission was entitled to take account only of the period between February 1998 and May 2000.

249 The Commission only produced evidence that the applicant committed the infringement from August 1997 until 18 May 2000. Moreover, the applicant was the first undertaking to have supplied evidence of a cartel between August 1997 and February 1998. That period could not therefore be used in fixing the amount of its fine.

250 Third, the Commission provided no reasons for the application of the increase in the fine in respect of deterrent effect. It failed to explain why that increase was necessary, and in particular did not explain why repetition was probable in the absence of such an increase.

251 The increase in question was excessive and disproportionate having regard to the objective, which was to prevent repetition. The amount of the fine before that increase would manifestly have sufficed to have a deterrent effect, whatever the turnover and resources of the applicant.

252 Fourth, the applicant submits that the Commission did not fully take into account its cooperation during the procedure, pursuant to the Leniency Notice. Thus, it ought to have taken account of the applicant's cooperation outside the scope of that notice, and by not doing so infringed the Guidelines, and the principles of proportionality and equal treatment.

253 The Commission contests the applicant's arguments.

Findings of the Court

— The assessment of the gravity of the infringement and of the level of the starting amount of the fine

254 Under Article 23(3) of Regulation No 1/2003, in order to determine the amount of the fine it is necessary to take into consideration the gravity and duration of the infringement.

255 According to settled case-law, the gravity of an infringement is assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, in respect of which the Commission has a margin of discretion (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, and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 43).

256 Section 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'.

257 In the present case, in order to categorise the infringement as very serious, the Commission took account of the nature of the infringement committed, which consisted in conduct which is among the most serious infringements of Article 81 EC, the fact that the infringement covered the whole of the EEA, where the combined HP and PBS markets had a considerable total value, and the fact that that infringement must have had an impact on the market, even if it could not be measured (recitals 453 to 457 of the contested decision).

258 Thereafter, the general starting amount of the fine was individualised for each participant by reference, in particular, to its specific size on the market. The applicant, the largest producer on the combined HP and PBS markets, was given a starting amount of EUR 50 million (recitals 460 to 462 of the contested decision).

259 First, the applicant contests those findings, claiming that the Commission ought to have taken into account that the duration of the cartel relating to PBS was shorter than that relating to HP and that the HP market represented between 60 % and 65 % of the combined markets in the two products.

260 The Court observes that, although the starting amount is determined according to the gravity of the infringement as a whole, in the case of a single and continuous infringement it may be appropriate to reflect, at that stage of the determination of the amount of the fine, the variable intensity of the unlawful conduct (see, to that effect, *BPB* v *Commission*, paragraph 89 above, paragraph 364).

261 In the present case, in recital 331 of the contested decision, the Commission stated that, 'whilst the Commission remain[ed] of the view that what [was] at stake [was] a single infringement covering both HP and PBS', it would take into account, for the setting of the fine 'the fact that the collusion regarding PBS [had] commenced later than that regarding HP and ceased earlier'.

262 Thus, contrary to the applicant's submission, the Commission took into consideration, when determining the amount of the fine, the fact that the PBS-related conduct lasted for a shorter period than the infringement as a whole.

263 The applicant cannot reasonably claim that the Commission did not in fact proceed in that manner, simply because recitals 457 to 462 of the contested decision refer to the size of the combined HP and PBS markets and do not set out the precise manner in which the duration of the collusive conduct in respect of one or other of those products was reflected in the determination of the starting amount.

264 In the grounds of its decision, the Commission is not required to include figures or a more detailed explanation relating to the method of calculating the fine (see, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 50).

265 Moreover, in reply to the Court's written question, the Commission specified that it had indeed chosen to take into account the different duration of the PBS-related conduct, not in connection with the increase in the fine in respect of duration, but in the determination of the starting amount, making it clear that it was only one of the factors that it took into account in order to set the starting amount at an appropriate level.

266 In this respect, in submitting that the taking into account of the limited duration of the conduct on the PBS market ought to have resulted in a proportionate reduction in the starting amount of the fine, the applicant fails to have regard to the case-law according to which an appropriate starting amount cannot be fixed merely by a simple arithmetic calculation, the size of the affected market being indeed only of the factors that may be taken into account when determining that amount (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 255 above, paragraph 243).

267 The complaint alleging failure to take account of the limited duration of the PBS-related conduct is therefore unfounded.

268 Second, the applicant submits that the starting amount of the fine, set at EUR 50 million, is disproportionate having regard to the Guidelines and earlier Commission decisions and that the contested decision does not provide a sufficient statement of reasons in this respect.

269 In that connection, as regards the earlier decisions on which the applicant relies, the Court points out that the Commission has a margin of discretion when setting the amount of fines, in order that it may channel the conduct of undertakings towards compliance with the competition rules. The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level, at any time, to ensure the implementation of competition policy and to strengthen the deterrent effect of fines (see Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 49 and the case-law cited).

270 As regards the Guidelines, the Court would point out that, since the infringement in the present case was categorised as very serious, a categorisation that the applicant did not call into question, a starting amount of EUR 50 million cannot be considered manifestly disproportionate in the light of the scale provided for by the Guidelines.

271 As regards the alleged inadequacy of the statement of reasons in the contested decision concerning the determination of the starting amount of the fine imposed on the applicant, according to settled case-law, that essential procedural requirement is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above, paragraph 463 and the case-law cited).

272 In the present case, the Commission satisfied those requirements, since it stated, in recitals 453 to 462 of the contested decision, the factors which enabled it to determine the gravity of the infringement concerned, namely those relating to its nature, its extent and the size of the markets concerned, and since it explained their application to the circumstances of this case.

273 Furthermore, as regards the reasoning behind the starting amount in absolute terms, it should be pointed out that fines constitute an instrument of the Commission's competition policy and the Commission must be allowed a margin of discretion when setting their amount, in order that it may channel the conduct of undertakings towards compliance with the competition rules. The Commission cannot therefore be required to set out reasons in that connection other than those relating to the gravity and duration of the infringement (judgment of 8 October 2008 in *SGL Carbon* v *Commission*, paragraph 269 above, paragraph 32).

274 The second complaint is therefore without substance.

275 Third, the applicant claims that the Commission was wrong not to examine the actual impact of the cartel on the market in the periods other than those in which the price agreements had, according to the applicant, in fact been implemented, namely between August 1997 and 18 May 2000 in respect of HP, and between 14 May 1998 and 19 December 1999 in respect of PBS.

276 It submits that the Commission was required to examine the extent to which prices had been affected or, at the very least, to estimate the probability of an actual effect on the market during the periods referred to.

277 In this respect, it should be pointed out that, while the existence of an actual impact of the infringement on the market is a factor to be taken into account in assessing the gravity of the infringement, it is one of a number of criteria, such as the nature of the

infringement and the size of the geographic market. Likewise, it is apparent from the first paragraph of Section 1A of the Guidelines that that impact is to be taken into account only where this can be measured.

278 Furthermore, the Commission may classify horizontal price or market sharing agreements, such as the infringement in question in the present case, as very serious infringements solely on account of their nature, without being required to demonstrate an actual impact of the infringement on the market. The actual impact of the infringement is only one among a number of factors which, if it can be measured, may allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million (Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraphs 74 and 75).

279 In the present case, it is apparent from recital 455 of the contested decision that the Commission found that it was not possible to measure the actual impact on the EEA market of the complex of unlawful arrangements in question and that, therefore, it did not rely specifically on such an impact, in particular, by reason of the consideration that the actual impact should be taken into account only where this can be measured.

280 In the same recital, the Commission stated that the cartel arrangements had been implemented by the European producers and that such implementation had indeed had an impact on the market, even if the actual effects were '*ex hypothesi* difficult to measure'.

281 Moreover, in recital 457 of the contested decision, which contains the conclusion categorising the infringement as very serious, the Commission referred not only to the nature of the infringement, the geographic extent and the size of the market, but also to the fact that it 'must have had an impact'.

282 In this respect, the Court holds that since the cartel in question was implemented in the whole EEA territory and had as its object an allocation of market shares and customers and a fixing of target prices, the Commission was entitled to categorise it as very serious, in view of its nature, and was not required to demonstrate that it had had an actual impact on the market.

283 Thus, the Commission's finding that, taken as a whole, the infringement 'must have had an impact' on the market can be regarded only as a subsidiary item of evidence taken into account in the determination of its gravity.

284 Moreover, the applicant does not contest that finding as such, but merely submits that the Commission ought to have recognised the fact that the infringement had not had actual effects during certain periods of the infringement and taken it into account when determining the starting amount.

285 Those arguments are not therefore, in actual fact, directed against the categorisation of the infringement as very serious, but seek to call into question the amount of the fine imposed by the Commission on the basis of its gravity.

286 In this respect, the Court would point out that although, if it can be measured, the actual impact of the infringement is one of the factors that may lead to an increase in the starting amount of the fine beyond the minimum likely amount, in the present case, it is quite clear from recital 455 of the contested decision that the Commission considered that the impact in question could not be measured and therefore could not be taken into account in the determination of the amount of the fine.

287 In so far as the applicant refers to Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 241 to 254, in which the Court reduced the amount of the fine determined according to the gravity of the infringement, having found that the Commission had set that amount having regard to the actual impact on the market, although that impact had not been demonstrated for the entire duration of the infringement, the Court would point out that, unlike the circumstances of that case, in the present case, the Commission did not rely on the actual impact of the infringement on the market when determining the amount of the fine.

288 Furthermore, since it is an optional element in the determination of the amount of the fine, the applicant cannot validly complain that the Commission did not set out in detail why it found that the actual impact of the infringement could not be measured.

289 In establishing the starting amount of the fine imposed on the applicant, the Commission was entitled, without being required to justify that choice, to disregard the factor of actual impact and rely on other factors, such as the nature of the infringement, the geographic scope and the size of the market.

290 The applicant is therefore wrong to submit that the Commission was required to determine the actual impact of the cartel on the market and to take account of the absence of such an impact during certain periods of the infringement, or to set out the specific reasons which formed the basis of its finding that that impact could not be measured.

291 In the light of all those considerations, the Court rejects the complaints regarding the assessment of the gravity of the infringement and the determination of the starting amount of the fine.

— Deterrent effect

292 The applicant submits that the Commission provided no reasons for the application of the increase in the fine in respect of deterrent effect, and failed to explain why that increase was necessary in the light of the applicant's specific situation and to assess the probability of repeated infringement. Moreover, in the applicant's submission, the increase in question, of 50 %, is excessive having regard to the objective which was to prevent repeated infringement and is disproportionate, whatever the size of its undertaking.

293 As regards the statement of reasons in the contested decision, the Court would point out that the Commission stated that it was appropriate to set the fines at a level which ensures that they have sufficient deterrent effect, in view of the size of each undertaking (recital 463 of the contested decision).

294 In the same recital, the Commission decided to apply a multiplier of 1.5 to the starting amount of the fine imposed on the applicant, in the light of its large size, resulting from its high worldwide turnover during the most recent tax year preceding the contested decision.

295 It must be stated that, in doing so, the Commission explained, to the requisite legal standard, the factors taken into consideration in increasing, for deterrence, the fine imposed on the applicant and thus enabled it to ascertain the reasons for that increase, made in the light of its specific situation, and to defend itself, and enabled the Union courts to exercise their power of review.

296 In the statement of reasons explaining the increase in the level of the fine, the Commission is not required to indicate the figures which guided, in particular as regards the deterrent effect sought, the manner in which it exercised its discretion (see, to that effect, *Cascades* v *Commission*, paragraph 264 above, paragraphs 39 to 48, and Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 125).

297 As regards the merits of the contested decision, it should first of all be borne in mind that, in order to determine the amount of the fine, the Commission must ensure that it has the necessary deterrent effect (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 106, and *Archer Daniels Midland* v *Commission*, paragraph 158 above, paragraph 63).

298 In this respect, the Commission may inter alia take into consideration the size and the economic power of the undertaking in question (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 297 above, paragraph 120, and *Dansk Rørindustri and Others* v *Commission*, paragraph 255 above, paragraph 243).

299 Similarly, the fourth paragraph of Section 1A of the Guidelines provides that it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

300 In the present case, as regards the applicant's claim that the increase in question is disproportionate, the Court would point out that, since the infringement being punished corresponds to conduct which the Commission has found to be unlawful time and time again since it first became active in the field, the Commission was entitled to set the fine at a sufficiently deterrent level, and was not required to assess the likelihood of any repeated infringement by the applicant (see, to that effect, Joined

Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraphs 46 and 47).

301 Next, the Commission has a margin of discretion when setting the amount of fines, in order that it may channel the conduct of undertakings towards compliance with the competition rules. In this respect, in view of the applicant's size evidenced by its particularly high worldwide turnover, the increase in question, of 50 %, cannot be regarded as disproportionate in the light of the purpose of deterrence.

302 Furthermore, since the increase in question is based on a factor which was not taken into account in the determination of the starting amount, namely the need to ensure that the fine is sufficiently deterrent in the light of the applicant's considerable overall resources, the applicant cannot reasonably claim that the purpose of deterrence was sufficiently taken into account by the starting amount.

303 In light of the foregoing, the Court must reject this complaint.

— The duration of the infringement

304 In recital 467 of the contested decision, the Commission found that the applicant had participated in an infringement of long duration, since it ran from 31 January 1994 until 31 December 2000, namely for 6 years and 11 months. The starting amount of the applicant's fine was therefore increased by 65 %, namely 10 % for each full year of participation in the infringement and 5 % for the remaining period.

305 First, the applicant contests that finding, submitting that the Commission failed to demonstrate its participation in the infringement for the period prior to August 1997, or for the period after 18 May 2000.

306 Given that that complaint is wholly coterminous with the applicant's arguments in the first two pleas, relating to the duration of the infringement, there is no need to examine it separately.

307 Second, the applicant submits that it was the first undertaking to have supplied evidence, in the context of its cooperation with the Commission, of a cartel between August 1997 and February 1998. In the applicant's submission, the Commission was not therefore entitled to take into account that period when determining the amount of its fine.

308 According to the final paragraph of point 23(b) of the Leniency Notice, 'if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence'.

309 In the present case, the applicant submits, in essence, that the evidence of the infringement that it provided in the context of its cooperation had a direct bearing on the establishment of the duration of the cartel, since it enabled the Commission to place the start of the infringement at August 1997.

310 The Court observes that that argument is based on the proposition that the Commission did not establish, to the requisite legal standard, the existence of the infringement in the period prior to August 1997.

311 However, since that proposition was rejected following the examination of the first plea (see paragraph 170 above), this argument cannot succeed either. Since the Commission was right to find that the cartel had related to periods prior to August 1997, the evidence adduced by the applicant, concerning the subsequent period, could not have had any direct bearing on the establishment of the duration of the cartel.

312 In the light of all the foregoing, in so far as this complaint concerns the duration of the infringement, it does not require a separate examination from that carried out in respect of the first and second pleas above, and is not well founded as regards the remainder.

— The failure to take account of the applicant's cooperation outside the Leniency Notice

313 In the alternative to the third plea, alleging incorrect application of the Leniency Notice, which is examined below, the applicant submits that the Commission did not fully take into account, as an attenuating circumstance, its cooperation outside the scope of that notice.

314 It is sufficient to recall, in this respect, that, in relation to infringements which fall within the scope of the Leniency Notice, as a rule, an interested party cannot validly complain that the Commission failed to take into account the extent of its cooperation as an attenuating circumstance outside the legal framework of the Leniency Notice (see, to that effect, Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 586 and the case-law cited).

315 That applies *a fortiori* in the present case, since the Commission took the applicant's cooperation into account, by reducing the fine pursuant to the Leniency Notice. In those circumstances, the applicant cannot validly complain that the Commission did not apply a further reduction to the fine imposed on the applicant, outside the scope of that notice.

316 Consequently, the Court must reject this complaint and, therefore, the fourth plea as a whole.

The application of the Leniency Notice

Arguments of the parties

317 This plea consists of three complaints relating, first, to the assessment of when the applicant made its leniency application, second, to its ranking in relation to two other undertakings concerned and, third, to the level of the reduction in the fine granted.

— The assessment of when the applicant made the leniency application

318 The applicant claims that the Commission was wrong to consider that its leniency application was submitted on 4 April 2003, rather than at 9.30 hrs on 3 April, when the applicant contacted the Commission by telephone, admitted its participation in the infringement and requested an urgent meeting to provide oral evidence.

319 Leniency applications must be dealt with in order of receipt, irrespective of whether the applicant for leniency is ready to provide information in writing or orally. In the present case, the applicant made its leniency application during the telephone conversation of 3 April, which was followed by a fax, sent on the same day at 13.24 hrs, in which the applicant requested an urgent meeting to provide an oral statement.

320 The Commission's refusal to consider such a request as an application for leniency penalises an undertaking which wants to make an oral statement, which requires time in organisational terms. According to the applicant, when an undertaking admits an infringement and wants to cooperate by making a statement, without delay and at a time agreed with the Commission, its application should be deemed to have been made when it requested a meeting with the Commission to make its statement.

321 Oral corporate statements are an accepted means of making leniency applications. The approach adopted by the Commission in the contested decision discourages undertakings from providing oral evidence and is contrary to the objectives of the Leniency Notice. In the present case, the applicant was the only undertaking to bring its managers, direct witnesses of the cartel, to make oral statements and to answer the Commission's questions.

322 According to the applicant, the telephone call and the fax of 3 April confirmed its request for a meeting in order to make an application for leniency, and stated the nature of the information that it intended to communicate to the Commission as soon as possible. In a second fax, sent on the same day at 17.24 hrs, the applicant stated that it was ready to give information immediately and was at the Commission's disposal for a meeting on the same day or the following day.

323 Thus, the communications in question clearly stated the purpose of the meeting and the nature of the information that the applicant intended to provide to the Commission. It is irrelevant that they did not themselves contain information relating to the infringement.

324 By refusing to consider that the applicant had made its leniency application on 3 April 2003 at 9.30 hrs or, alternatively, at 13.24 hrs, the Commission failed to appreciate the specificities inherent to an oral application, and infringed Article 23(2) of Regulation No 1/2003 and points 21 to 23 of the Leniency Notice.

325 Moreover, the Commission infringed the principle of the protection of legitimate expectations and the principle of sound administration. The applicant could legitimately have believed that its leniency application would be treated as having been made at the time of its telephone call. In those circumstances, it was incumbent on the Commission to inform the applicant of how it intended to apply the Leniency Notice, which would have enabled the applicant to make an immediate written leniency application by fax.

326 By giving preferential treatment to an undertaking which sent documents by fax, the Commission infringed the principle of equal treatment to the detriment of the applicant, which wanted to provide oral evidence.

327 The Commission contests the applicant's arguments.

— The applicant's ranking in relation to two other undertakings concerned

328 The applicant submits that the Commission was wrong to find that EKA Chemicals and Arkema had satisfied the requirements of point 21 of the Leniency Notice at the time of their respective leniency applications.

329 The Commission solely took into account the time when the leniency applications were made by EKA Chemicals and Arkema, and failed to assess whether they had provided any evidence of significant added value, in disregard of points 21 to 23 of the Leniency Notice, Article 23(2) of Regulation No 1/2003, and its obligation to state reasons.

330 The information provided by EKA Chemicals and Arkema did not amount to evidence of significant added value and did not, therefore, satisfy the requirements of point 21 of the Leniency Notice.

331 In relation to EKA Chemicals, the greater part of the information provided by it in its fax of 29 March 2003 and its oral statement of 31 March 2003 concerned the agreements between the two Scandinavian producers, and had therefore no relevance to proving the cartel in the EEA. Much of the information related to events which preceded the start of the cartel.

332 In the contested decision, the Commission relied only six times on the evidence provided by EKA Chemicals, and then solely in respect of the period before August 1997. The evidence is of limited value, because it is uncorroborated, vague and unconvincing. The Commission actually used evidence provided by EKA Chemicals only on 8 October 2004. Given that EKA Chemicals took part in the cartel only until it

entered the 'continental market' (recital 364 of the Decision), it could not have provided information concerning that market.

333 As regards Arkema, on 3 April 2003 its legal advisers sent the Commission a fax, to which 13 annexes were attached, stating that the annexes contained documents relating to the infringement.

334 The documents in question were handwritten notes and spreadsheets, undated and untitled, some being difficult to read and of poor quality, or incomplete, others containing codes or notations which were incomprehensible without further explanation. The Commission itself acknowledged, in its letter to the applicant on 1 April 2005, that it was difficult to read those documents. Arkema provided no explanation or comment on those documents until 26 May 2003.

335 The documents in question cannot be regarded as evidence, because it is impossible for the facts to be proved without additional explanations. They contain no information on dates, places, the subject-matter of discussions, or participants and it cannot be ascertained that they relate to HP.

336 Only the later explanations, provided on 26 May 2003, gave any probative value to the documents in question. For each of the documents of 3 April 2003, a detailed explanation, given on 26 May 2003, was necessary to permit an understanding of its content and appreciation of its meaning.

337 It was only on 26 May 2003, around seven weeks after the initial fax, that Arkema supplied evidence. The time needed to provide that evidence demonstrates the inadequacy and deficiencies of the submission of 3 April 2003, which was the product of

a 'rushed and inadequate attempt' by Arkema to obtain leniency simultaneously in several cases. That haste is illustrated by the fact that the annexed documents sent on 3 April 2003 were in the wrong order or incomplete, and had to be supplemented by documents provided on 26 May 2003.

338 In the contested decision, the Commission relied both on the documents provided on 3 April and 26 May 2003 and on the explanations provided on 26 May 2003. When it refers to a document submitted on 3 April 2003, it expressly relies upon the explanations provided on 26 May 2003 (see, for example, recital 185 of the contested decision). The documents sent on 3 April 2003 were used only with reference to a single meeting (recital 192 of the contested decision), and that reference also required reference to the explanations of 26 May 2003.

339 Furthermore, Arkema did not apply for leniency in relation to PBS and did not provide any information on PBS prior to 15 July 2003. The Commission was therefore not entitled to conclude that the documents supplied on 3 April 2003 concerned both products under investigation.

340 The Commission contests the applicant's arguments.

— The level of the reduction granted to the applicant

341 In the alternative, the applicant argues that the Commission erred in law and committed a manifest error of assessment, by refusing to grant to the applicant, on the basis of its cooperation, the maximum reduction of 20 % as provided for the undertaking which is the third to satisfy the requirements of point 21 of the Leniency Notice.

342 The level of reduction is determined on the basis of when the evidence has been supplied and the significant added value of that evidence. The Commission did not examine the extent to which the information provided by the applicant represented significant added value.

343 Further, the Commission failed properly to assess the scope of information provided by the applicant. Unlike the information from EKA Chemicals and Arkema, that provided by the applicant related to both HP and PBS. The applicant supplied detailed and precise information on all the key meetings referred to in the contested decision, organised between August 1997 and the end of 1998 in respect of HP, and between May 1998 and December 1999 in respect of PBS. To prove the infringement, the Commission relied on almost all the meetings mentioned by the applicant.

344 In that regard, the Commission ought to have taken the view that the applicant had been the first to provide detailed, and thus new, information on all the above meetings which formed the core of the cartel. The Commission was incorrect to state that other undertakings had already informed the Commission of those meetings. The Commission was not entitled to confine itself to assessing the evidence provided by the applicant 'as a whole', but should have assessed each element of it.

345 The Commission misrepresented the nature of the information from the applicant by finding that it merely corroborated the information already provided by Degussa. The applicant provided substantial additional evidence, with direct witness statements. The Commission relied only 10 times on information from Degussa, which notably did not report the 1997 meetings on HP, those being revealed by the applicant.

346 The Commission should have taken into consideration the fact that the applicant alone made available its business managers, who provided direct evidence of the

infringement; that the applicant did not merely submit written statements prepared by its lawyers; and that the applicant's leniency application was followed by continued cooperation, whereby it responded to requests for information and voluntarily provided additional information. The Commission was wrong to consider that the oral testimony of those who attended a meeting was of less probative value than documentary evidence.

347 The contested decision is heavily based on information provided by the applicant. By not taking account of the high level of that cooperation the Commission failed properly to apply point 23 of the Leniency Notice.

348 The reduction granted to the applicant is particularly low and disproportionate, both in comparison with the maximum reduction possible under the Leniency Notice and in comparison with the reductions granted to the other undertakings concerned, in particular Arkema, and that infringed the principle of equal treatment. The applicant's contribution to the establishment of the infringement was greater than that of Arkema. The reduction in the fine granted to the applicant is therefore 'manifestly unlawful and unreasonably low'.

349 The Commission states that it set out, to the requisite legal standard, in recital 523 of the contested decision, the reasons why it had granted to the applicant a reduction in its fine of 10 % because of its cooperation.

350 As regards the scope and extent of the added value of the evidence provided by the applicant, the Commission did take into consideration the fact that the evidence in question related to both HP and PBS. The fact remains that the applicant basically submitted evidence which enabled the Commission to corroborate some of the information from Degussa and Atofina.

351 In the Commission's submission, whilst it is true that the evidence provided by the applicant is referred to in the contested decision in relation to all the multi-lateral meetings in the period from 1997 to 2000, when the applicant made its application for leniency, those meetings had already been reported by other undertakings. The Commission was therefore entitled to find that the evidence provided by the applicant was merely corroboration of what the Commission already knew about the overall infringement.

352 As regards the extent and continuity of the applicant's cooperation after the submission of its leniency application, it is clear from the final sentence of the second paragraph of point 23(b) of the Leniency Notice that the Commission is not obliged to take those factors into account. Continued cooperation should be presumed, and the import of the provision in question is rather that a failure to cooperate after the leniency application may be penalised.

353 As regards the alleged infringement of the principle of equal treatment, the situations of the applicant and Arkema were not comparable, for the reasons set out in recitals 510 and 513 of the contested decision, that difference justifying the granting of the maximum reduction to Arkema, but not to the applicant. Moreover, the Commission explicitly took into account the date of the production of evidence by the applicant, in recital 515 of the contested decision.

Findings of the Court

354 The Leniency Notice provides, in its points 21 to 23:

'21. In order to qualify [for a reduction in the fine], an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession

and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.

23. The Commission will determine in any final decision adopted at the end of the administrative procedure:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:

— first undertaking to meet point 21: a reduction of 30-50 %,

— second undertaking to meet point 21: a reduction of 20-30 %,

— subsequent undertakings that meet point 21: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

355 In the present case, pursuant to the Leniency Notice, the Commission found that Degussa satisfied the conditions to qualify for total immunity from any fine. EKA Chemicals and Arkema, which were regarded as respectively the first and second undertakings to have satisfied the requirements of point 21 of the Leniency Notice, received fine reductions of 40 % and 30 % respectively. The applicant was regarded as the third undertaking to have satisfied those requirements and received a reduction of 10 % (recitals 501 to 524 of the contested decision).

— The assessment of when the applicant made the leniency application

356 It is apparent from the contested decision that EKA Chemicals made its leniency application on 29 March 2003, made an oral statement on 31 March 2003 and provided evidence of the infringement during the same week (recitals 67, 503 and 505 of the contested decision).

357 By fax of 3 April 2003, at 15.50 hrs, Arkema sent the Commission its leniency application, accompanied by 13 annexes stating that they contained documents concerning the cartel in question. On 26 May 2003, Arkema submitted to the Commission new material relating to its leniency application, including explanations on the documents sent on 3 April 2003 (recitals 69, 510 and 516 of the contested decision).

358 It is apparent from the file, and from recitals 68 to 71 of the contested decision, that the applicant first contacted the Commission by telephone on the morning of 3 April 2003.

359 By fax of the same day at 13.15 hrs, the applicant informed the Commission that it wished 'by this fax' to make an application pursuant to the Leniency Notice and, in view of the oral nature of the evidence, that it wished to 'have a meeting with the Commission as soon as possible in order to apprise it of that evidence, following the procedure [which makes it possible] to make that type of statement orally'. Lastly, the applicant sought confirmation from the Commission of its 'availability for a meeting [the following day]'.

360 By fax of the same day at 17.24 hrs, the applicant confirmed that it was 'ready to give further information immediately and [was] therefore entirely at the Commission's disposal for a meeting [on the same day or the following day]'. By fax of the same day at 17.28 hrs, the applicant confirmed its participation in a meeting with the Commission, scheduled for the following day, 4 April 2003, at 14.15 hrs.

361 On 4 April 2003 the applicant made a statement orally at the Commission's offices, and evidence was given by officers of the company. On 9 April 2003, the applicant made an oral statement concerning specifically PBS. It confirmed its statements in writing, appending certain additional items of evidence, on 11 and 16 April 2003.

362 In the light of those facts, which are not contested by the applicant, the Commission found, in the contested decision, that '[o]n 4 April 2003 … [the applicant had] submitted an application under the Leniency Notice consisting of an oral statement' (recital 515 of the contested decision).

363 In this complaint, the applicant submits that the Commission erred in law in the application of points 21 to 23 of the Leniency Notice. According to the applicant, when an undertaking wants to cooperate by making a statement, without delay and at a time agreed with the Commission, its application should be deemed to have been made when it contacted the Commission to make that statement.

364 The Court notes, in this respect, that, according to points 21 and 23 of the Leniency Notice, in order to qualify for a reduction in the fine, an undertaking must provide the Commission with evidence which represents significant added value with respect to the evidence which was already in its possession. Moreover, for the purposes of applying the bands of reduction in the fine provided for in point 23(b) of that notice,

the Commission must establish the time at which the undertaking satisfied those requirements.

365 It is therefore clear from the wording of the provisions in question that, for the purposes of applying the bands of reduction provided for in point 23(b) of the Leniency Notice, the Commission must establish the time at which the undertaking actually provided it with evidence representing significant added value with respect to the evidence already in its possession.

366 That interpretation is supported by the considerations inherent in the system laid down by the notice in question, pursuant to which the Commission is required to determine the precise time at which the conditions for a reduction in the fine are met by the undertaking concerned, by comparing the evidence provided with that already in its possession when the application is made, and must, therefore, actually have the evidence in question at its disposal.

367 In so far as the applicant claims that that approach, based on determining the time at which the evidence provided by the undertaking which has made an application for leniency is actually produced, limits the incentive for the undertakings concerned to submit oral evidence, even though that evidence may include witness evidence by persons directly involved in the unlawful conduct, the Court observes that that argument, even if were established, cannot call into question the interpretation stemming from the actual wording of the Leniency Notice.

368 In any event, the applicant is wrong to submit that the approach in question may lead to unequal treatment to the detriment of undertakings that wish to make an oral statement.

369 The provisions in question of the Leniency Notice, which require that the precise time at which evidence with a significant added value with respect to the evidence already in the Commission's possession be determined, apply without distinction to any undertaking making a leniency application.

370 As regards determining the date of the application, undertakings making a leniency application pursuant to that notice must be regarded as being in comparable situations, irrespective of the manner in which the evidence is submitted, that being a matter for the applicant for leniency to choose. Those situations must, therefore, be treated in the same way.

371 In the light of those considerations, it is necessary to reject the applicant's contention that, for the purposes of applying the bands of reduction in the fine, account must be taken of the time when the undertaking contacts the Commission to make an oral statement.

372 In the present case, it is common ground that the applicant did not submit to the Commission any evidence relating to the infringement concerned prior to its oral statement of 4 April 2003. Accordingly, the Commission was right to find that that was the date on which the applicant had satisfied the requirements of point 21 of the Leniency Notice.

373 In this respect, nor can the applicant reasonably rely on the time constraints relating to the submission of its oral statement.

374 It is precisely because the oral disclosure of information is as a rule a slower means of cooperation than the disclosure of information in writing that the undertaking in

question must, by deciding to disclose information orally, take account of the risk that another undertaking may disclose to the Commission, in writing and before it, decisive evidence of the cartel's existence (see, to that effect, *BASF* v *Commission*, paragraph 314 above, paragraph 505).

375 Furthermore, the applicant does not claim that the time at which it made its leniency application was affected, in any way whatsoever, by the availability of the Commission's resources. Moreover, it is apparent from the circumstances of the present case that the Commission took full account of the urgency pleaded by the applicant and organised a meeting on the date proposed in order to receive its application.

376 As regards the alleged infringement of the principle of the protection of legitimate expectations, it is settled case-law that the right to rely on this principle extends to any individual in a situation where the Union administration has caused him to entertain legitimate expectations (see Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* v *Commission* [2006] ECR II-1601, paragraph 210 and the case-law cited).

377 In the present case, the applicant submits merely that the Commission ought to have informed it of how it intended to apply the Leniency Notice.

378 However, in the light of the clear wording of the aforementioned provisions of that notice, which require evidence amounting to significant added value with respect to the evidence already in the Commission's possession, the applicant could not have reasonably believed that the order of its cooperation would be established, for the purposes of applying the bands of reduction in the fine, by reference to the date

of its communications of 3 April 2003, since no evidence was submitted in those communications.

379 Furthermore, the applicant does not claim that the Commission gave it the slightest assurance that its application would be treated as if it had been submitted on 3 April 2003 and the applicant does not allege that the Commission did not act as quickly as the circumstances required.

380 Accordingly, it must be stated that the Commission did not take any measure or adopt any conduct which might have caused the applicant to entertain any legitimate expectations that its leniency application would be regarded as satisfying the requirements of point 21 of the Leniency Notice at the time when it contacted the Commission on 3 April 2003.

381 The Court therefore rejects the applicant's arguments alleging infringement of the principle of legitimate expectations, as well as that alleging infringement of the principle of sound administration, which is based on the same arguments.

382 In the light of all the foregoing, the complaint concerning the assessment of the date of the applicant's leniency application is not well founded.

— The assessment of the information provided by two other undertakings concerned

383 The applicant claims that neither EKA Chemicals nor Arkema provided evidence representing significant added value with respect to the evidence already in the Commission's possession at the time when their respective applications were made.

384 First, the applicant submits that, in order to rank each undertaking for the purposes of applying the bands of reduction in the fine provided for in point 23(b) of the Leniency Notice, the Commission solely took into account the time when their respective leniency applications were made, and did not consider the added value of the evidence provided. The applicant also claims that the statement of reasons for the assessments in question is not sufficient.

385 The Court observes that, in recitals 503 and 509 of the contested decision, the Commission found that EKA Chemicals and Arkema had each produced evidence representing significant added value with respect to the evidence already in its possession at the time when their respective contributions were made.

386 As regards EKA Chemicals, the Commission found inter alia that it had submitted evidence concerning the period between 31 January 1994 and 14 October 1997 relating to facts previously unknown to the Commission which therefore had a direct bearing on the establishment of the duration of the cartel. In addition, the Commission stated that EKA Chemicals had provided evidence corroborating and complementing that submitted by Degussa in relation to the period between 14 October 1997 and 31 December 1999 (recital 506 of the contested decision).

387 Although those findings were made in the context of the assessment of the level of the reduction of the fine within the applicable band, the Commission also relied on such findings in order to determine the band applicable to EKA Chemicals, as regards the evidence provided by it between 29 and 31 March 2003, no other leniency application having been made between those two dates.

388 In the case of Arkema, the Commission found that its submission of 3 April 2003 consisted of handwritten documents pertaining to the existence of anti-competitive behaviour relating to the two products under investigation and that those documents, in themselves, were sufficiently clear to be understood by the Commission, even though they were subsequently supplemented (recital 510 of the contested decision). The Commission thus found that the first submission by Arkema which had significant added value occurred on 3 April 2003 (recital 513 of the contested decision).

389 It is clear from this statement of reasons that, contrary to the applicant's claim, for the purposes of determining the applicable band of reduction in the fine, the Commission examined and found that the contributions of EKA Chemicals and Arkema contained significant added value with respect to the evidence already in its possession at the time of each of their applications.

390 The applicant's arguments based on an alleged error of law in the assessment of the applications in question must therefore be rejected.

391 Moreover, the abovementioned recitals of the contested decision show clearly and unequivocally the main elements of the reasoning, at the end of which the Commission found that each of the submissions in question represented, at the time when

it was made, significant added value for the purposes of point 21 of the Leniency Notice, which was taken into account in order to determine the band of reduction in the fine applicable to each of the two undertakings concerned under point 23(b) of that notice.

392 The applicant's arguments based on the alleged infringement of the obligation to state reasons must therefore also fail.

393 Second, the applicant submits that the Commission's assessments are vitiated by manifest errors.

394 It should be recalled in this respect that although, in assessing the cooperation given by members of a cartel, the Commission cannot disregard the principle of equal treatment, it has a wide discretion in assessing the quality and usefulness of the cooperation provided by a given undertaking. Accordingly, only a manifest error of assessment by the Commission is open to censure (see Case T-116/04 *Wieland-Werke* v *Commission* [2009] ECR II-1087, paragraph 124 and the case-law cited).

395 It follows that the applicant cannot merely put forward in an annex to the application its own assessment of the submissions of EKA Chemicals and Arkema, but must show, by specific arguments, how the Commission's assessment is vitiated by a manifest error.

396 In this respect, as regards the contribution of EKA Chemicals, the Court would point out that it is apparent from recital 506 of the contested decision that EKA Chemicals provided contemporaneous documents about certain meetings and other collusive contacts relating to facts previously unknown to the Commission which had a direct

bearing on the establishment of the duration of the cartel, as regards the period between 31 January 1994 and 14 October 1997, and evidence corroborating and complementing that submitted by Degussa, in respect of the subsequent period.

397 In the light of the finding that the infringement covered the whole EEA territory, the accuracy of that assessment is not undermined by the fact, relied on by the applicant, that the information of EKA Chemicals related mainly to the Scandinavian market. It should be recalled that EKA Chemicals submitted information about contacts with producers on the 'continent' and that, moreover, a number of instances of unlawful conduct related without distinction to the Scandinavian and 'continental' markets (see, in particular, recitals 106 and 144 of the contested decision).

398 Next, in so far as the applicant contests the probative value of the evidence provided by EKA Chemicals, the Court observes that that evidence enabled the Commission inter alia to determine that the cartel commenced on 31 January 1994 and to corroborate Degussa's statements relating to the initial period of the cartel. The fact that, in the examination of the first plea, that evidence was considered to be insufficient to establish the applicant's participation in the infringement from that date does not call into question its probative value regarding the establishment of the cartel as such.

399 Furthermore, the applicant's contention that the contribution of EKA Chemicals was to a large extent limited to the events which preceded the start of the cartel is based on its complaint that the cartel commenced in August 1997 and the Court rejected that complaint as unfounded at the end of the examination of the first plea (see paragraph 170 above).

400 Lastly, the allegedly small number of recitals of the contested decision in which the evidence submitted by EKA Chemicals was used does not call into question the probative value of that evidence. Furthermore, the mere fact that some of those recitals refer to evidence adduced following the initial application by EKA Chemicals does not suffice to justify the applicant's contention that the Commission relied in actual fact on information provided by EKA Chemicals subsequent to its leniency application.

401 In the light of those considerations, the Court considers that the applicant's arguments do not show that the Commission committed a manifest error in concluding that EKA Chemicals had submitted evidence of significant added value, for the purposes of point 21 of the Leniency Notice, before the applicant made its leniency application.

402 As regards the evidence submitted by Arkema, the Commission found inter alia, in the contested decision, that 'its first submission consisted of [thirteen] handwritten notes pertaining to the existence of anti-competitive behaviour between competitors for both products under investigation' and that, '[a]lthough those documents were in themselves sufficiently clear to be understood by the Commission in the context of the information already in its possession, [Arkema] [had] supplemented its initial submission only on 26 May 2003 with a written statement giving additional explanations for each of the documents submitted on 3 April 2003 and adding new documents with related explanations' (recital 510 of the contested decision).

403 The Commission stated, as a general point, that the evidence submitted by Arkema 'concern[ed] the Europe-wide cartel for both products with [Arkema] submitting contemporaneous documents which enabled the Commission to corroborate the information already provided by Degussa and are used exhaustively in the Decision' (recital 513 of the contested decision).

404 With respect to those findings, the applicant submits that the evidence adduced by Arkema on 3 April 2003 had no probative value, since, it alleges, it consisted of handwritten notes and spreadsheets, undated and untitled, which were difficult to read and/or incomplete, since they contained codes or notations, and were therefore incomprehensible without further explanation. According to the applicant, it was Arkema's additional explanations of 26 May 2003 which gave probative value to its submission.

405 It should be recalled, in this respect, that the evidence in question concerns clandestine conduct, involving meetings held secretly and a bare minimum of documentation.

406 In view of the difficulty of obtaining direct evidence of such conduct, such as notes or minutes of meetings contemporaneous with the infringement, its probative value cannot be called into question merely because it is handwritten or fragmentary, contains abbreviations and codes and because it may also require further clarification or must be examined in the context of other information in the Commission's possession.

407 In particular, the fact that a sound understanding of such documents requires clarification of certain details, such as the use of abbreviations, does not prevent a finding that they are sufficiently clear (see, to that effect, Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 561).

408 In the present case, the documents in question, submitted by Arkema on 3 April 2003, contain notes and tables of figures, compiled during the period of the infringement, consisting of specific documentary evidence of the anti-competitive content of the discussions during that period. The probative value of those documents is not

undermined by the fact that their content could not be fully understood unless those documents were placed in their context and compared with other information or the codes and acronyms used therein were explained in greater detail.

409 Furthermore, the Court observes that at least some of the documents in question, namely the contemporaneous notes containing names of persons and undertakings, dates and detailed proposals of target prices and market shares, were capable of serving as independent proof of the infringement. Some of those documents were used as such by the Commission in the contested decision in establishing that the cartel meetings took place and the concrete results thereof, in particular in recitals 176 and 181.

410 It should also be recalled that, at the time of Arkema's application, the Commission already had a large amount of evidence on how the cartel was conducted, evidence which was contained in the submissions of Degussa and EKA Chemicals, and that the evidence submitted by Arkema could be used in the context of that information which was already in the Commission's possession.

411 Furthermore, the fact that, in relying on that evidence in certain grounds of the contested decision, the Commission referred both to a document provided on 3 April 2003 and to explanations given by Arkema on 26 May 2003 does not mean that it admitted that the documents initially provided were, in themselves, devoid of probative value. Although the evidence provided on 26 May 2003 did in fact contain certain explanations on, or transcripts of, the documents of 3 April 2003, most of that information merely clarified the documents already submitted.

412 Accordingly, the applicant's argument, based on the alleged absence of the probative value of the documents submitted by Arkema on 3 April 2003, cannot succeed.

413 As regards the significant added value of the items of evidence in question, it should be recalled that they are contemporaneous documents, relating to collusive meetings in 1997 and 1998, which are heavily relied on in the contested decision for that period, and some of which are directly quoted in the decision.

414 In this respect, in so far as the applicant claims that the Commission was wrong to find that Arkema's initial application concerned both products in question, it is sufficient to observe that, although the documents submitted by Arkema on 3 April 2003 related solely to unlawful conduct concerning HP, that is not capable of calling into question the conclusion that Arkema's cooperation represented significant added value, since the present case involved a single infringement which concerned both markets.

415 In the light of all those considerations, it is not apparent that the Commission committed a manifest error of assessment in concluding that Arkema had submitted, by fax of 3 April 2003, evidence of significant added value for the purposes of point 21 of the Leniency Notice.

416 At the hearing, the applicant pleaded for the first time a difference between the assessment in question in the present case and the Commission's assessment of Arkema's cooperation in the case which gave rise to Decision C(2006) 2098 of 31 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates).

417 When questioned on that point, the Commission did not object to that new line of argument being pleaded.

418 It must be pointed out that Article 48(2) of the Rules of Procedure provides that 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 come to light in the course of the procedure.

419 In the present case, even if the line of argument in question could be regarded as a new plea, it is not caught by that prohibition, given that it is based on the factual assessment made in Decision C(2006) 2098, which, as the Commission acknowledged at the hearing, was made public only after the closure of the written procedure in this case.

420 As regards the substance of that line of argument, the Court observes that according to the fax of 3 April 2003, annexed to the application, that Arkema thereby sought the application of the Leniency Notice by providing documents relating to three products, including HP, which was covered by the contested decision, and Methacrylates, to which Decision C(2006) 2098 relates.

421 In recital 405 of Decision C(2006) 2098, relied on by the applicant, the Commission found, in the context of the determination of the level of the reduction in the fine to grant to Arkema, that '[a]lthough the timing of [Arkema's] leniency application on 3 April 2003 was relatively early in the proceedings, in the month following the inspections', it was 'only after receipt of [Arkema's] subsequent submissions' that the Commission reached the conclusion that '[Arkema] qualified for leniency in view of the nature and level of detail of these submissions, which strengthened the Commission's ability to prove the facts in question'. The Commission stated, in the same

recital, that, 'even if [Arkema] had provided significant added value with its first submission …, the extent to which [Arkema] ha[d] added value to the Commission's case ha[d] remained limited throughout the proceedings'.

422 It is apparent from that finding that, in the case which gave rise to Decision C(2006) 2098, the Commission considered that, although Arkema had submitted its leniency application on 3 April 2003, it was only after receipt of its subsequent statements that the Commission had reached the conclusion that that undertaking had provided evidence representing significant added value.

423 None the less, the finding in question does not show, contrary to the applicant's claim, that in the assessment of the submission in question in the present case the Commission also took into account Arkema's statements subsequent to its fax of 3 April 2003.

424 First, the assessment made in Decision C(2006) 2098, concerning the documents appended to Annexes A 14 and A 15 to the fax of 3 April 2003, did not relate to the same evidence as that at issue in the present case; the evidence in the present case was attached in Annexes A 1 to A 13 of that submission. Furthermore, the assessment relied on concerned the reduction in the fine within the applicable band, pursuant to the second paragraph of point 23(b) of the Leniency Notice, and not the applicable band in itself, for the purposes of the first paragraph of point 23(b) of the notice, which is the issue in the present case.

425 Second, it is apparent from Decision C(2006) 2098 that no leniency application had been made, in the case which gave rise to that decision, between 3 April 2003 and the

Commission's receipt of Arkema's subsequent statements. Thus, unlike in the present case, in the case which gave rise to Decision C(2006) 2098, the Commission was entitled to take into account the subsequent statements in question in determining whether Arkema fulfilled the conditions for a reduction in the fine referred to in the Leniency Notice.

426 In the light of those considerations, the assessment made in Decision C(2006) 2098 cannot call into question the lawfulness of the assessment in the present case.

427 In the light of all those considerations, the Court rejects as unfounded the applicant's complaint relating to the assessment of the submissions of EKA Chemicals and Arkema.

— The level of the reduction in the fine granted to the applicant

428 In recitals 523 and 524 of the contested decision, the Commission stated that the applicant was the third undertaking to have satisfied the requirements of point 21 of the Leniency Notice, since it submitted, on 4 April and 17 May 2003, documents concerning a Europe-wide cartel for both products concerned. As regards the added value of that cooperation, the Commission found that the applicant had 'basically … submitted evidence which enabled the Commission to corroborate certain of the information already provided by Degussa and [Arkema] and which is used widely in the [contested d]ecision'. In the light of those findings, the Commission applied a reduction of 10 % to the applicant's fine.

429 The applicant submits, in the alternative, that the Commission was wrong to refuse to grant it the maximum reduction, of 20 %, within the band applicable to the third undertaking for the purposes of the first paragraph of point 23(b) of the Leniency Notice.

430 The Court notes that, under the second paragraph of point 23(b) of the Leniency Notice, in order to determine the level of reduction in the fine within the applicable band, the Commission may take into account the time at which the submission is made, the extent of the added value of the evidence provided and the extent and continuity of any cooperation.

431 In the present case, the Commission found, in recital 515 of the contested decision, that the applicant had intervened at an early stage of the procedure, shortly after the date of the inspections, that its submission had represented significant added value and had been provided in a continuous manner, evidence having been submitted inter alia on 4, 9, 11 and 16 April and on 17 May 2003. It is common ground that the evidence adduced by the applicant was widely used in the contested decision to establish the infringement, in particular with respect to the period between 1997 and 2000.

432 Moreover, as is apparent from the Commission's reply of 15 September 2009 to a written question put by the Court, the applicant was the first to submit evidence with respect to a number of meetings between August and November 1997 in Brussels. In addition, the information relating to those meetings enabled the Commission to establish certain key aspects of the cartel in question, namely the existence of firm agreements on coordinated HP price rises as well as collusion initiatives relating to PBS.

433 Consequently, it must be stated that the Commission was wrong to find, in recital 523 of the contested decision, that, first, the evidence provided by the applicant had

basically corroborated certain information already provided by Degussa and Arkema and that, second, the evidence set out in that recital gave no justification whatsoever, in the light of the criteria referred to in the second paragraph of point 23(b) of the Leniency Notice, for the application of the rate of reduction in question within the applicable band.

434 The Court therefore holds that the Commission was manifestly wrong, on the basis of those findings, to set at 10 % the level of reduction in the fine granted to the applicant in respect of its cooperation.

435 Furthermore, the assessment in question, which led to a small reduction in the applicant's fine, contrasts with the assessment made of Arkema's cooperation, the Commission having found that Arkema had submitted additional evidence only on 26 May 2003, several weeks after its initial application, whilst granting it the maximum reduction within the applicable band (recitals 510 and 513 of the contested decision).

436 Moreover, unlike Arkema's statements, the applicant's statements contained evidence of the infringement with regard to both products concerned; the applicant's statements moreover contained a detailed and substantiated account by means of witness evidence of individuals participating directly in the cartel of the content of the illegal arrangements; this is indeed highlighted by the fact that that witness evidence was widely used in the contested decision.

437 In the light of those considerations, the Court upholds that last complaint of the applicant's.

438 The Court dismisses this plea as to the remainder.

439 In the exercise of its unlimited jurisdiction, the Court considers that, in view of what has been said in paragraphs 430 to 437 above, it is appropriate to reduce the applicant's fine by 20 %, on the basis of its cooperation. The fine imposed on the applicant must therefore be reduced accordingly.

The determination of the final amount of the fine

440 Following examination of the pleas raised by the applicant and in the exercise of its unlimited jurisdiction, the Court adjusts the amount of the fine imposed on the applicant by reducing the increase in the starting amount of the fine applied by the Commission on the basis of the duration of the applicant's participation in the infringement to 55 %, and by increasing to 20 % the rate of reduction in the fine applied under the Leniency Notice.

441 As a consequence of that adjustment, the final amount of the fine imposed on the applicant is set at EUR 139.5 million.

Costs

442 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

443 In the present case, since the form of order sought by the applicant has been upheld in part, the Court will make an equitable assessment of the circumstances in holding that the applicant is to bear 80 % of its own costs and pay 80 % of the costs incurred by the Commission and that the Commission is to bear 20 % of its own costs and pay 20 % of the costs incurred by the applicant.

444 Moreover, the Court rejects the request made by the applicant in its application for costs that the Commission be ordered to pay the expenses incurred in providing and maintaining the bank guarantee in order to avoid the enforcement of the contested decision. According to settled case-law, such expenses do not constitute costs of the proceedings (see, to that effect, *Cimenteries CBR and Others* v *Commission*, paragraph 214 above, paragraph 5133 and the case-law cited).

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. Annuls Article 1(m) of Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case C.38.620 — Hydrogen peroxide and perborate) in so far as the European Commission found therein that Solvay SA had participated in the infringement during the period prior to May 1995;

2. **Sets the amount of the fine imposed on Solvay in Article 2(h) of Decision C(2006) 1766 final at EUR 139.5 million;**

3. **Dismisses the action as to the remainder;**

4. **Orders Solvay to bear 80 % of its own costs and to pay 80 % of the Commission's;**

5. **Orders the Commission to bear 20 % of its own costs and to pay 20 % of Solvay's.**

Vadapalas Dittrich Truchot

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

Table of contents