Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

6 February 2014*

(Competition — Agreements, decisions and concerted practices — Markets in tin heat stabilisers and ESBO/esters heat stabilisers — Decision finding two infringements of Article 81 EC and Article 53 of the EEA Agreement — Consultancy firm not operating on the relevant markets — Fines — Action for annulment — Concept of undertaking — Principle that offences and penalties must be defined by law — Duration of the infringement — Limitation — Duration of the administrative procedure — Reasonable time — Rights of the defence — Late notification of the investigation procedure — Maximum amount of 10% of turnover — Penalising of two infringements in a single decision — Concept of single infringement — Application for variation — Amount of the fines — Duration of the infringements — Duration of the administrative procedure — 2006 Guidelines on the method of setting fines — Value of sales — Symbolic fine — Unlimited jurisdiction)

In Case T-27/10,

AC-Treuhand AG, established in Zurich (Switzerland), represented by C. Steinle and I. Bodenstein, lawyers,

applicant,

v

European Commission, represented by F. Ronkes Agerbeek and R. Sauer, acting as Agents, and by A. Böhlke, lawyer,

defendant,

APPLICATION for annulment of Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (COMP/38589 — Heat Stabilisers) or, in the alternative, a reduction of the amount of the fines imposed,

THE GENERAL COURT (Third Chamber),

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

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 18 September 2012,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 The present case concerns Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38589 — Heat Stabilisers) ('the contested decision', summarised in OJ 2010 C 307, p. 9).

2 By the contested decision, the Commission of the European Communities found that a number of undertakings had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in two sets of anti-competitive agreements and concerted practices covering the EEA and relating to, first, the tin stabilisers sector and, second, the epoxidised soybean oil and esters sector ('the ESBO/esters sector').

3 The contested decision found that there were two infringements relating to two categories of heat stabilisers, which are products added to polyvinyl chloride (PVC) products in order to improve their thermal resistance (recital 3 to the contested decision).

4 According to Article 1 of the contested decision, each of those infringements consisted of price fixing, allocation of markets through sales quotas, allocation of customers and exchange of commercially sensitive information, in particular on customers, production and sales.

5 The contested decision states that the undertakings concerned participated in those infringements during various periods between 24 February 1987 and 21 March 2000, in respect of tin stabilisers, and between 11 September 1991 and 26 September 2000, in respect of the ESBO/esters sector.

6 The applicant, AC-Treuhand AG, whose principal place of business is in Zurich (Switzerland), is a consultancy firm which offers 'a full spectrum of services tailored to national and international associations and interest groups', while the contested decision also states that that company describes its services as follows: 'Business management and administration for Swiss and international professional associations and federations, non-profit organisations; collection, processing and assessment of market data, presentation of market statistics; audit of the reported figures at the premises of the participants' (recital 66 to the contested decision).

7 The applicant was established in November 1993 and registered on 28 December 1993 following a management buyout of a division of Fides Trust AG ('Fides'). Before that buyout, the applicant's activities were carried out by Fides. The applicant continued its activities, with the same persons, to provide the same services to its members and was bound by the same obligations (recital 67 to the contested decision).

8 Fides and the applicant organised a number of meetings (around 160) relating to the cartels forming the subject-matter of the contested decision ('the Fides meetings' and 'the AC-Treuhand meetings') between 1987 and 2000 (recitals 68 and 111 to the contested decision).

9 Mr S. was the person who, on behalf of Fides and then on behalf of the applicant, 'ran' the meetings in question throughout the infringement periods (recital 68 to the contested decision).

10 The contested decision holds the applicant liable in that it played an essential and similar role in both the infringements at issue by organising meetings for the cartel participants which it attended and in which it actively participated, collecting and supplying to the participants data on sales on the relevant markets, offering to act as a moderator in case of tensions between the undertakings concerned and encouraging the parties to find compromises, for which it received remuneration (recitals 108 to 129, 356 to 359, 380 to 387, 668, 669 and 744 to 753 to the contested decision).

11 The investigation leading to the adoption of the contested decision was initiated following the submission by Chemtura on 26 November 2002 of an application for immunity under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) (recitals 79 and 80 to the contested decision).

12 On 12 and 13 February 2003, the Commission carried out inspections at the premises of CECA (France), Baerlocher (Germany, France, Italy and the United Kingdom), Reagens (Italy), Akcros (United Kingdom) and Rohm & Haas (France), pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87).

13 During the inspection carried out at the premises of Akcros, the latter's representatives informed the Commission's officials that certain documents were covered by legal professional privilege (recital 81 to the contested decision). That claim was subsequently the subject of legal proceedings before the General Court brought on 11 April and 4 July 2003, which gave rise to the judgment of the General Court in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2007] ECR II-3523 dismissing the actions (see recitals 84 to 90 of the contested decision) ('the Akzo proceedings').

14 On 8 October 2007 and on several occasions in 2008, the Commission sent the undertakings concerned a number of requests for information pursuant to Article 18 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) (recitals 91 and 92 to the contested decision).

15 The applicant received an initial request for information on 8 October 2007 ('the request of 8 October 2007').

16 The applicant refused to reply to the Commission's request of 5 June 2008 concerning its worldwide turnover and, in reply to a supplementary request for information, merely sent its reply to the Commission in the case that gave rise to Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44) ('*Organic peroxides*').

17 On 17 March 2009 the Commission adopted a statement of objections, which was sent to several companies, including the applicant, on 18 March 2009 (recital 95 to the contested decision).

18 The applicant replied to the statement of objections by letter of 25 May 2009.

19 On 11 November 2009 the Commission adopted the contested decision.

20 Article 1 of the contested decision holds the applicant liable for its participation in the tin stabilisers infringement from 1 December 1993 until 21 March 2000 and in the ESBO/esters infringement from 1 December 1993 until 26 September 2000.

21 With regard to its power to impose fines on the applicant for the abovementioned infringements, the Commission rejected the arguments, put forward by the undertakings concerned, that the suspension resulting from the Akzo proceedings, pursuant to Article 25(6) of Regulation No 1/2003, applied only to the parties to those proceedings, namely Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd. The Commission held that the suspension had an effect *erga omnes*, so that the limitation period had been suspended with regard to all the undertakings concerned by the investigation, including the applicant (recitals 672 to 682 to the contested decision).

22 The Commission also observed that this Court had confirmed that a consultancy firm that deliberately participated in a cartel could be held liable as a co-perpetrator of the infringement (Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501; '*AC-Treuhand I*').

23 In setting the amount of the fines, the Commission applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

24 Article 2 of the contested decision reads as follows:

'For the infringement(s) in the tin stabiliser sector … the following fines are imposed:

…

17) AC-Treuhand is liable for: EUR 174 000;

…

For the infringement(s) in the ESBO/esters sector … the following fines are imposed:

…

38) AC-Treuhand is liable for: EUR 174 000;

…'

Procedure and forms of order sought

25 By application lodged at the Court Registry on 27 January 2010, the applicant brought the present action.

26 By letters lodged at the Court Registry on 12 July 2011, the Commission declared that, in the light of the judgment of the Court of Justice of 29 March 2011 in Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, it would withdraw its arguments to the effect that the suspension of the limitation period, under Article 25(6) of Regulation No 1/2003, by the Akzo proceedings had an effect *erga omnes*, including with respect to the applicant, of which the Court took notice.

27 On hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, to ask the parties to answer certain questions. The parties complied with that request within the prescribed period.

28 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 18 September 2012.

29 At the hearing, the Court requested the applicant to produce its turnover for 2011. The applicant complied with that request within the prescribed period and the Court asked the Commission to submit any observations it might wish to make on that document. Those observations were lodged within the prescribed period.

30 The applicant claims that the Court should:

— annul the contested decision in so far as it concerns the applicant;

— in the alternative, reduce the amount of the fines imposed on it;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the action in its entirety;

— order the applicant to pay the costs.

Law

32 In support of the action, the applicant puts forward nine pleas in law, some of which are put forward primarily in support of its claim for annulment of the contested decision and others in support of its alternative claim that the contested decision should be varied as to the amount of the fines.

33 In the context of the ninth plea in the application, the applicant claims that the decision had not been properly notified to it.

34 At the hearing, however, the applicant confirmed that, as indicated in its written answer to a question put by the Court on that matter, it was withdrawing its plea alleging that the notification of the contested decision had been irregular, which the Court duly noted.

35 Accordingly, there is no longer any need to adjudicate on the applicant's ninth plea.

The pleas seeking annulment of the contested decision

36 With a view to securing the annulment of the contested decision, the applicant puts forward four pleas and also the first part of a fifth plea, alleging, first, infringement of Article 81 EC and breach of the principle that offences and penalties must be defined by law (third plea); second, that the Commission's power to impose fines was time-barred, in application of Article 25(5) of Regulation No 1/2003 (second plea); third, breach of the rights of the defence owing to the late notification of the investigation procedure initiated against it (eighth plea); fourth, breach of the 'reasonable time' principle owing to the duration of the administrative procedure (seventh plea); and, fifth, infringement of Article 23(2) of Regulation No 1/2003 (first part of the sixth plea).

Third plea, alleging infringement of Article 81 EC and breach of the principle that offences and penalties must be defined by law

37 In its third plea, which it is appropriate to examine first, the applicant claims that the Commission infringed Article 81 EC, since the applicant did not participate in an agreement within the meaning of that provision, which applies only to undertakings which have entered into an agreement in restriction of competition or have engaged in concerted practices, but not those which have merely organised meetings or provided services in the context of the anti-competitive agreements.

38 The applicant entered into an agreement the object of which was not to distort competition but to provide services; that agreement therefore does not come within the scope of Article 81 EC.

39 The Commission could not therefore, in the applicant's submission, penalise it for conduct not covered by Article 81 EC and, in doing so, it breached the principle that offences and penalties must be defined by law, laid down in Article 7(1) of the Convention for the Protection of Human Rights and

Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 49 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

40 The applicant claims, moreover, that even if its conduct should be considered to fall within the scope of Article 81 EC, the contested decision would still constitute a breach of the principle that offences and penalties must be defined by law, since the Commission's broad interpretation of Article 81 EC could not be foreseen by the applicant at the time when the facts complained of took place, in the light of the case-law of the Court of Justice and the practice of the Commission.

41 In addition, the applicant claims that the unforeseeability of the application of Article 81 EC is all the more serious in the present case, since the penalty imposed by the Commission was not a symbolic fine, as in the *Organic peroxides* case, but twice the highest fine possible.

42 The Commission contends that the third plea should be rejected, relying, in particular, on *AC-Treuhand I*.

43 In that regard, it is sufficient to recall that the Court has already held, in a case involving the applicant, moreover, that Article 81 EC could apply to the conduct of an undertaking like the applicant in the circumstances of the present case (*AC-Treuhand I*, paragraphs 112 to 138).

44 In *AC-Treuhand I*, the Court also held that any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the relevant market affected by the restriction of competition, like the applicant in the present case, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle, since that undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and the previous Community case-law, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates (*AC-Treuhand I*, paragraph 150).

45 Therefore the applicant's arguments that, first, the application of Article 81 EC in the present case is contrary to the principle that offences and penalties must be defined by law and, second, the Commission's interpretation of that provision in the contested decision was not foreseeable, cannot succeed.

46 That assessment is not called into question by the argument which the applicant derives from the fact that the penalty imposed on it by the Commission in the contested decision was not a symbolic fine on it, but twice the highest fine possible, as that argument seeks to challenge not the lawfulness per se of the contested decision but the amount of the fines imposed, with a view to a variation of the decision, so that it is of no effect in support of the claims for annulment and must be joined to the analysis of the fourth plea, seeking a variation of the contested decision.

47 The third plea, on which the applicant relies for the purposes of the annulment of the contested decision, must therefore be rejected.

Second plea, alleging that the Commission's powers to impose fines were time-barred

48 In its second plea, raised in support of the claims for annulment of the contested decision, the applicant claims that the Commission did not establish that the infringements had continued until 11 November 1999.

49 Since the contested decision was adopted on 11 November 2009, the Commission's powers to impose fines were time-barred on that date, pursuant to Article 25(5) of Regulation No 1/2003.

50 In the applicant's submission, the elements constituting the infringements began to fall off in 1996 and ceased 'in mid-1999' or 'during the summer of 1999', in the words used in its written pleadings.

51 In support of this plea, the applicant disputes the probative force of the factors on which the Commission relies in the contested decision.

52 The applicant also relies on a statement, made on 20 May 2009 and repeated on oath on 17 January 2010, by one of its former associates, Mr S. ('the statement of Mr S.'), who 'ran' the Fides meetings and then the AC-Treuhand meetings, which it communicated to the Commission in its reply to the statement of objections and which was placed on the file by the parties in the present case.

53 The evidence which emerges from that statement, and which establishes that the unlawful conduct ended 'in mid-1999 at the latest', is borne out by statements and evidence from other undertakings which are to be found in the case file.

54 Taking the view that the limitation period expired on 11 November 2009, the applicant claims that the Commission no longer had a legitimate interest in finding that infringements had been committed. The Commission rejects the applicant's arguments, contending that it has established to the requisite legal standard that the infringements had continued beyond 11 November 1999, that its power to impose fines was therefore not time-barred and that it was thus not required to demonstrate a legitimate interest in finding that the infringements had been committed.

– The relevant case-law

55 In that regard, it should be borne in mind that, as regards proof of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58; Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86; and Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 62).

56 It is therefore necessary for the Commission to produce precise and consistent evidence to support the firm conviction that the infringement took place (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 179 and the case-law cited).

57 Admittedly, if the Commission finds that there has been an infringement of the competition rules on the basis that the established facts cannot be explained other than by the existence of anti-competitive behaviour, the Courts of the European Union will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 16, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraphs 126 and 127).

58 However, it is also apparent from the case-law that 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, since it is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (*JFE Engineering and Others* v *Commission*, paragraph 180, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraphs 56 and 271).

59 It must also be taken into consideration that since the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 55).

60 Furthermore, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by inferences (*Aalborg Portland and Others* v *Commission*, paragraph 56).

61 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 (*Aalborg Portland and Others* v *Commission*, paragraph 57).

62 According to the case-law, moreover, if there is no evidence directly establishing the full duration of an infringement, the Commission should adduce, at the least, evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see, to that effect, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79, and Case T-11/06 *Romana Tabacchi* v *Commission* [2011] ECR II-6681, paragraph 132).

63 The Court of Justice has also held that, where the Commission has been able to establish that an undertaking had taken part in meetings between undertakings of a manifestly anti-competitive nature, the General Court was entitled to consider that it was for that undertaking to provide another explanation of the tenor of those meetings. In taking that approach, the General Court did not unduly reverse the burden of proof and did not breach the presumption of innocence (Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181).

64 Likewise, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting its probative value. On the contrary, except in cases where such proof could not be provided by the undertaking concerned because of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, first, the existence of the circumstance relied on by it and, second, that that circumstance calls into question the probative value of the evidence relied on by the Commission (Case T-141/08 *E.ON Energie* v *Commission* [2010] ECR II-5761, paragraph 56).

65 It is in the light of those considerations that the Court must determine whether the Commission established to the requisite legal standard, in the contested decision, that the infringements had continued at least until 11 November 1999.

– The duration of the infringements

66 In the present case, it should be borne in mind at the outset that in the contested decision the Commission considered that the infringements had lasted, in the form of meetings in Switzerland, notably of the undertakings involved, until 21 March 2000 with respect to the infringement concerning tin stabilisers and until 26 September 2000 with respect to the infringement concerning the ESBO/esters sector (recital 100 to the contested decision).

67 The Commission also found that '[f]or a considerable number of the meetings … there [was] contemporaneous direct evidence that the participants … had regular anti-competitive discussions' (recital 137 to the contested decision).

68 The applicant maintains, in essence, that the Commission has not established the existence of the unlawful conduct, that is to say, that the AC-Treuhand meetings that took place after 11 November 1999 had an anti-competitive object, with sufficiently probative material evidence and that the unlawful conduct had ended 'in mid-1999' or 'during the summer of 1999', in the words used by the applicant in its written pleadings.

69 The fact none the less remains that the applicant does not dispute that, in the immediate continuation of the Fides meetings, the AC-Treuhand meetings had, at least until 'mid-1999', a manifestly anti-competitive object.

70 Likewise, the applicant expressly acknowledges in its written pleadings that all those meetings were run by Mr S., whose conduct the applicant describes as regrettable, and observes that, by letter of 17 November 2009, it so informed its customers, making its excuses.

71 Nor, even though the applicant claims that the unlawful conduct declined from 1996, does it dispute the continuous nature of the unlawful conduct.

72 The applicant therefore acknowledges the existence of the infringements and their continuous nature from 1 December 1993 until at least mid-1999.

73 Nor does the applicant dispute that AC-Treuhand meetings took place during the second half of 1999 and the first half of 2000.

74 The applicant also expressly acknowledges in its written pleadings that those meetings were 'run' by Mr S.

75 Consequently, in order to assess the applicant's second plea, it is sufficient to ascertain whether, in the present case, the Commission has established to the requisite legal standard that the AC-Treuhand meetings that took place after 11 November 1999 had, like their predecessors, an anti-competitive object (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155; *Commission* v *Anic Partecipazioni*, paragraph 96; and *Aalborg Portland and Others* v *Commission*, paragraph 81).

– The continuation beyond 11 November 1999 of the tin stabilisers infringement

76 With regard to the tin stabilisers sector, the Commission found, in the contested decision, that the unlawful conduct had lasted until 21 March 2000, that is to say, beyond 11 November 1999, on the basis of the evidence variously referred to at recitals 299 to 304 for 1999, and in recitals 316 to 323 and 420 for 2000.

77 First, as regards 1999, nine AC-Treuhand meetings were held in Switzerland, namely two in February, two in April, two in July, one in September and two others on 29 and 30 November 1999, bringing together Akcros, Baerlocher, CECA, Reagens and Chemtura (recital 299 to the contested decision), and the applicant acknowledges that all those meetings took place, apart from one in July.

78 Second, the Commission claims that, in Chemtura's monthly report for August 1999, dated 16 September 1999, which that undertaking produced in the context of its cooperation with the Commission during the administrative procedure, it was stated that '[Chemtura's] competitors [were] following [its] price leadership and [had] also increased their prices' and that one undertaking, A, had 'problems to show price discipline' (recital 303 to the contested decision).

79 Third, in Chemtura's October monthly report, dated 15 November 1999, it was noted that undertaking A, unlike all other market participants, was reducing its prices, but that '[a]ctions [were] underway to stop this trend' (recital 303 to the contested decision).

80 Fourth, in a Chemtura e-mail dated 23 November 1999, reference is made to a price increase of 8% for 1999 in Western Europe and to the fact that a price increase was expected in the fourth quarter of 1999 (recital 304 to the contested decision).

81 Fifth, Chemtura's monthly report for November 1999, dated 17 December 1999, mentioned a price increase, led by a competitor undertaking and supported by two other competitor undertakings, that would 'not go into effect before the first quarter of 2000' (recital 304 to the contested decision).

82 Sixth, as regards 2000, two AC-Treuhand meetings were held in Zurich, that is on 20 and 21 March, bringing together Akcros, Baerlocher, CECA, Reagens and Chemtura (recital 316 to the contested decision), which the applicant does not dispute.

83 Seventh, at recital 317 to the contested decision, the Commission referred to a memorandum dated 16 February 2000 drawn up by an Akcros employee for the attention of one of his superiors ('the Akcros memorandum'), the terms of which, not disputed by the applicant, must be reproduced in full below:

'I spoke with Marketing Managers, who have between them substantial history in the EU stabiliser markets … Today we and most of our EU competitors participate in industrial groups (one for ESBO and one for Tins) whose major function it is to consolidate market information in the form of tonnes sales each month … This information is sent in to AC-Treuhand, Switzerland by each member company, the results of which are sent back out to the participants in total … No competitive information is seen. This, to me, seems quite above board and useful. However, two to four times per year the member companies come together in Switzerland to discuss issues of common interest such as market outlooks, trends, activities of non-member companies and the like. While the actual meeting chaired by AC-Treuhand does not seem improper, it was indicated to me that, while together, competitors do have conversations about price levels and customers. It is for this reason, I would recommend that we indicate to AC-Treuhand that we will no longer participate in the meetings, but will send in our sales information to take advantage of that service. The situation over two years before in these groups was altogether different. Then so-called "red papers" were generated, which contained minutes from the meetings detailing group decisions to raise prices and divide markets. Specific customers were discussed as well. These minutes were not distributed, but were kept in AC-Treuhand's files which were "safe" as Switzerland was not an EU member. In 1996 or 1997, this type of meeting no longer took place, presumably because of the increased pressures to not do business like this as laws and enforcement became more stringent. More than one member of the Tins group has put pressure upon our representative to go back to this situation where price fixing and market allocation was regularly done at the AC-Treuhand meetings. Baerlocher is applying the greatest amount of such pressure upon us and other members who are not in favour of such an arrangement. They talk specifically about "freezing" market shares, whereas if one member increases

his share by taking an account, he would have to give back another account to balance things out again. This would be confirmed via monthly quota checks. We will not agree to participate in such improper activities, and this is one more reason why we should back off from these meetings … In summary, there seemingly were improper meetings/discussions in which Akcros did participate. Although we probably do still have the occasional discussion that might be considered to be wrong, no longer do we participate in the formal meetings that are clearly inappropriate. I would recommend the following: (1) Notify AC-Treuhand that we will no longer attend meetings in Switzerland for the Tin and Epoxy groups, although we will continue to send in our sales data as before. (2) Have … put on awareness training that our Marketing Managers (and others) must attend so that they know clearly what actions they can and cannot take related to contact with competitors. Please let me know if you agree to these suggestions.'

84 Eighth, and in order to support its interpretation of the Akcros memorandum, the Commission stated at recital 318 to the contested decision that Akzo had admitted that the Akcros memorandum had been preceded by the handwritten notes of the author of that memorandum ('the handwritten Akcros notes'), from which it is clear, as the applicants do not dispute, that there had been discussions which were 'not written up' concerning 'price levels' which 'need[ed] to go up', or 'be supported', and on 'some customer[s]', and, moreover, that the meetings had taken place in 'Switzerland — not EU member', as they 'can't get raided'.

85 Ninth, the Commission noted that, as a follow-up to the Akcros memorandum, the representative of Akcros stated, at an AC-Treuhand meeting on 21 March 2000 in Zurich, that it would no longer attend the AC-Treuhand meetings, 'while continuing its participation in the exchange of sales data' (recital 319 to the contested decision), a matter which the applicant does not dispute.

86 Tenth, the Commission noted that Akcros had confirmed by letter of 5 June 2000 addressed to Mr S., then an AC-Treuhand employee, that it would no longer participate in AC-Treuhand meetings (recital 321 to the contested decision), a matter which the applicant does not dispute.

87 Eleventh, the Commission referred to the statements made by Chemtura in the context of its cooperation with the Commission during the administrative procedure, referring to the continuation of the tin stabilisers cartel 'until 2000' (recital 420(a) to the contested decision).

88 In the light of all that evidence, taken together, the Court considers that the Commission has proved the infringement which it identified in the contested decision in relation to tin stabilisers, by adducing evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement in relation to tin stabilisers in the present case, in that the Commission referred, in the contested decision, to sufficient evidence to support the firm conviction that the infringement relating to tin stabilisers had been committed.

89 Considered together, the various items of evidence referred to at paragraphs 77 to 87 above with regard to tin stabilisers preclude the possibility that the AC-Treuhand meetings which were held at the end of November 1999 and in March 2000, as regards tin stabilisers, did not have an anti-competitive object.

90 That evidence clearly demonstrates the anti-competitive object of those AC-Treuhand meetings, having particular regard to the Akcros memorandum, which criticises the anti-competitive nature of the AC-Treuhand meetings; to the decision of that undertaking that it would no longer participate in them; to the fact that it distanced itself publicly from them, on two occasions in 2000, and further that it envisaged competition rules awareness training for its managers; to the statements by Chemtura attesting to the continuation of the cartel 'until 2000'; and to the lack of any evidence from the applicant of a change in the nature of the AC-Treuhand meetings.

91 It follows that the AC-Treuhand meetings at the end of November 1999 and in March 2000 could not have had a different object from that of the previous meetings when the same undertakings and the same individuals were convened in the same context by Mr S.

92 Consequently, it must be held that the Commission produced, in the contested decision, a body of evidence which, assessed as a whole, supports the firm conviction that there was unlawful conduct in relation to tin stabilisers at the AC-Treuhand meetings, after 11 November 1999.

93 That assessment is not called into question by the applicant's arguments.

94 In the applicant's submission, the unlawful conduct on its part ceased in 'mid-1999', whether in the tin stabilisers sector or the ESBO/esters sector, as is clear from Mr S.'s statement, the terms of which are corroborated by documents in the Commission's file and also in the minutes of the AC-Treuhand meetings, on which the applicant depends entirely in order to submit its viewpoint on the end of the cartel, since none of its other employees had the slightest connection with the cartel.

95 The applicant maintains that the cartel activities during the AC-Treuhand meetings, whether in the tin stabilisers sector or the ESBO/esters sector, began to fall off gradually 'from 1996/1997'.

96 However, and independently of whether such a falling-off did take place, it must be held that the applicant acknowledges, expressly and at a number of points in its written pleadings, the existence of the unlawful conduct imputable to it, whether in the tin stabilisers or the ESBO/esters sector, at least until 'mid-1999'.

97 Accordingly, there is no need for the Court, for the purposes of assessing the applicant's second plea, to adjudicate on the elements on which it relies in order to establish such a falling-off, it being made clear that the applicant's argument to that effect does not seek a variation of the contested decision as regards the amount of the fines imposed on it, but annulment of the contested decision on the ground that the Commission's powers to impose fines are time-barred.

98 In the applicant's submission, the elements on which the Commission relies in the contested decision and which are set out at paragraphs 77 to 87 of the present judgment would not in any event allow the existence of an infringement concerning tin stabilisers to be established after 11 November 1999.

99 In that sense, the applicant relies on arguments that apply both to the infringement concerning tin stabilisers and to the infringement concerning the ESBO/esters sector.

100 First, the applicant asserts that Mr K., one of the representatives of one of the members of the cartel, namely Ciba, which was taken over by Chemtura in May 1998, who was the 'founder' of the cartel and participated from the outset in all the AC-Treuhand meetings, ceased to participate in them in July 1999 in respect of the tin stabilisers sector and in September 1999 in respect of the ESBO/esters sector, as he had retired.

101 That argument cannot succeed.

102 It cannot be inferred from the withdrawal of one of the representatives of the participants in the cartel, however central his role, that the participants necessarily ceased their unlawful conduct, especially when the AC-Treuhand meetings centred on Mr S. continued.

103 Second, the applicant relies on Mr S.'s statement that 'at the end of the 1990s there [were] no longer such [anti-competitive] discussions during the [AC-Treuhand meetings]'.

104 In the light of the fact, expressly recognised by the applicant, that Mr S., on behalf of the applicant, 'ran' the AC-Treuhand meetings which on the applicant's admission had an anti-competitive object, of the timing of that statement, which was made *in tempore suspecto*, and of the fact that Mr S. stated that he '[could] not say with certainty the time from which that type of discussion [had] been abandoned', Mr S.'s statement cannot affect the probative force of the evidence produced by the Commission in the contested decision.

105 For the same reasons, the applicant's request that oral evidence be heard from Mr S. should be refused, without there being any need to assess its admissibility.

106 Third, the applicant observes that Arkema produced only evidence showing that the cartel had lasted until 29 September 1999 and that Ciba had adduced evidence of the anti-competitive discussions only until April 1999, for tin stabilisers, and May 1999, for the ESBO/esters sector.

107 That argument cannot be accepted.

108 It cannot be considered that the mere fact that certain undertakings adduced evidence establishing the existence of infringements only until a certain period is sufficient to call into question the finding — and, moreover, the substantiated finding — that the infringements lasted beyond that period.

109 Fourth, the applicant claims that Faci stated that prices had been discussed only up to the beginning of 1999 and that Chemson stated that the unlawful conduct had ended in September 1999 at the latest.

110 That argument cannot be accepted either.

111 Firstly, it should be observed that the Faci statements to which the applicant refers relate to only one of the components of the cartels at issue, namely unlawful price-fixing, and not to their other aspects, in particular market-sharing and customer-allocation and also the exchange of commercially sensitive information.

112 Secondly, with respect to the information provided by Chemson statements, it cannot be accepted, on the basis of the statement made by an undertaking *in tempore suspecto*, that all the participants in the cartels at issue necessarily ceased their unlawful conduct, especially when the AC-Treuhand meetings centred on Mr S. continued and when, as the applicant itself observes, another undertaking, namely Ciba, did not exclude the possibility that the cartel might have continued.

113 Fifth, the applicant observes that, in the context of its cooperation with the Commission during the administrative procedure, Chemtura made no reference whatsoever to the AC-Treuhand meetings.

114 In order to reject that argument, it is sufficient to point out that the applicant itself maintains that Chemtura's management were 'apparently' unaware of the content of those meetings.

115 Sixth, the applicant claims that Chemtura adopted an autonomous pricing strategy as early as May 1998.

116 For the same reasons as those set out at paragraph 112 of the present judgment, that argument is unconvincing, especially as the fact that one of the participants does not comply with the terms of a cartel cannot, if it does not publicly distance itself from the cartel, exonerate it or, *a fortiori*, establish the cessation of a cartel so far as the other participants were concerned (see, to that effect, Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 120).

117 Seventh, the applicant submits that Akzo, with which Akcros was associated, adopted a policy of strict compliance with the competition rules 'at the end of the 1990s'.

118 For the same reasons as those set out at paragraph 112 of the present judgment, that argument cannot be upheld, particularly as it is common ground that Akcros did not formally distance itself from the cartels at issue until March 2000.

119 Eighth, as regards, specifically, the tin stabilisers infringement, the applicant denies that one particular AC-Treuhand meeting took place in 1999.

120 However, the applicant expressly admits that the other AC-Treuhand meetings took place, in particular the meeting held in July 1999 and others held on 29 and 30 November 1999, so that that argument must be rejected as ineffective.

121 Ninth, with respect to the Chemtura monthly reports referred to at paragraphs 78 and 79 of the present judgment, and also to the Chemtura e-mail of 23 November 1999 and its monthly report of 17 December 1999, referred to at paragraphs 80 and 81 of the present judgment, first, the applicant observes that those reports make no reference to it, and thus do not prove that any pricing agreements were concluded with its support or even during an AC-Treuhand meeting.

122 Second, in the applicant's submission, those items do not establish the existence of pricing agreements, but merely refer to an increase in prices and, accordingly, do not prove that any anti-competitive activities connected with the AC-Treuhand meetings took place after mid-1999.

123 That argument cannot succeed.

124 As observed at paragraph 62 of the present judgment, it has consistently been held that, if there is no evidence directly establishing the full duration of an infringement, the Commission should adduce, at the least, evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.

125 Firstly, the applicant acknowledges that the AC-Treuhand meetings held in February and April 1999 and at least one meeting held in July 1999 had an anti-competitive object.

126 Secondly, those factors reveal, at least, and on the tin stabilisers market, an upwards alignment of prices on the part of undertakings operating on that market and participating in AC-Treuhand meetings during the second part of 1999, that is to say, during a period contemporaneous with AC-Treuhand meetings the existence of which is not disputed by the applicant.

127 Tenth, with regard to the year 2000 and as concerns both the tin stabilisers cartel and the cartel in the ESBO/esters sector, the applicant disputes the Commission's reading of the Akcros memorandum.

128 In the applicant's submission, the Akcros memorandum, the terms of which are reproduced at paragraph 83 of the present judgment, are 'largely exonerating'. It maintains that the memorandum does not prove that the cartel continued until 2000 but, on the contrary, reveals that the cartel became much less intensive in 1996/1997 and that no further anti-competitive activity took place in 1999/2000.

129 That, it maintains, follows from certain passages in the Akcros memorandum referring to a 'situation [that had been] altogether different' 'two years before', stating that in '1996 or 1997, that type of meeting [had] no longer [taken] place', that sending non-competitive information to AC-Treuhand seemed 'quite above board and useful', that 'the actual meeting chaired by AC-Treuhand [did] not seem improper', and that 'pressure [had been put on its] representative to go back to [the] situation where price-fixing and market-allocation were regularly done at the AC-Treuhand meetings'.

130 That assertion cannot succeed.

131 It must be pointed out that, in its written pleadings, the applicant reproduces only manifestly truncated passages from the Akcros memorandum, as is apparent from paragraph 83 of this judgment.

132 Thus it is clear from certain passages of the Akcros memorandum, dated 16 February 2000, that its author recommended no further participation in those meetings, and in fact did so twice in that document, and recommended that Akcros should do no more than send in 'sales information'. He also referred, using, it must be emphasised, the present tense, to '"freezing" market shares' and to 'the occasional discussion that might be considered to be wrong' and which '[was] clearly inappropriate'.

133 In any event, a reading of the Akcros memorandum in its entirety shows, to the requisite legal standard, the existence of the unlawful conduct in which the applicant is found in the contested decision to have participated, in that it reveals, for both the tin stabilisers market and the ESBO/esters market, moreover, proof that an undertaking participating in the AC-Treuhand meetings was aware of the anti-competitive object of those meetings and that that undertaking deemed it appropriate in March 2000 not to participate any longer in those meetings and to distance itself publicly from their object, which it did twice, and did so during the first quarter of 2000, that is to say, during a period contemporaneous with AC-Treuhand meetings the existence of which is not disputed by the applicant.

134 It cannot be accepted that in doing so Akcros was, during the first half of 2000, referring to anti-competitive meetings dating from three, or indeed four, years earlier.

135 In the light of all the foregoing considerations, it must be held that the Commission established, to the requisite legal standard, the continuation, beyond 11 November 1999, of the tin stabilisers infringement.

– The continuation of the infringement in the ESBO/esters sector beyond 11 November 1999

136 As regards the ESBO/esters sector, the Commission considered, in the contested decision, that the unlawful conduct had continued into 1999 and until 26 September 2000, in other words beyond 11 November 1999, on the basis of various items of evidence set out at recitals 305 to 315, for 1999, and at recitals 316 to 323, for 2000.

137 First, as regards 1999, eight AC-Treuhand meetings took place, namely two in January, two in May, two in September, and also one on 14 December and one on 15 December, the participants in those meetings being Akcros, CECA, Chemson, Faci and Chemtura (recital 305 to the contested decision), which the applicant does not dispute.

138 Second, the Commission stated that Chemtura's monthly report for August, dated 16 September 1999, indicated that certain undertakings had 'succeeded with a price increase of about 10% for [the ESBO/esters sector] effective in October' (recital 308 to the contested decision).

139 Third, the Commission referred, at recital 315 to the contested decision, to the minutes of a meeting of 15 December 1999, drafted by AC-Treuhand and mentioning the impossibility of 'closer cooperation … at present' with another undertaking not yet attending the AC-Treuhand meetings.

140 Fourth, as regards 2000, five AC-Treuhand meetings took place, namely two in March, one in June and two in September, the participants in those meetings being Akcros, CECA, Chemson, Faci and Chemtura (recital 316 to the contested decision), which the applicant does not dispute.

141 Fifth, the Commission relied on the Akcros memorandum, the content of which was reproduced at paragraph 83 of this judgment.

142 Sixth, the Commission also relied on the handwritten Akcros notes, which were mentioned at paragraph 84 of this judgment.

143 Seventh, the Commission stated that, as a follow-up to the Akcros memorandum, the representative of that company announced, at an AC-Treuhand meeting of 22 March 2000 in Zurich, that it would no longer attend AC-Treuhand meetings (recital 319 to the contested decision).

144 Eighth, the Commission also stated that Akcros had confirmed, by letter of 5 June 2000, its intention no longer to attend the AC-Treuhand meetings (recital 320 to the contested decision), which the applicant does not dispute.

145 Ninth, the Commission referred to the minutes of a meeting of 26 September 2000 organised by the applicant in Italy, which it had obtained from Chemson during the administrative procedure and which mentioned the possibility that the 'cooperation' might not continue 'as in the past' (recital 323 to the contested decision), which the applicant disputes only by referring to Mr S.'s statement.

146 Tenth, the Commission also relied on the statements made by Chemtura as part of its cooperation with the Commission during the administrative procedure which referred to the continuation of the cartel in the ESBO/esters sector 'until 2001' (recital 420(b) to the contested decision).

147 In the light of all the foregoing, taken together, the Court considers that the Commission proved the infringement concerning the ESBO/esters sector that it found in the contested decision by adducing evidence capable of demonstrating, to the requisite legal standard, the existence of the facts constituting the infringements at issue in this case, in that the Commission referred, in the contested decision, to sufficient evidence to support the firm conviction that the infringement concerning the ESBO/esters sector had been committed.

148 Considered as a whole, the various items of evidence referred to at paragraphs 137 to 146 of the present judgment, as regards the ESBO/esters sector, preclude the possibility that AC-Treuhand meetings which took place, at least in December 1999, for that sector, did not have an anti-competitive object.

149 That evidence clearly demonstrates the anti-competitive object of those AC-Treuhand meetings, in particular as regards the AC-Treuhand minutes dated 15 December 1999 referred to at paragraph 139 of the present judgment, the Akcros statement criticising the anti-competitive nature of the AC-Treuhand meetings, Akcros's decision not to participate further in those meetings, the fact that Akcros publicly distanced itself from them, and did so on two occasions in 2000, that it proposed to provide its management with competition rules awareness training, Chemtura's statements showing that the cartel continued 'until 2001' and the absence of any evidence on the applicant's part of any change in the nature of the AC-Treuhand meetings.

150 It follows that the AC-Treuhand meetings of December 1999 and in March 2000 could not have had a different object from that of the previous meetings when the same undertakings and the same individuals were convened in the same context by Mr S.

151 Consequently, it must be held that the Commission produced, in the contested decision, a body of evidence which, assessed as a whole, supports the firm conviction that the unlawful conduct concerning the ESBO/esters sector was adopted in the context of the AC-Treuhand meetings continuing beyond 11 November 1999 at least.

152 The foregoing considerations, taken as a whole, cannot be called into question by the applicant's arguments.

153 First, the applicant cannot effectively dispute the probative force of the Chemtura monthly report referred to at paragraph 138 of this judgment, for the reasons set out at paragraphs 124 to 126 of this judgment.

154 Second, the applicant cannot seriously assert that the minutes of an AC-Treuhand meeting held on 15 December 1999, referred to at paragraph 139 of this judgment and referring to the impossibility of 'closer cooperation … at present' with another undertaking not yet attending the AC-Treuhand meetings referred to that undertaking's participation in the presentation of market statistics.

155 The applicant merely reiterates its argument relating to the alleged content of the AC-Treuhand meetings, which cannot affect the probative force of the evidence used by the Commission in the contested decision.

156 Moreover, to contemplate 'closer' cooperation implied that a minimum level of cooperation already existed, which could be nothing other than the participation of that undertaking in the market statistics, so that 'closer' cooperation precluded participation solely in the market statistics.

157 Third, the applicant cannot properly rely on Mr S.'s statement, for the reasons set out at paragraph 104 of this judgment.

158 Nor, fourth, can the applicant convince the Court by disputing the probative force of the Akcros memorandum, for the reasons set out at paragraphs 131 to 133 of this judgment.

159 For all the foregoing considerations, it must be held that the Commission established to the requisite legal standard that the infringement concerning the ESBO/esters sector continued beyond 11 November 1999.

160 Accordingly, there is no need to assess the applicants' arguments concerning the other evidence used by the Commission in the contested decision in order to establish the existence of the infringement concerning the ESBO/esters sector until September 2000.

161 Even if those arguments were well founded, they could not have any effect in support of the applicant's second ground of annulment.

162 In the light of all the foregoing considerations, it must be held that the Commission proved to the requisite legal standard in the contested decision that the unlawful conduct had continued after 11 November 1999, so that its powers to impose penalties were not time-barred on 11 November 2009.

163 Last, it must be held that the applicant's argument concerning the lack of a legitimate interest in finding that an infringement had been committed thereby loses its factual premiss and that it must, therefore, be rejected.

164 Accordingly, the second plea, on which the applicant relies in order to secure annulment of the contested decision, must be rejected.

Eighth plea, alleging breach of the rights of the defence owing to the late notification of the investigation procedure

165 By its eighth plea, raised for the purposes of annulment of the contested decision, the applicant maintains that the exercise of its rights of defence was affected by the fact that the Commission was late in notifying it that an investigative procedure had been initiated against it.

166 In the applicant's submission, under a general obligation borne by the Commission, it was incumbent on the Commission to notify it that an investigative procedure had been initiated against it shortly after the investigations had commenced and, at the latest, when it issued its request of 8 October 2007, and to do so expressly.

167 Yet the applicant was notified of the investigation only by letter from the Commission dated 9 February 2009, or one and a half years later, a few weeks before notification of the statement of objections, on 18 March 2009.

168 That late notification of an investigative procedure initiated against it affected the applicant's exercise of its rights of defence.

169 The applicant claims in that respect that, between 2007 and 2009, Mr S.'s memory became less precise, with the consequence that his statement of 20 May 2009 was less detailed and lost even more credibility in the Commission's eyes.

170 In that regard, it should be borne in mind that, according to consistent case-law, and as confirmed in Article 6(3) TEU, fundamental rights are an integral part of the general principles of law observance of which the Court of Justice ensures. The Court of Justice has thus repeatedly held that respect for the rights of the defence in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law (see Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 26 and the case-law cited).

171 As regards a proceeding pursuant to Article 81 EC, it follows from the case-law that the administrative procedure before the Commission is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary investigation stage and an *inter partes* stage. The preliminary investigation stage, covering the period up to notification of the statement of objections, is intended to enable the Commission to gather all the relevant evidence confirming that there has or has not been an infringement of the competition rules and to adopt an initial position on the course which the procedure is to follow. For its part, the *inter partes* stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 113 and the case-law cited).

172 As regards the preliminary investigation stage, the Court of Justice has stated that the starting point of that stage is the date on which the Commission, in the exercise of the powers conferred on it by the EU legislature, takes measures that suggest that an infringement has been committed and that have a significant impact on the situation of the undertakings suspected (see *Elf Aquitaine* v *Commission*, paragraph 114 and the case-law cited).

173 It is not until the beginning of the administrative *inter partes* stage that the entity concerned is informed, via the statement of objections, of all the essential elements on which the Commission is relying at that stage of the procedure. Consequently, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence (see *Elf Aquitaine* v *Commission*, paragraph 115 and the case-law cited).

174 That being so, the Court of Justice has also held that the measures of inquiry adopted by the Commission during the preliminary investigation stage — in particular, the measures of investigation and requests for information — may in certain situations suggest, by their very nature, the allegation that an infringement of the EU competition rules has been committed and can have a significant impact on the situation of the undertakings concerned (*Elf Aquitaine* v *Commission*, paragraph 116).

175 Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure, since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (*Elf Aquitaine* v *Commission*, paragraph 117).

176 Accordingly, as regards compliance with the 'reasonable time' requirement, the Court of Justice has held, in essence, that the appraisal of the source of any interference with the effective exercise of the rights of the defence must not be confined to the *inter partes* stage of the administrative procedure, but must extend to the entire procedure and be carried out by reference to its total duration (Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 49 and 50, and Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraphs 54 and 55).

177 According to the Court of Justice, similar considerations apply to the question whether, and if so to what extent, the Commission is required to provide the entity concerned, at the preliminary investigation stage, with certain information concerning the subject-matter and purpose of the investigation, which would enable its defence in the *inter partes* stage to be effective (*Elf Aquitaine* v *Commission*, paragraph 119).

178 That does not mean, however, that, before the first measure is taken against a given entity, the Commission is under a duty, as a matter of routine, to warn that entity even of the mere possibility of measures of investigation or of proceedings based on EU competition law, especially if, by such a warning, the effectiveness of the Commission's investigation might be unduly compromised (see *Elf Aquitaine* v *Commission*, paragraph 120 and the case-law cited).

179 It is on the basis of those considerations that the Court must assess the merits of the eighth plea, which the applicant puts forward for the purpose of securing annulment of the contested decision and which it bases on what it alleges to have been the late notification of the investigation initiated against it.

180 In that regard, it should be made clear at the outset that the applicant does not claim in its eighth plea that the exercise of its rights of defence was affected owing to the duration of the entire administrative procedure, as that argument forms the subject-matter of its seventh plea and in any event is assessed under that plea, at paragraphs 198 to 221 of this judgment.

181 In the context of its eighth plea, the applicant claims that the exercise of its rights of defence was affected on account of the time that elapsed between the request of 8 October 2007 and that date on which it acknowledges having been notified by a letter from the Commission that an investigation procedure was being imitated against it, namely on 9 February 2009, or one and a half years later and a few weeks before it was notified of the statement of objections, on 18 March 2009.

182 In its argument in support of its eighth plea, the applicant maintains that the Commission was required to notify it that an investigation procedure had been initiated against it immediately the investigation commenced or, 'at the latest', in the applicant's own words, on the date of the request of 8 October 2007.

183 Thus, for the purpose of assessing the merits of the applicant's eighth plea, there is no need to ascertain whether the Commission was required to notify the applicant of the administrative procedure at an earlier stage than 8 October 2007.

184 It is sufficient to ascertain, in the light of the case-law referred to at paragraphs 169 to 177 of this judgment, whether the Commission, in the request of 8 October 2007, provided the applicant with sufficient information as to the subject-matter and the purpose of the investigation that could put the applicant in a position to preserve the effectiveness of its defence at the *inter partes* stage.

185 In the request of 8 October 2007, the Commission referred to 'allegations of anti-competitive conduct in the heat stabilisers sector' involving 'a number of parties involved in the heat stabilisers market'.

186 As regards the actual content of the information sought, the Commission requested the details of a contact person or a 'lawyer duly authorised to respond' to the request in question.

187 It is also apparent from paragraphs 3 and 5 of the request of 8 October 2007 that the Commission wished to receive indications of the periods of the parties' involvement on the heat stabilisers market and whether the applicant organised meetings for the heat stabilisers industry.

188 It is therefore reasonable to take the view that, by the content of the request of 8 October 2007, the Commission provided the applicant with information on the subject-matter and the purpose of the investigation in question, that could put it in a position to preserve the effectiveness of its defence at the *inter partes* stage.

189 Admittedly, in the request of 8 October 2007, the Commission did not expressly mention any charges against the applicant in particular.

190 However, in the request of 8 October 2007 the Commission was not required to attribute certain charges expressly to the applicant and, accordingly, it was not required at that stage to inform it that it was considered to be implicated. Thus, in order to consider that the applicant's rights of defence were guaranteed, it was sufficient that the Commission indicated clearly the legal bases and the purpose of its request (see, to that effect, Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 334).

191 In addition, even on the view that the Commission was required, at least, to notify the applicants of the putative infringements and that it was liable to expose itself to criticism linked with those infringements, it must be considered that the Commission complied with such an obligation with regard to the content of its request of 8 October 2007, as set out at paragraphs 185 to 187 of this judgment.

192 The applicant's eighth plea is therefore unfounded.

193 In any event, even on the assumption that the applicant was notified of the investigation procedure initiated against it at a late stage, that is to say, only on 9 February 2009, the applicant has not established that that delay had affected the exercise of its rights of defence.

194 It must be pointed out that the applicant merely relies for that purpose on the fact that Mr S.'s memory deteriorated between 2007 and 2009.

195 Such an argument cannot be usefully invoked by the applicant.

196 Independently of the reliability of Mr S.'s statements at a physiological level and of the central role which he played in the cartels, which the applicant does not dispute and which renders the veracity of his statements, whatever their content, more suspect, the applicant has wholly failed to demonstrate how, if it had been informed only one and a half years earlier, around 10 years after the end of the events at issue, of the investigation procedure initiated against it, it might have been in a position to preserve the effectiveness of its defence in the context of the *inter partes* stage.

197 Accordingly, the eighth plea, whereby the applicant seeks annulment of the contested decision, must be rejected.

Seventh plea: breach of the 'reasonable time' principle owing to the duration of the administrative procedure

198 In the context of its seventh plea, whereby it seeks annulment of the contested decision, the applicant claims that there has been a breach of the 'reasonable time' principle owing to the duration of the administrative procedure. It maintains that an excessively long period elapsed between the beginning of the investigations, on 12 February 2003, and the statement of objections, on 18 March 2009, namely more than six years.

199 Such a period cannot be justified by the level of complexity of the case. Furthermore, in the applicant's submission, the Commission was not required to suspend the administrative procedure vis-à-vis the applicant pending the outcome of the *Akzo* proceedings.

200 The exercise of the applicant's rights of defence were affected, since in 2009 the recollections of Mr S., who had 'run' the AC-Treuhand meetings, were already very hazy and, moreover, it no longer had certain documents relating to the infringement period, as the period during which documents are required by law to be kept, which, according to the applicant, is 10 years in Swiss law, had expired, so that it was only with difficulty that the applicant could defend itself against the Commission's objections.

201 While observing that it accepted, at recital 771 to the contested decision, that the investigation phase had lasted longer than normal owing to specific circumstances, which justified an exceptional reduction of 1% of the amount of the fines imposed, in particular for the applicant, the Commission asserts that it was required to await the outcome of the *Akzo* proceedings, so that the duration of the procedure is not imputable to it.

202 The Commission also contends that, even if that period were imputable to it, the decision would not have to be annulled, since the applicant's rights of defence were not affected.

203 In that regard, it should be borne in mind that, according to consistent case-law, compliance with the 'reasonable time' requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of law whose observance the Courts of the European Union ensure (see *Technische Unie* v *Commission*, paragraph 40 and the case-law cited), that principle being inspired by Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and enshrined in Article 41 of the Charter of Fundamental Rights.

204 It also follows from the case-law, however, that there is no need to annul a Commission decision, even where the procedure has been excessively long, where it has not been shown in detail that the rights of defence of the undertakings concerned have been impaired and there is thus no reason to believe that the excessive length of the procedure had an impact on the content of the Commission's decision (see, to that effect, *Baustahlgewebe* v *Commission*, paragraph 49, and Case T-276/04 *Compagnie maritime belge* v *Commission* [2008] ECR II-1277, paragraph 45).

205 Save in those circumstances, failure to observe the 'reasonable time' principle has no impact on the validity of the administrative procedure and cannot render the contested decision unlawful.

206 It should also be borne in mind that the assessment of the source of any obstacles to the effective exercise of the rights of the defence must not be confined to the adversarial phase of the administrative procedure, but must extend to the entire procedure and be carried out by reference to its total duration (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraphs 49 and 50, and *Technische Unie* v *Commission*, paragraphs 54 and 55).

207 It is in the light of those considerations that the Court must assess the applicant's seventh plea, which alleges a breach of the 'reasonable time' principle, and whereby it seeks annulment of the contested decision.

208 In the present case, it is common ground, as stated at paragraphs 11 to 19 of the present judgment, that the Commission began its investigation in this case by carrying out inspections, on 12 and 13 February 2003, that it resumed its investigation, by issuing requests for information to the undertakings involved, including the applicant, on 8 October 2007, and that it sent those undertakings a statement of objections on 18 March 2009, before adopting the contested decision on 11 November 2009.

209 It is also common ground that the applicant was formally involved in the administrative procedure in the present case only with effect from the Commission's request for information of 8 October 2007.

210 Consequently, so far as the applicant is concerned, the administrative procedure lasted from 8 October 2007 until 11 November 2009, or a little over two years.

211 In the circumstances of the present case, such a duration cannot, according to the Court, constitute an excessive time by reference to the 'reasonable time' principle, so that that assessment on its own might suffice to reject the applicant's seventh plea, whereby it alleges a breach of the 'reasonable time' principle' and seeks annulment of the contested decision.

212 However, the applicant claims breach of the 'reasonable time' principle by taking account of the period, not from the request of 8 October 2007 which directly concerns it but from the beginning of the investigation concerning, generally, the cartels at issue, namely 12 and 13 February 2003, although the applicant was not involved in the beginning of the investigation.

213 Independently of whether the time between the initiation of the investigation concerning, generally, the cartels at issue and the applicant's involvement in the procedure constitutes a breach of the 'reasonable time' principle and whether such a breach is imputable to the Commission, the applicant's seventh plea, whereby it alleges a breach of the 'reasonable time' principle and seeks annulment of the contested decision, cannot be upheld.

214 As has been observed in paragraph 206 of the present judgment, the Court of Justice has extended the relevant period, for the purposes of determining observance of the 'reasonable time' principle, to cover the period beginning with the preliminary stage of the Commission's investigation.

215 Even on the assumption that, as the applicant maintains without being contradicted on that point by the Commission, observance of the 'reasonable time' principle must be ascertained not as from the statement of objections, or as from the first investigative measure involving the applicant, but as from the initiation of the investigation concerning, generally, the unlawful conduct at issue, the fact would none the less remain that the applicant would be required, in order to secure the annulment of the contested decision, to establish that the exercise of its rights of defence was affected by the duration of the administrative procedure and that the content of the contested decision was altered as a consequence of that duration.

216 It must be held that the applicant has adduced no probative evidence to that effect.

217 The applicant has not in any way established that if the Commission had involved it at an earlier point in the investigation Mr S. would have been inclined to provide a statement in quite different terms, that is to say one that would have put the applicant in a better position to exercise its rights of defence, in such a way that the content of the contested decision would have been altered.

218 Next, it must be held that the applicant has provided no indication of the nature or the content of the documents on which it would have been able to rely had it kept them.

219 Last, the applicant cannot properly rely on the duration, in Swiss law, of the period during which undertakings are obliged to keep documents, since it could in any event have anticipated, in the present case, the need to keep certain documents in the expectation that objections would be raised against it by the Commission, since in the *Organic peroxides* case it had been the addressee of a statement of objections on 27 March 2003 and a decision finding an infringement attributable to the applicant on 10 December 2003.

220 In any event, the applicant does not dispute the anti-competitive nature of the AC-Treuhand meetings run by Mr S. until 'mid-1999', and the period crucial for its defence in that regard was the second half of that year. At the time when it was involved in the Commission's investigation, that is to say, on 8 October 2007, as on the date of the statement of objections, namely 18 March 2009, the period for keeping documents to which it refers had not yet expired for documents relating to the second half of 1999. Consequently, the applicant must still have had, even at the time of the statement of objections, all the relevant documents and was able to keep them in order to exercise its rights of defence. It cannot thus claim that the allegedly excessive duration of the administrative procedure affected the exercise of its rights in that respect.

221 Accordingly, the seventh plea, which the applicant puts forward with a view to securing the annulment of the contested decision, must be rejected.

First part of the sixth plea, alleging infringement of Article 23(2) of Regulation No 1/2003

222 By the first part of its sixth plea, the applicant claims that there has been an infringement of Article 23(2) of Regulation No 1/2003 in that the total amount of the two fines imposed, namely EUR 348 000 (EUR 174 000 x 2), exceeds 10% of its total turnover during the business year preceding the year of adoption of the contested decision, which was EUR 1 763 917 in 2008.

223 In the applicant's submission, there was only a single infringement; both fines therefore relate to the same infringement and the sum of the two fines cannot exceed 10% of its overall turnover.

224 Although the Commission referred at length to a single infringement in the statement of objections, it concluded in the contested decision that there had been 'two parallel — but similar — infringements' (recital 395 to the contested decision), without explaining that change in its analysis, which, in the applicant's submission, vitiates the contested decision with a breach of the obligation to state reasons.

225 As for the substance, the Commission misapplies the criterion of a link of complementarity between the agreements, replacing it, in the contested decision, with the requirement of proof of economic interdependence of the two cartels, whereas the existence of a complex single infringement presumes that a common anti-competitive aim is being pursued.

226 As is plain from the contested decision itself, the agreements constituting the two alleged infringements are very closely linked with respect to the products, which are used in a complementary manner for PVC and sold to the same category of customers, the content of the agreements, the objective pursued, the individuals, the role of Mr S., the chronology and the geographic scope.

227 In the alternative, the applicant relies on the principle *in dubio pro reo*, which applies to the question whether it committed one or more infringements. In the present case, any doubt as to the existence of two infringements should operate to the applicant's advantage.

228 While accepting that it changed its position on the single nature of the unlawful conduct in the contested decision by comparison with the statement of objections, the Commission asserts that it did so after a review that took into account the contrary opinion of various parties concerned, including the applicant, notably in their replies to the statement of objections.

229 The Commission observes in that context that it stated in the contested decision that, for the two infringements, the meetings were separate and the duration of the infringements was different, the products concerned were different — in their chemical and physical properties, their prices, their uses and their customers —, as some undertakings that participated in a single infringement were customers on the market affected by the other infringement.

– Preliminary observations

230 As a preliminary point, it should be borne in mind that describing certain unlawful acts as constituting one and the same infringement or as a number of separate infringements is not, in principle, without consequence as regards the penalty that may be imposed, since a finding that a number of separate infringements have been committed may lead to the imposition of several separate fines, each time within the limits laid down in Article 23(2) of Regulation No 1/2003 and thus within the upper limit of 10% of turnover in the business year preceding the adoption of the decision (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 118; Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraphs 70 and 158; and *Amann & Söhne and Others* v *Commission*, paragraph 94).

231 Thus the Commission may find, in a single decision, two separate infringements and impose two fines the total amount of which exceeds the upper limit of 10% laid down in Article 23(2) of Regulation No 1/2003, provided that the amount of each fine does not exceed that upper limit.

232 It is irrelevant, for the application of that upper limit of 10%, whether fines are imposed for the various infringements of the EU competition rules in a single set of proceedings or in separate proceedings at different points in time, as the maximum limit of 10% applies to each infringement of Article 81 EC (Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 132).

233 In the present case, it is therefore sufficient, for the purpose of assessing the merits of the first part of the sixth plea, to ascertain whether the Commission established the existence of two separate infringements and not merely the existence of a single infringement, as the applicant claims.

– The dual nature of the infringements

234 It is apparent from the contested decision that it was following a number of considerations, set out at recitals 3 to 8, concerning the relevant markets, recitals 75 to 77, concerning the relevant products, recitals 388 to 394, concerning the principles which in its view were applicable to that question, and recitals 395 to 404, concerning the application of those principles in the present case, that the Commission concluded that there had in this instance been two separate infringements.

235 Accordingly, the argument which the applicant puts forward — and which, moreover, it does not substantiate, other than by reference to the statement of objections and without relying on a breach of its rights of defence in that regard — in support of its allegation of a failure to state reasons in the contested decision as to the existence of two separate infringements must be rejected.

236 It is clear from the contested decision that the Commission relied on different grounds, essentially set out at recitals 396 to 401, for its view that the infringement on the tin stabilisers market was parallel to and similar to the infringement on the ESBO/esters market, but was separate from it, in the light, in essence, of the absence of an overall plan with the objective of distorting competition, of the

differences between the markets and the products in question and also of the lack of interdependence between the two cartels, in particular as regards the duration of the infringements, the participants and the dates of the various collusive meetings.

237 As regards the substance, the applicant claims, in essence, that the two alleged infringements were closely linked, so that they derived from an overall plan, that is to say that, in reality, they constituted only one single infringement.

238 In that regard, it should first of all be recalled that the notion of a single infringement covers a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition, and also individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object) (Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 257, and *Amann & Söhne and Cousin Filtrerie* v *Commission*, paragraph 89).

239 Next, it should be observed that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. When the different actions form part of an 'overall plan' because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, paragraph 258).

240 It should be made clear, last, that the concept of a single objective cannot be determined by a general reference to the distortion of competition on the market concerned by the infringement, since an impact on competition, as object or effect, constitutes an essential element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different instances of conduct which relate to a particular economic sector and are prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement (see Case T-208/06 *Quinn Barlo and Others* v *Commission* [2011] ECR II-7953, paragraph 149 and the case-law cited).

241 Thus, for the purposes of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they are complementary, in that each of them is intended to deal with one or more consequences of the normal pattern of competition, and whether, through interaction, they contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of a global plan having a single objective. In that regard, it will be necessary to take into account any circumstance capable of establishing or of casting doubt on that link, such as the period of implementation, the content (including the methods used) and, correlatively, the objective of the various unlawful actions in question (see *Amann & Söhne and Cousin Filtrerie* v *Commission*, paragraph 92 and the case-law cited).

242 For objective reasons, therefore, the Commission may initiate separate procedures, find separate infringements and impose a number of separate fines (see *Amann & Söhne and Cousin Filtrerie* v *Commission*, paragraph 93 and the case-law cited).

243 It is in the light of those considerations that the Court must assess the assertion whereby the applicant challenges the existence of two separate infringements and claims that there was a single infringement covered by an 'overall plan'.

244 In that regard, in the first place, it should be observed that the applicant cannot properly rely on the fact that the two cartels formed part of continuous conduct pursuing a single economic aim designed to distort competition. As recalled at paragraph 240 of this judgment, the concept of a single objective cannot be determined by a general reference to the distortion of competition on the markets concerned by the infringement, since an impact on competition, as object or effect, constitutes an essential element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of part of its meaning, since it would have the consequence in the present case that different instances of conduct which relate to the same economic sector, namely, in the present case, the heat stabilisers market, and are prohibited under Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement.

245 Nor, next, is it disputed that the AC-Treuhand meetings brought together representatives of the same undertakings, whether in connection with the tin stabilisers market or the ESBO/esters market. Indeed, certain companies represented at the meetings relating to tin stabilisers were also represented at the meetings relating to the ESBO/esters sector, namely the companies in the Akzo, Elf Aquitaine, Chemtura and BASF groups.

246 The fact none the less remains that, as regards the main parties involved in the infringements in question, that identity of subjects was only partial. It should be emphasised that some undertakings participated in only one of the two cartels. Thus, MRF Michael Rosenthal and Reagens, and the undertakings in the Baerlocher group, participated only in the tin stabilisers cartel, whereas Faci and the undertakings in the GEA group participated only in the cartel in the ESBO/esters sector.

247 It should also be emphasised, with respect to the undertakings that participated both in the AC-Treuhand meetings relating to the tin stabilisers and in those relating to the ESBO/esters sector, that some of those undertakings were not necessarily represented, during concomitant periods, by the same individuals, depending on whether one cartel or the other was involved, as is clear from the tables in Annex I to the contested decision.

248 Consequently, notwithstanding the partial identity of the undertakings concerned, it is not the case that all the undertakings in question and their representatives were aware that they were participating in a common objective characterising the existence of a single infringement.

249 In the second place, it should be borne in mind that the existence of different, albeit neighbouring, product markets is a relevant criterion for the purposes of determining the scope and therefore the identity of infringements of Article 81 EC (see judgment of 19 May 2010 in Case T-11/05 *Wieland-Werke and Others* v *Commission*, not published in the ECR, paragraph 83 and the case-law cited).

250 In the present case, while it is not disputed that the product markets in question are at least neighbouring markets, the relevant products, namely tin stabilisers, ESBO and esters, cannot be regarded, for the purposes of finding that there was a single infringement, as belonging to the same market.

251 Independently of the question of their chemical or physical properties and their applications, it is apparent, first of all, as observed at paragraph 245 of this judgment, that only the big European groups in the sector supplied tin stabilisers, ESBO and esters.

252 It follows, next, from the various documents on the file and from the dual nature of the various meetings in question, depending on the products concerned, that the prices applied and, in this case, unlawfully set between competitors differed appreciably depending on whether they related to tin stabilisers or the ESBO/esters sector.

253 Last, it should be emphasised, as the Commission has correctly asserted and as the applicant does not materially dispute, that some undertakings, such as Baerlocher and Reagens, were both suppliers of tin stabilisers and buyers of ESBO and esters.

254 The Commission was therefore correct to take the view, in order to reject the existence of a single infringement and to conclude that there had been two separate infringements, one relating to tin stabilisers and the other to the ESBO/esters sector, that those product markets were different.

255 In the third place, it should be emphasised that the fact that the two cartels may have related to two different product markets does not necessarily preclude the possibility that they were covered by the same overall plan, provided that the existence between them of links of complementarity, in terms of conditionality or coordination, can be established.

256 The various instances of conduct at issue cannot be characterised as a single infringement, since they are not complementary in that each of them was not intended to deal with one or more consequences of the normal pattern of competition and did not contribute through interaction to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of a global plan having a single objective.

257 First of all, it should be borne in mind, as stated at paragraph 253 of this judgment, and this is a point which the applicant does not dispute, that some participants in one of the two cartels at issue obtained supplies from undertakings participating in the other cartel.

258 As the applicant claimed in its reply to the statement of objections, it would have been absurd for undertakings participating in the tin stabilisers cartel, such as Baerlocher and Reagens, to participate in an overall cartel constituting a single infringement, since they were customers in the ESBO/esters sector and thus exposed to its harmful effects, unless those undertakings must be considered to have been spared the effects of the cartel in the latter sector, which, however, the applicant does not claim for the purposes of demonstrating the existence of an overall plan and which is not in any event apparent from any document in the file.

259 Next, it should be observed that the two cartels did not have the same duration. Independently of the exact dates on which they ceased and of the fact that both cartels were imputed to the applicant only from 1 December 1993, the date on which it succeeded Fides, the applicant does not dispute that the tin stabilisers cartel began in February 1987, while the cartel in the ESBO/esters sector did not begin until September 1991.

260 It follows that the members of the two cartels cannot have had either a common project or a common objective that would have envisaged the coordinated and global elimination of competition on the two markets concerned (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 312).

261 Finally, it should be emphasised that, as is apparent from the tables in Annex I to the contested decision, which the applicant itself acknowledges, indirectly, but necessarily, in the application, not only did almost no meeting relating to tin stabilisers take place on the same date as a meeting relating to the ESBO/esters sector, but also, and above all, even though the timing of those meetings was often very close, they were held several days, indeed more than a week, apart.

262 It is thus quite clear that the members of the two cartels could have neither a common project nor a common objective that envisaged the coordinated and global elimination of competition on both the markets in question.

263 In the light of those factors, it must be held that the Commission established with sufficient certainty that there were two separate infringements, so that the argument which the applicant derives from a doubt that should operate to its advantage in that respect must be rejected and, accordingly, that the Commission did not err in concluding, at recital 401 to the contested decision, that there had been one single and continuous infringement of Article 81 EC and Article 53 of the EEA Agreement for tin stabilisers and a separate single and continuous infringement for ESBO/esters.

264 In the last place, it should be emphasised that none of the foregoing considerations can be called into question by the applicant's other arguments.

265 Neither the fact that the unlawful conduct imputable to the applicant had a single object, nor the fact that just one person, Mr S., 'ran' both cartels, nor the fact that the applicant was not active on either of the markets in question is relevant in that context, in the light of the applicant's specific role in the commission of the infringements, the dual nature of which has been established to the requisite legal standard by the Commission.

266 Moreover, a contrary solution would enable consultancy firms, such as the applicant, to engage in a number of collusive activities having the same object with the same person on separate markets, indeed on neighbouring markets, without being at risk of incurring more than just a single penalty, which would be wholly unsatisfactory in terms of the effectiveness of the competition rules and the requirements of deterrence.

267 Accordingly, the first part of the sixth plea, and all the pleas whereby the applicant seeks annulment of the contested decision, must be rejected.

The claims for variation of the contested decision as regards the amount of the fines imposed

268 In support of its alternative claims for variation of the contested decision as regards the amount of the fines imposed on it, the applicant puts forward four pleas and also the second part of a fifth plea, based, first, on error of assessment as to the duration of the infringements (first plea); second, on the duration of the administrative procedure (seventh plea); third, on the Commission's obligation to impose only a symbolic fine in the circumstances of the present case (fourth plea); fourth, on breach of the 2006 Guidelines with respect to the calculation of the basic amount of the fine (fifth plea); and, fifth, on breach of those Guidelines as regards the calculation of the applicant's ability to pay (second part of the sixth plea).

First plea: error of assessment as to the duration of the infringements

269 By its first plea, the applicant maintains that the Commission's assessment of the duration of the infringements is incorrect, in that the infringements did not last until 21 March 2000, in the case of tin stabilisers, or until 26 September 2000, in the case of the ESBO/esters sector.

270 In that regard, it should be borne in mind that it has been held, at paragraphs 48 to 164 of this judgment, that the Commission established to the requisite legal standard that the infringements existed at least until 11 November 1999.

271 Thus, on the assumption that it were well founded, the first plea could succeed only with respect to the period from 11 November 1999 until 21 March 2000, for tin stabilisers, and until 26 September 2000 for the ESBO/esters sector.

272 It should also be considered, in particular on the basis of the applicant's written answer, submitted before the hearing, to a question put by the Court on that point and from the fact that the applicant raised no objection to the Report for the Hearing drawn up in that respect, that by its first plea the applicant seeks not so much the annulment of the contested decision as a reduction of the amount of the fines imposed on it in that decision, in the exercise by the Court of its unlimited jurisdiction.

273 Consequently, in the present case this plea cannot succeed for the purposes of the variation of the contested decision as regards the amount of the fines imposed on the applicant.

274 As is clear from recitals 713 and 751 to 753 to the contested decision, the amount of the fine, fixed as a lump sum by reference to the gravity and duration of the infringements, was, at the final stage of the Commission's calculations, substantially reduced in application of Article 23(2) of Regulation No 1/2003.

275 Thus, any reduction in respect of duration for the last, brief periods in question would not, under the 2006 Guidelines, allow any further reduction of the final amount of the fines imposed in the contested decision.

276 Accordingly, the first plea, which the applicant puts forward for the purposes of the variation of the contested decision as regards the fines imposed on it, must be rejected as ineffective.

Seventh plea, based on the duration of the administrative procedure

277 In the context of its seventh plea, the applicant, relying on the 'reasonable time' principle, takes issue with the Commission for the excessive duration of the administrative procedure for the purposes, primarily, of securing the annulment of the contested decision and, in the alternative, securing its variation as regards the amount of the fines imposed on the applicant.

278 Since this plea was rejected as regards annulment of the contested decision, any breach of the 'reasonable time' principle could entail, if anything, only a variation of the amount of the fines imposed on the applicant in the contested decision.

279 In this case, in the exercise of its unlimited discretion, the Court considers that it is not appropriate to grant a reduction of the amount of the fines imposed on the applicant in the contested decision over and above that already granted by the Commission, as the breach which the applicant alleges of the 'reasonable time' principle had no impact on the exercise of its rights of defence.

280 Consequently, this plea cannot succeed.

281 In any event, in order for this plea to be capable of operating for the purposes of a variation, it would still be necessary for the applicant to establish to that effect a breach by the Commission of the 'reasonable time' principle.

282 It has been held in the present judgment that the applicant has not established such a breach in its regard.

283 Accordingly, the seventh plea, which the applicant puts forward for the purposes of a variation of the contested decision as regards the amount of the fines imposed on it, must be rejected.

Fourth plea, based on an obligation borne by the Commission to impose only a symbolic fine in the circumstances of the present case

284 In the context of its fourth plea, the applicant claims that the Commission ought to have imposed only a symbolic fine on it, since the application to it of Article 81 EC was not foreseeable, the 2006 Guidelines offer the Commission that possibility and the Commission imposed only a symbolic fine on the applicant in the *Organic peroxide* case.

285 In the present case, that plea cannot succeed.

286 The Commission cannot be criticised for having breached an alleged obligation to impose only a symbolic fine in the present case.

287 Admittedly, according to point 36 of the 2006 Guidelines, '[t]he Commission may, in certain cases, impose a symbolic fine', while '[t]he justification for imposing such a fine should be given in its decision'.

288 However, it is manifestly clear from the actual words of that provision that the imposition of a symbolic fine does not in any circumstance constitute an obligation on the Commission, but is merely an option coming within its discretion, without prejudice to review by the Court in the exercise of its unlimited jurisdiction.

289 Nor can the alleged obligation borne by the Commission to impose a symbolic fine in the present case follow from the Commission's previous practice, in particular from the fine imposed on the applicant in the *Organic peroxides* case.

290 It has consistently been held that 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 within the limits indicated in Regulation No 1/2003 if that is necessary to ensure the implementation of EU competition policy; on the contrary, the proper application of the EU competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 169 and 227, and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 90).

291 That conclusion cannot be called into question by the argument which the applicant bases on what it claims to be the unforeseeable nature of the fines imposed in the contested decision.

292 In so far as it is in the same vein as that put forward in support of the third plea, alleging infringement of Article 81 EC and breach of the principle that offences and penalties must be prescribed by law, that argument must also be rejected, for the reasons set out at paragraphs 43 to 46 of the present judgment.

293 Accordingly, the fourth plea, which the applicant puts forward for the purposes of a variation of the contested decision as regards the fines imposed on it, must be rejected.

Fifth plea and second part of the sixth plea, alleging breach of the 2006 Guidelines

294 By the fifth plea and in the second part of the sixth plea, the applicant claims that the Commission breached the 2006 Guidelines, in that, first, the fines imposed on it in the contested decision ought not to have been set as a lump sum, but by reference to the fees charged for supplying the services linked with the infringements, in accordance with the methodology set out in the 2006 Guidelines, and, second, the Commission ought to have taken account of the applicant's ability to pay, within the meaning of point 35 of the 2006 Guidelines.

295 In this case, the fifth plea and the second part of the sixth plea cannot succeed.

296 In the first place, the applicant's fifth plea must be considered to rest on a flawed premiss.

297 Admittedly, in application of the 2006 Guidelines, '[w]ithout prejudice to point 37 [of those Guidelines], the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings', namely, '[f]irst, the Commission will determine a basic amount for each undertaking' and, '[s]econd, it may adjust that basic amount upwards or downwards', it being made clear, on the one hand, that the basic amount of the fine must be 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement' and, on the other, that '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the geographic area within the EEA … normally … during the last full business year of its participation in the infringement' (points 9 to 13 of the 2006 Guidelines).

298 The 2006 Guidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria which the Commission intends to apply when exercising the discretion conferred on it by Article 23(2) of Regulation No 1/2003 for the purpose of setting fines. The Guidelines do not constitute the legal basis of a decision imposing fines, which is based on Regulation No 1/2003, but they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by that decision and, consequently, ensure legal certainty on the part of the undertakings (see Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 219 and 223 and the case-law cited).

299 Thus, although the Guidelines cannot not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons (see, to that effect, Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91, and *Romana Tabacchi* v *Commission*, paragraph 72).

300 The fact that the Commission has limited its own discretion by adopting the Guidelines is not, however, incompatible with its maintaining a significant discretion (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 246, 274 and 275).

301 In that sense, the Commission has made clear, at point 37 of the 2006 Guidelines, that '[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology'.

302 It must be noted that, in the present case, the applicant was not active on the markets affected by the infringements, so that the values of its sales of services linked directly or indirectly to the infringement was zero or unrepresentative of the impact on the relevant markets of the applicant's participation in the infringements in question.

303 Accordingly, the Commission could not take the value of the applicant's sales on the relevant markets into account, nor could it take the amount of the fees charged by the applicant into account, since they did not represent that value.

304 Those particular circumstances of the present case enabled, indeed obliged, the Commission to depart from the methodology set out in the 2006 Guidelines on the basis of point 37 of those Guidelines (see, to that effect and by analogy, Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 30).

305 Accordingly, the Commission was correct to depart from the methodology set out in the 2006 Guidelines in setting the amount of the fines as a lump sum and, ultimately, within the upper limit set out in Article 23(2) of Regulation No 1/2003.

306 Admittedly, the Commission can rely on point 37 of the Guidelines only if it states sufficient reasons in the decision at issue, and likewise the criteria applied in setting the amount of the fine imposed.

307 In the present case, however, it is not disputed that the Commission provided sufficient reasons at recitals 746 to 751 to the contested decision to justify the amount of the fines imposed on the applicant.

308 In any event, the Court considers, in the exercise of its unlimited jurisdiction, that the amount of the fines imposed on the applicant for the infringements found in the contested decision is appropriate by reference, in particular, to the gravity of those infringements.

309 In the second place, it must be held that the second part of the sixth plea cannot succeed either.

310 Admittedly, according to point 35 of the 2006 Guidelines, '[i]n exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context'.

311 The fact none the less remains that, irrespective of the applicant's actual economic situation, it is common ground that it did not submit any request to that effect to the Commission.

312 This Court has already held that a reduction of the amount of the fine according to point 35 of the 2006 Guidelines is subject to three cumulative conditions, namely the submission of a request during the administrative procedure; the existence of a specific social and economic context; and the inability to pay of the undertaking, which must provide objective evidence showing that the imposition of a fine would irretrievably jeopardise its economic viability and cause its assets to lose all their value, which does not necessarily coincide with the commencement of winding-up proceedings where there are realisable assets (Joined Cases T-204/08 and T-212/08 *Team Relocations and Others* v *Commission* [2011] ECR II-3569, paragraph 171, and Case T-199/08 *Ziegler* v *Commission* [2011] ECR II-3507, paragraph 165).

313 The applicant cannot therefore take issue with the Commission for not having granted it a reduction on that basis.

314 Accordingly, the second part of the sixth plea, and all the pleas which the applicant puts forward for the purposes of a variation of the contested decision as regards the amount of the fines imposed on it, must be rejected.

315 In view of all the foregoing considerations, the action must be dismissed in its entirety.

Costs

316 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission, in accordance with the latter's pleadings.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders AC-Treuhand AG to pay the costs.

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 6 February 2014.

[Signatures]