JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

18 June 2008*

In Case T-410/03,

Hoechst GmbH, formerly Hoechst AG, established in Frankfurt am Main (Germany), represented initially by M. Klusmann and V. Turner, then by M. Klusmann, V. Turner and M. Rüba, and finally by M. Klusmann and V. Turner, lawyers,

applicant,

v

Commission of the European Communities, represented initially by W. Mölls, O. Beynet and K. Mojzesowicz, and subsequently by W. Mölls and K. Mojzesowicz, acting as Agents, assisted by A. Böhlke, lawyer,

defendant,

APPLICATION for annulment, so far as the applicant is concerned, of Commission Decision 2005/493/EC of 1 October 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Chisso Corporation, Daicel Chemical Industries Ltd, Hoechst AG, The Nippon Synthetic Chemical Industry Co.

* Language of the case: German.

Ltd and Ueno Fine Chemicals Industry Ltd (Case No COMP/E-1/37.370 — Sorbates) (Summary in OJ 2005 L 182, p. 20), or, in the alternative, a reduction to an appropriate level of the amount of the fine imposed on the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 8 February 2007,

gives the following

Judgment

Facts

1 By Decision 2005/493/EC of 1 October 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Chisso Corporation, Daicel Chemical Industries Ltd, Hoechst AG, The Nippon Synthetic Chemical Industry Co. Ltd and Ueno Fine Chemicals Industry Ltd (Case No COMP/E-1/37.370 — Sorbates) ('the Decision'), the Commission 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 a cartel on the sorbates market.

2 The undertakings to which the Decision was addressed are Chisso Corporation, Daicel Chemical Industries Ltd ('Daicel'), The Nippon Synthetic Chemical Industry Co. Ltd ('Nippon Synthetic'), Ueno Fine Chemicals Industry Ltd ('Ueno'), all established in Japan, and the applicant, Hoechst AG, subsequently Hoechst GmbH, established in Germany.

3 The period during which the infringement was found to have been committed lasted from 31 December 1978 until 31 October 1996 (for Chisso, Daicel, Ueno and Hoechst) and from 31 December 1978 until 30 November 1995 (for Nippon Synthetic).

4 'Sorbates', as defined in the Decision, are chemical preservatives (anti-microbial agents) capable of retarding or preventing growth of micro-organisms, such as yeast, bacteria, moulds or fungi. They are used essentially in food and beverages. Sorbates sometimes also preserve other food characteristics such as flavour, colour, texture and nutritional value. In addition, sorbates are also used to stabilise other types of products such as pharmaceutical products, cosmetics, pet food and animal feed (recital 56 to the Decision).

5 According to the Decision, there are three types of sorbates. First, sorbic acid is the main product, from which other sorbates derive. It is a technically complex substance to produce and of limited application owing to its low solubility in water. Second, potassium sorbate is used where high water solubility is desired. Third, calcium sorbate is used for the coating of cheese wrapping paper in France and Italy. Sorbic acid represents almost 30% of sorbates sales in Western Europe, potassium sorbate represents 70% and calcium sorbate represents a residual part (recitals 57 to 61 to the Decision).

6 At the material time there were seven large suppliers of sorbates at worldwide level: two undertakings were European (Hoechst and Cheminova A/S); one was in the United States (Monsanto, later Eastman Chemical Company); and the remaining four undertakings were Japanese (Chisso, Daicel, Nippon Synthetic and Ueno) (recital 64 to the Decision).

7 Until September 1997, when it transferred its sorbates business to one of its wholly-owned subsidiaries (Nutrinova Nutrition Specialities & Food Ingredients GmbH, 'Nutrinova'), Hoechst was the main operator on the worldwide market (more than 20% in 1995) and on the European market (more than 45% in 1995). Hoechst was followed by Chisso, Daicel, Nippon Synthetic and Ueno (each of which had between 9.5 and 15% of the European market for the same year (recitals 65 and 70 (Table I of the Decision)).

8 According to recitals 4 and 5 to the Decision, lawyers acting for Chisso met the representatives of the Commission's services on 29 September 1998 in order to inform the Commission that Chisso was willing to cooperate within the framework of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the 1996 Leniency Notice) concerning a worldwide cartel on the sorbic acid market.

9 On 27 October 1998 Nutrinova's lawyer also contacted the Commission's services and informed them that Nutrinova was willing to cooperate within the framework of the 1996 Leniency Notice.

10 On 29 October 1998, at a meeting between lawyers acting for Hoechst and Nutrinova and the Commission's services, an oral description of the relevant market, the producers, market shares, the proceedings in the United States and the cartel's activities was provided.

11 On 13 November 1998, Chisso provided an oral description of the cartel's activities to the Commission's services and supplied documentary evidence.

12 On 9 December 1998 the Commission's services received oral testimony from Chisso's representative in the cartel, who supplied explanations and clarifications about the documents submitted on 13 November 1998.

13 On 21 December 1998 Nutrinova submitted a memorandum on the sorbates market.

14 On 19 March and 28 April 1999 Nutrinova submitted a memorandum setting out the anti-competitive activities affecting the sorbates market and documentary evidence.

15 On 20 April 1999 Chisso submitted a declaration confirming and expanding upon the oral statement made at the meeting of 13 November 1998.

16 On that basis, the Commission on 26 May and 17 June 1999 issued requests for information to Daicel, Nippon Synthetic and Ueno under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and Article [82 EC] (OJ, English Special Edition 1959-62, p. 87) (recital 6 to the Decision).

17 On 15 July 1999, 24 October 2001 and 21 February 2002 respectively, Nippon Synthetic, Ueno and Daicel expressed their willingness to cooperate under the 1996 Leniency Notice. They responded to the Commission's requests for information (recitals 7, 10 and 11 to the Decision).

18 The Commission subsequently sent further requests for information under Article 11 of Regulation No 17, the last such request being sent on 13 December 2002 (recital 21 to the Decision).

19 Between 1998 and 2001 proceedings were initiated in the United States and in Canada concerning price-fixing in the sorbates sector. Fines were imposed on Daicel, Hoechst, Nippon Synthetic and Ueno (in the proceedings in the United States) and Daicel, Hoechst and Ueno (in the proceedings in Canada) (recitals 30 to 32 to the Decision).

20 On 20 December 2002 the Commission initiated a proceeding under Article 81 EC and Article 53 of the EEA Agreement and issued a statement of objections to the undertakings to which the Decision is addressed (recital 22 to the Decision).

21 On 24 April 2003 the undertakings to which the Decision is addressed took part in the hearing before the Commission (recital 29 to the Decision).

22 On 1 October 2003 the administrative procedure was closed when the Commission adopted the Decision.

23 According to Article 1 of the operative part of the Decision, the following undertakings had infringed Article 81(1) EC and, from 1 January 1994, Article 53(1) of the EEA Agreement, by participating, for the periods indicated below, in a complex, single and continuous agreement and concerted practice in the sorbates sector, by which they had agreed to fix target prices and to allocate volume quotas, to define a reporting and monitoring system and not to supply technology to potential entrants:

a) Chisso, from 31 December 1978 to 31 October 1996;

b) Daicel, from 31 December 1978 to 31 October 1996;

c) Hoechst, from 31 December 1978 to 31 October 1996;

d) Nippon Synthetic, from 31 December 1978 to 30 November 1995;

e) Ueno, from 31 December 1978 to 31 October 1996.

24 In Article 2 of the operative part of the Decision, the Commission ordered the undertakings listed in Article 1 to bring to an end immediately the infringements referred to in that article, in so far as they have not already done so, and to refrain from repeating any act or conduct described in Article 1 and from adopting any measure having equivalent object or effect.

25 On the basis of the findings of fact and the legal assessments made in the Decision, the Commission imposed on the undertakings concerned fines calculated in application of the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines') and in the 1996 Leniency Notice.

26 In Article 3 of the operative part of the Decision, the Commission imposed the following fines:

a) Daicel: EUR 16 600 000;

b) Hoechst: EUR 99 000 000;

c) Nippon Synthetic: EUR 10 500 000;

d) Ueno: EUR 12 300 000.

27 The amount of the fine imposed on Hoechst takes into account, in particular, the role as leader of the cartel which it played jointly with Daicel, and also of the fact that its conduct constituted a repeated infringement (recitals 363 to 373 to the Decision). However, Hoechst received a reduction of 50% of the amount of the fine for its cooperation during the administrative procedure (recitals 455 to 466 to the Decision).

28 Chisso was considered by the Commission to have been the first to provide decisive evidence in the context of the investigation. On that basis, it was given complete immunity and was not fined (recitals 439 to 447 to the Decision).

29 The Decision was served on Hoechst on 9 October 2003, by letter dated 8 October 2003.

Procedure and forms of order sought by the parties

30 By application registered at the Registry of the Court of First Instance on 18 December 2003, Hoechst brought the present action.

31 On 16 December 2004 the Court rejected an application to intervene by Chisso (order of 16 December 2004 in Case T-410/03 *Hoechst* v *Commission* [2004] ECR II-4451).

32 On 2 March 2006 the Commission was requested to answer a question put by the Court and to supply, first, a number of documents in the investigation file, in the form made accessible to Hoechst, and, second, a usable non-confidential version or non-confidential summary of Chisso's letter of 17 December 2002, with the annexes thereto. The Commission responded to that request within the prescribed period. As regards Chisso's letter of 17 December 2002, together with the annexes, the Commission stated that Chisso agreed that the original versions of those documents should be used for the sole purposes of the proceedings before the Court.

33 On 5 April 2006 the Commission's response and the documents supplied by it were notified to Hoechst.

34 On 18 May 2006 Hoechst was invited to submit its observations on the Commission's response. In particular, it was invited to state how the non-disclosure of Chisso's letter of 17 December 2002, with the annexes thereto, in the form submitted to the Court by the Commission, had prevented it from having knowledge of documents that might be useful to its defence and had thus breached its rights of defence. By letter of 16 June 2006 Hoechst responded to that question within the prescribed period.

35 On 12 July 2006 the Commission was invited to submit its observations on certain points in Hoechst's response. By letter of 5 September 2006 the Commission submitted its observations within the prescribed period.

36 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

37 The parties submitted oral argument and their answers to the questions put by the Court at the hearing held on 8 February 2007.

38 At the hearing the Court ordered the Commission, on the basis of Article 65(b) and the second subparagraph of Article 67(3) of the Rules of Procedure of the Court, to produce, within three weeks from the date of the hearing, the internal notes relating to the telephone conversations which had taken place between its services and Chisso between September 1998 and April 1999.

39 The order of the Court, which was recorded in the minutes of the hearing, was served on the parties on 13 February 2007.

40 The Commission complied with the Court's request within the prescribed period.

41 In accordance with the second subparagraph of Article 67(3) of the Rules of Procedure, the documents submitted by the Commission were not communicated to the applicant while the Court ascertained their confidential nature and their relevance to the result of the case.

42 On 30 April 2007 the oral procedure was closed.

43 On 11 May 2007 the parties were informed that the Court had decided to remove the internal notes referred to in paragraph 38 above from the file and to return them to the Commission.

44 Hoechst claims that the Court should:

— annul the Decision in so far as it concerns the applicant;

— in the alternative, reduce the amount of the fine imposed on it to an appropriate amount;

— order the Commission to pay the costs.

45 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order Hoechst to pay the costs.

Law

46 Hoechst's action is supported by 13 pleas in law.

47 Contrary to the Commission's contention, it is possible upon reading the arguments put forward to determine the scope of the pleas on which Hoechst relies in support of the form of order which it seeks.

48 Thus, the first and fourth pleas seek annulment of the Decision, in its entirety, in so far as it concerns Hoechst.

49 The 13th plea seeks annulment in part of the operative part of the Decision, namely Article 2, in so far as it concerns Hoechst.

50 The remaining pleas seek a reduction in the fine.

I — *The pleas seeking annulment of the Decision in its entirety in so far as it concerns Hoechst*

51 By its first plea, Hoechst challenges the Commission's refusal to grant it access to a number of exculpatory documents. In the context of its fourth plea, Hoechst emphasises the fact that the hearing officer's file is incomplete.

A — *The first plea, alleging refusal to grant access to certain exculpatory documents*

1. Summary of the administrative procedure and of the Decision.

52 At a meeting held on 13 November 1998 between Chisso and the Commission, one of the Commission's officials responsible for the case assured Chisso that 'fair warning would be given if another company would look like overtaking Chisso under the requirements of [the Leniency Notice]'.

53 On 9 December 1998 the Commission's services received the oral testimony of Chisso's representative in the cartel.

54 On 5 March 1999, during a telephone interview with the Commission's services, Nutrinova requested that a meeting be arranged. That request went unanswered.

55 On 20 December 2002 the Commission initiated a proceeding under Article 81 EC and Article 53 of the EEA Agreement and sent a statement of objections to the undertakings to which the Decision is addressed. On the same date those undertakings were granted access to the file, in the form of two CD-ROMs containing a full copy of the documents, apart from business secrets and other confidential information (recitals 22 and 23 to the Decision).

56 The Commission's note on the meeting of 13 November 1998 was in the file.

57 By letter to the hearing officer dated 22 January 2003, Hoechst requested that it and Nutrinova should, through their counsel, have access to the internal documents relating to the telephone conversations between Commission officials and Chisso between September 1998 and the end of April 1999. They also requested access to a letter from Chisso dated 17 December 2002 which appeared in the file in a non-confidential version.

58 As regards the internal documents relating to the telephone conversations between the Commission and Chisso, counsel for Hoechst and Nutrinova referred to the terms of the minute of the meeting of 13 November 1998 and stated:

'It is a crucial point for our clients to know whether and to what extent submissions have been prompted by Commission officials while our clients were cooperating with the Commission.'

59 As regards Chisso's letter of 17 December 2002, counsel for Hoechst and Nutrinova observed in particular that an annex to that letter, namely a letter of 26 March 1999, was entitled '[T]o the Commission concerning Chisso's cooperation with the Directorate-General for Competition'. They added:

'Any arguments made with regard to Chisso's cooperation or — more importantly — any hints that would refer to contacts Chisso has had at the time with Commission officials could on the other hand be very relevant for our clients' defences.'

60 By letter of 24 February 2003 the hearing officer refused the requests set out in the letter of 22 January 2003.

61 The hearing officer stated, in that regard, that the notes relating to the telephone conversations between Chisso and the Commission were internal documents and therefore non-accessible. In the absence of any strong evidence to the contrary, it had to be presumed that the Commission had made an objective assessment of the information that would be useful to Hoechst. Furthermore, as regards Chisso's letter of 17 December 2002 (and the letter of 26 March 1999 annexed to that letter), the hearing officer informed Hoechst that Chisso had requested confidential treatment for those documents.

62 On 7 March 2003 Hoechst, together with Nutrinova, reiterated, through their counsel, the requests set out in the letter of 22 January 2003, in the context of their response to the statement of objections. More particularly, Hoechst insisted, with Nutrinova, on obtaining access to the file, and submitted arguments relating to the unequal treatment which had been in evidence during the proceedings.

63 On 23 September 2003 the hearing officer submitted her final report in the case (OJ 2005 C 173, p. 5). In that report, she observed, in particular:

'… I informed the parties by letter of 24 February 2003 that further access to the file would not be granted at that stage of the procedure. I explained that notes of telephone conversations between parties and Commission officials are internal documents of the Commission and thus, in principle, non-accessible. In this particular case, the Commission had, exceptionally, made accessible some of the internal file notes and had referred to them in the [s]tatement of [o]bjections, in order to explain the facts and dates of the meetings that the Commission held with the different addressees. With regard to the letters from Chisso, the latter had requested confidential treatment for these letters and the parties had been given access to non-confidential summaries of those letters.'

64 A footnote accompanying that paragraph stated:

'Chisso's legal representative subsequently after the [o]ral [h]earing and in response to a request from me to reconsider the confidentiality nature of the letter sent to the Commission on 26 March 1999, confirmed its view that this document contained business secrets and thus as such was confidential.'

65 The hearing officer then observed in her final report:

'As a result of these claims made by Hoechst and Nutrinova, I have paid special attention to the conclusions of the Commission on the issue of leniency in the present draft decision. I have also examined internal notes of the Commission services in so far as these exist. In the event, the concerns expressed by Hoechst and Nutrinova are largely rendered moot by the conclusions set out in the draft decision on the issue of leniency. In addition, I am satisfied that the actions of the Commission services vis-à-vis the parties have had no impact on the outcome of the case on this issue. I also confirm that no additional access to file is required in order to satisfy Hoechst's

rights of defence. Neither the Commission's internal documents nor the documents provided by Chisso provide … additional inculpatory or exculpatory evidence which would be required to be made available to Hoechst.'

66 On 1 October 2003 the Commission adopted the Decision and, at recitals 26 and 27, answered Hoechst's claims as follows:

'(26) As regards the documents or parts of documents provided by Chisso for which it claimed protection as "business secrets", their non-transmission to the other parties protects the legitimate commercial interests of this company. It prevents the other parties from obtaining strategic information on Chisso's commercial interests and on the operation and development of its business, pursuant to Article 20 of Regulation No 17 and the Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 [EC] and 86 [EC], Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89.

(27) Secondly, as to the access to the Commission's internal documents, according to well established case-law, the Commission is under no obligation with regard to the rights of the defence to grant access to its internal documents during the procedure. Moreover, as far as contacts with undertakings in the context of their cooperation are concerned, the Commission considers that Hoechst's reasoning is based on a fundamentally wrong premis. Additional access to the Commission's internal documents in no way would facilitate the companies' rights of defence and contribute to determine who was the first undertaking to provide the Commission with decisive evidence. In fact, this appraisal will be made exclusively on the basis of the documents provided by the undertakings, to which the parties had access.'

2. Arguments of the parties

a) Arguments of Hoechst

67 Hoechst states that it was only on reading the statement of objections that it observed that at the beginning of the proceedings, more or less in parallel with Hoechst, Chisso had cooperated with the Commission in reliance on the 1996 Leniency Notice. At the same time, the document to which Hoechst had access enabled it to discover irregularities in the administrative procedure. Hoechst makes clear in that regard that it is challenging, in the eighth plea, the fact that the first decisive evidence of the existence of the cartel was supplied by Chisso on 13 November 1998.

68 In its first plea, first, Hoechst disputes the refusal of access to internal documents relating to the conversations between the Commission and Chisso. Second, Hoechst disputes the refusal of access to a letter from Chisso dated 17 December 2002, together with the annexes to that letter. Third, Hoechst draws attention to the fact that the Commission did not agree to its request to carry out fresh investigations. In addition, Hoechst requests that measures of organisation of procedure be taken.

The refusal of access to documents relating to the conversations between the Commission and Chisso

69 The applicant submits that the Commission refused to grant it access to certain documents submitted by Chisso and also to notes drawn up by the Commission concerning the meetings and telephone conversations with Chisso. If the applicant had been able to consult them, it would have been able to obtain a complete picture of the contacts between the Commission and Chisso and it would therefore have been easier for the applicant to prove that it was it, and not Chisso, that had been the first, in time and with respect to content, to adduce decisive evidence of the existence of the cartel and that therefore ought to have obtained a reduction in its fine. It

would therefore also have been easier for Hoechst to demonstrate that Chisso's acts of cooperation had been influenced by information from the Commission.

70 The applicant refers to Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 69; Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 65; and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 334, and emphasises that the right to consult the file is one of the fundamental guarantees of Community law in procedural matters, intended to protect the rights of defence of the addressees of a statement of objections. The right of access to the file must, in particular, ensure the effective exercise of the right to be heard, since it provides the opportunity to be aware of and to assess the evidence used by the Commission in the statement of objections and, where possible, to refute that evidence in the response. The Commission's duty is to give access, in principle, to the whole file. The situation is otherwise only with respect to the Commission's internal documents and evidence containing business secrets of third parties.

71 Hoechst also submits that the principle of equality of arms means that the Commission cannot decide alone whether, and to what extent, it will grant access to the documents which a party might use as exculpatory evidence. There would be a breach of the rights of the defence if it were possible to demonstrate that the administrative procedure might have had a different outcome if Hoechst had obtained access to the exculpatory documents concerned. For the documents not in the file, Hoechst ought to have expressly requested to consult the documents in question.

72 In this case, Hoechst made quite clear that all the notes relating to the telephone conversations which took place between September 1998 and April 1999 between the Commission's representatives and Chisso were important for its defence, as they might have been exculpatory documents, showing the lack of impartiality in the conduct of the proceedings at that time.

73 The parts of the file that Hoechst was able to consult show that the applicant was treated unequally by comparison with Chisso.

74 First, the Commission granted Chisso, in autumn 1998, something that it refused to grant at the same time to Hoechst, namely recognition of oral depositions as acts of cooperation. At the same time, the Commission actively invited Chisso to meetings with it, whereas it refused the same meetings to Hoechst. In particular, an internal Commission note dated 9 November 1998 states that '[Chisso's] lawyers [had] at last agreed to hold the promised meetings, following calls initiated from [the Directorate-General for Competition]'. Those repeated telephone calls from the Commission show the partisan way in which it conducted the proceedings.

75 Second, it is also established that during that decisive period of the proceedings, that is to say, at the end of 1998, Chisso unlawfully obtained a promise from the Commission that it would receive a 'warning' if it appeared that other undertakings would overtake it in relation to cooperation. Such partial warnings are not only unlawful in themselves but also relevant for Hoechst's defence. In effect, that defence depends essentially on whether, and to what extent, the Commission gave Chisso such 'warnings' or indications concerning the state of the cooperation supplied by Hoechst. Furthermore, according to settled case-law the principle of sound administration includes the obligation for the competent institution to examine carefully and impartiality all the relevant aspects of the individual case (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 99). Even on the assumption that Chisso received no warning from the Commission, that has no impact on the complaint that the Commission in any event declared that it was prepared to give such a warning. That breach of the principle of sound administration is in itself sufficient to justify granting Hoechst greater access to the file in order to preserve its rights of defence.

76 In those circumstances, all the documents dealing with the contacts between Chisso's lawyers and the Commission officials responsible for the case are important for Hoechst's defence, as exculpatory documents. Hoechst explained that point of view on several occasions, both in writing (for the attention of the hearing officer and the head of division of the Commission responsible for the case) and at the hearing on 24 April 2003.

77 However, the hearing officer rejected those requests by letter of 24 February 2003 to counsel for Hoechst and Nutrinova, stating, in particular, the following:

'In the absence of strong evidence to the contrary, it has to be presumed that the Commission made an objective assessment of the information which is useful to [your clients] in this regard. No strong evidence to the contrary is conveyed in your letter. Moreover, the reason given (quoted above), for requesting additional access is not an appropriate basis upon which to consider granting access and, more specifically, it is not relevant to the issue of the application of the Leniency Notice in this case.'

78 Those arguments show that the hearing officer, whose actions are attributable to the Commission, misunderstood her powers and her duties to ensure respect for the rights of the defence. In accordance with the case-law, all that can be expected of a party which seeks wider access to the file is that it should establish by relevant arguments what documents may be of interest for its defence, and for what reason (*Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraph 335). Whether a particular document is of interest for the defence must be assessed from the viewpoint of the party defending itself and neither the Commission's agent responsible for the case nor the hearing officer is competent to decide what documents may serve for the defence as exculpatory documents.

79 The applicant also refers to Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraphs 81 and 83, and submits that where a case calls for difficult and complex economic assessments, the Commission must ensure that the addressees of a decision have the same knowledge of the facts as the Commission itself and the other parties concerned do. That principle also applies for the Commission's internal documents relating to the contacts with Chisso, to which Hoechst requested access in order to protect its rights. Referring to Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 40, the applicant states that the Commission's internal documents must be communicated where circumstances of the case are exceptional and the applicant makes out a plausible case for the need to communicate them. Access to the Commission's internal documents must be authorised

where they serve to prove a breach of the principle of lawfulness by the Commission (order of 18 June 1986 in Case 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11).

80 As regards the hearing officer's reference to the application of the 1996 Leniency Notice in the present case, Hoechst observes that it cannot be for the hearing officer to predict the future reasoning in the Commission's decision and to base her procedural decisions on that reasoning. The hearing officer can neither know nor decide what grounds will be adopted by the College of Members of the Commission and has neither the power nor the right to decide alone on the interest which potentially exculpatory documents might have for the defence (*Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraph 339).

81 In that context, Hoechst requests the Court to adopt measures of organisation of procedure consisting in ordering the Commission to put it and the Court in a position to consult, in their integral version, all the documents in the file, or otherwise in the Commission's possession, showing the content of the contacts between Chisso's lawyers and the Commission's representatives between September 1998 and April 1999. Furthermore, by way of measure of inquiry, Hoechst requests that the two Commission officials then responsible for the case be called as witnesses.

The refusal of access to a letter of 17 December 2002 from Chisso, together with the annexes thereto

82 Hoechst states that it has already claimed, before the adoption of the Decision, that a letter of 17 December 2002 from Chisso's lawyers which was in the file but the content of which was almost entirely concealed ought to have been in an unconcealed form in the file. Hoechst emphasised that the annexes to that letter, including a letter of 26 March 1999, which, according to the summary of its content, dealt with Chisso's cooperation with the Commission, was of great interest for its defence.

83 In so far as that document, as may be inferred from the file to which access was granted, related only to contents or to legal points relating to Chisso's cooperation and to its assessment, Hoechst contends that there is no valid reason for precluding consultation of it.

84 Hoechst adds that Chisso's letter might contain inculpatory evidence (for example, if Chisso accused the applicant of having been a leader of the cartel) and the Commission ought therefore to have given the applicant immediate access without any prompting. Conversely, should there be any sign of discrimination such as the procedural irregularities on the part of the Commission noted above, Chisso's letter might have an exculpatory effect. In that case, the letter ought to have been transmitted when Hoechst requested it, at the latest.

85 In that context, it is immaterial whether or not one of the parties to the procedure requested confidential treatment for the documents in question. The Commission ought to examine of its own motion, and objectively, the confidential nature of the documents in its file. Hoechst submits in that regard that Article 21(2) of Regulation No 17 provides that the Commission can grant only valid requests for confidential treatment for business secrets.

86 Hoechst contends that only business data such as turnover or market shares in non-historical periods could have constituted a ground for concealing — and only in part — Chisso's letter.

87 Referring to *Endemol* v *Commission*, paragraph 70 above (paragraph 65), Hoechst submits that the protection of confidential information must be weighed up against the rights of defence of the addressees of the statement of objections. The addressees of the statement of objections should be in a position to determine, in full knowledge of the facts, whether the documents described are relevant for their defence (*ICI* v *Commission*, paragraph 70 above, paragraph 104). In the present case, Hoechst maintains that its opportunity to defend itself was restricted in so far as it was unable to clarify certain decisive procedural and factual points.

88 In particular, in so far as Hoechst disputes the fact that Chisso was the first to supply decisive evidence, Chisso's letter of 26 March 1999, which, as the summary shows, concerned the latter's cooperation with the Commission, might have enabled conclusions to be drawn as to the content and date of the acts of such cooperation, in particular before 29 October 1998.

89 In that context, Hoechst requests the Court to adopt measures of organisation of procedure consisting in ordering the Commission to make available to the Court and to Hoechst Chisso's lawyers' letter of 17 December 2002 to the Commission, in the full version, together with the annexes. Furthermore, by way of measure of inquiry, Hoechst requests that the two Commission officials then responsible for the case be called as witnesses.

90 In its letter of 16 June 2006, in answer to a written question from the Court inviting it to submit further observations on the documents previously transmitted by the Commission, including, in particular, Chisso's letter of 17 December 2002, together with the annexes thereto (see paragraph 34 above), Hoechst claims that certain evidence has been rejected and that a number of irregularities vitiated the administrative procedure.

91 As regards the evidence which it claims to have been rejected, first, Hoechst contends that the letter of 11 January 1999 from Chisso's counsel to the Commission, which is now available for consultation for the first time, constitutes an exculpatory document.

92 That letter shows that on 3 November 1998, or several days after Hoechst requested immunity, Chisso sought confirmation that no other undertaking had offered to cooperate with the Commission.

93 That proves that on that date Chisso had not requested immunity from the Commission. Chisso requested immunity only after 11 January 1999, as shown in the very terms of the letter. It is not possible to make good a failure to request immunity. That

element was not mentioned in the Decision and is of such a kind as to confirm that Hoechst had been the first undertaking to cooperate with the Commission.

94 Second, Hoechst maintains that Chisso's letter to the Commission of 26 March 1999 is also an exculpatory document.

95 According to Hoechst, that letter shows that, at the time when it was sent, the written statements which the Commission had requested from Chisso had still not been submitted.

96 First of all, Hoechst observes, in that regard, that Chisso was informally granted extra time, for which there is no provision in the 1996 Leniency Notice.

97 Next, if certain documents were still missing on 26 March 1999, it is impossible to consider, contrary to what is stated at recital 458 to the Decision, that the Commission had proof of the existence of the cartel on the basis of the cooperation provided by Chisso. The Commission therefore gave unlawful commitments to Chisso and also adhered to them by subsequently granting Chisso immunity from a fine.

98 Hoechst also observes that it provided the Commission with documentary evidence on 19 March 1999, even though its personnel still faced the risk of criminal proceedings in the United States and though the 1996 Leniency Notice required only evidence of the existence of the cartel, which Hoechst provided as early as 29 October 1998.

99 As regards the irregularities which are alleged to vitiate the administrative procedure, Hoechst emphasises that the Commission, at recital 461 to the Decision, refused to accept that the applicant had been the first to cooperate, on the ground that it had documents without producing them, when it was agreed that, in view of the proceedings pending in the United States, Hoechst could provide those documents at a later stage.

100 At the same time, as shown by the letter of 26 March 1999, the Commission clearly allowed Chisso 'extra time' to submit documents. Furthermore, the documents produced by Chisso in April 1999 could have been provided earlier. Accordingly, Chisso's cooperation should have been rejected on the same grounds as those used against Hoechst.

101 In fact, no lack of cooperation was alleged on Chisso's part in spite of a strictly comparable situation. That constitutes unequal treatment to the detriment of Hoechst.

The request to carry out further investigations

102 Hoechst states that, in its letter of 22 January 2003 to the hearing officer, it had requested that further investigations be carried out at the Commission's premises in the form of questioning of witnesses. Although that request was not refused by either the hearing officer or the Commission, no action was taken, since the requested investigation was clearly not carried out. In so far as that investigation was decisive for the content of the Decision, for the reasons set out in the present plea, the Commission has breached the principle of sound administration.

b) Arguments of the Commission

The refusal to grant access to certain documents

103 The Commission emphasises that Hoechst does not deny that access to certain documents may in principle be refused when they are internal documents or contain business secrets.

104 In that context, first, the Commission states that the hearing officer paid 'particular attention' to her findings in the draft decision, concerning the question of the benefit of favourable treatment with respect to the fine. The hearing officer 'moreover' examined the Commission's internal notes before stating that she was convinced that 'the acts of the Commission's services vis-à-vis the parties [had] not had any influence on the outcome of the procedure from that point of view'.

105 Second, the Commission asserts that the first decisive evidence of the existence of the cartel was provided by Chisso at the meeting of 13 November 1998. The decision as to which undertaking was the first to supply decisive evidence to the Commission was taken solely on the basis of the documents produced by the undertakings, to which the parties had access. Accordingly, the warning promised to Chisso at the meeting of 13 November 1998 cannot logically have influenced the decision as to which undertaking was the first to cooperate. It follows at the same time that the criticisms concerning the conduct of the procedure after that date could not be of the slightest importance in that regard. That also applies to the complaints relating to the refusal to grant access to Chisso's letter of 17 December 2002 and the annexes thereto.

106 Nor, third, has Hoechst succeeded in casting serious doubts on the objectivity of the Commission's conduct of the procedure that might justify wider access to its internal documents.

107 The Commission submits, in that regard, that the opportunity given to Chisso on 9 December 1998 to submit oral observations served only to explain the written evidence submitted on 13 November 1998. On the other hand, the meeting proposed by Hoechst by telephone on 5 March 1999 was intended to substitute oral testimony for existing written evidence.

108 As regards the 'refusal' to agree to the meeting proposed by Hoechst, the Commission suggests that what it did was more in the nature of a general reference to the conditions of the application of the 1996 Leniency Notice than a definitive refusal of any new contact with Hoechst. The Commission also states that its position was based on a provisional assessment, first, of Hoechst's willingness to cooperate, in view of the fact that of Hoechst was not prepared to cooperate fully before the outcome of the criminal and civil proceedings in the United States, and, second, of the probative value of the information thus far sent to the Commission by Hoechst. As Hoechst did not state that it was prepared, at the time of the requested meeting, to cooperate fully with the Commission and to give information of a different nature from that which it had already supplied, it would have made no sense, either for the Commission or for Hoechst, to arrange a new meeting.

109 As regards the fact that the Commission actively invited Chisso to meetings and arranged such meetings, the Commission states that by its telephone call it was merely reacting to an initiative by Chisso. It was agreed at the meeting of 29 September 1998 that the lawyers would take the initiative for a new meeting with the Commission within two weeks. As they did not do so within the agreed period, the Commission resumed contact in order to ascertain whether the lawyers still desired a meeting.

110 Furthermore, the proper functioning of the Commission in the field of competition depends, in particular, on the effectiveness of the Leniency Notice and therefore on the confidence which cooperating undertakings are able to have in the confidentiality of the contacts which they make in that regard. It is therefore necessary to reject Hoechst's assertion that its interest in establishing the existence of any procedural defects prevails over the proper functioning of the institution. In that context, *Solvay* v *Commission*, paragraph 79 above, does not assist Hoechst to overcome the absence

of exceptional circumstances in the present case. That case did not concern internal notes of the Commission but only the confidential documents of one of the parties. Furthermore, the facts of that case were very different from those of the present case, which do not involve difficult and complex economic assessments.

111 Last, the Commission, referring to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above (paragraph 340), submits that where the documents that might have contained exculpatory evidence were not communicated to a party, a breach of the rights of the defence can be found only if it is established that the administrative procedure might have led to a different outcome if that party had had access to the documents in question during that procedure. That is precluded in this case, however, as regards the fact that Chisso was the first undertaking to cooperate by its contribution of 13 November 1998.

112 In its response of 5 September 2006 to a written question put by the Court, the Commission made the following comments on the supplementary observations communicated by Hoechst on 16 June 2006 (see paragraphs 34 and 90 to 101 above).

113 As regards, first, Chisso's letter of 11 January 1999, the Commission states that that document was already accessible during the administrative procedure and therefore cannot in any event be characterised as evidence to which the Commission did not provide access.

114 In any event, the Commission states that Section E, paragraph 1, of the 1996 Leniency Notice requires that undertakings 'contact' the Commission's Directorate-General for Competition. Although in the German version of that provision the word 'applicant' (Antragsteller) is used in that context, there is no need to submit a formal application. Nor, moreover, did Hoechst formulate an 'application' in its letter of 27 October 1998.

115 As to which undertaking was the first to cooperate within the meaning of Section B of the 1996 Leniency Notice, the Commission contends that it is not the date of

the 'application' that is decisive; what matters is which undertaking 'is the first to adduce decisive evidence of the cartel's existence'. Furthermore, the wording used in the letter of 11 January 1999 shows that Chisso clearly presumed that in had already begun to cooperate.

116 As regards, second, Chisso's letter of 26 March 1999, the Commission emphasises that that document concerns only questions relating to the time-limits which had been imposed on Chisso, and not on Hoechst, to produce further documents, at a time when Chisso had already satisfied the conditions for the application of Section B(b) of the 1996 Leniency Notice by virtue of its contribution of 13 November 1998. Hoechst is therefore wrong to claim that that letter is an exculpatory document. It cannot be an exculpatory document, since it does not relate to any of the reasons why Hoechst is unable to benefit from Section B of the 1996 Leniency Notice, which are set out at recitals 455 to 464 to the Decision, and to which the Commission refers.

117 The fact that Chisso is considered to be the first undertaking to have cooperated is based not on the observations which it submitted on 20 April 1999 but on the documents produced on 13 November 1998. The extensions of the time-limits therefore did not have the effect of retroactively recognising that Chisso was the first to cooperate.

118 If it is Hoechst's intention to assert that it follows from that document that Chisso no longer satisfied the conditions for the application of Section B(d) of the 1996 Leniency Notice, the Commission contends that its argument cannot be upheld, since a person cannot rely on an unlawful act committed in favour of a third party (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 ECR, paragraph 373). What is more, even if Chisso should actually lose the benefit of Section B of the 1996 Leniency Notice, that would have no impact on Hoechst.

119 The Commission adds that the evidence necessary for the purposes of the application of Section B(b) of the 1996 Leniency Notice is decisive evidence of the existence of the cartel. Contrary to Hoechst's opinion, evidence which merely put the Commission in a position to carry out an investigation is not sufficient.

120 It is true that information provided orally is not excluded a priori. However, such evidence is not relevant in itself in the context of the application of Section B(b) of the 1996 Leniency Notice and becomes relevant only from the time when it is recorded on the appropriate medium (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 505).

121 The applicant ought to have expressly requested that the Commission draw up a minute to that effect (*BASF* v *Commission*, paragraph 120 above, paragraph 502), in any event so long as the Commission did not propose to do so in the context of its administrative practice. Furthermore, the minute could help to prove the existence of the cartel only if the Commission were able to establish the authenticity of the statement.

122 As regards, third, the irregularities which are alleged to have vitiated the administrative procedure, Hoechst infers from the letter of 26 March 1999 that Chisso no longer satisfied the conditions for the application of Section B(d) of the 1996 Leniency Notice. That argument must be rejected, on the ground that no one can rely to his advantage on an unlawful act committed in favour of a third party.

123 Furthermore, the question as to whether the conditions for the application of Section B(d) of the 1996 Leniency Notice are satisfied must, in the Commission's submission, be determined on a case-by-case basis. One of the significant elements in that context is whether the conduct of the undertakings concerned gave rise to an appreciable delay in the procedure. If the procedure is considered as a whole, it is clear that that was not so in the present case. The Commission also emphasises that Hoechst

did not transmit the second part of its observations until April 1999, some days after Chisso had lodged its own declarations (which Hoechst describes as being late).

124 Last, the Commission disputes certain factual assertions in Hoechst's observations.

The request for the new investigations

125 The Commission asserts that an investigation was indeed carried out, but that it produced no results favourable to Hoechst. The official responsible for the case at the time was questioned and confirmed that Chisso had received no warning concerning the possibility that it might be overtaken in relation to cooperation. Chisso was not put on notice in that regard. The Commission refers on that point to recital 458, *in fine*, to the Decision.

3. Findings of the Court

126 The Court notes, by way of preliminary observation, that Hoechst claims on a number of occasions in the context of the first plea that there has been a breach of the principles of sound administration and equal treatment, in support of its assertion that there has been a breach of the right of access to the file. Those arguments, moreover, are again developed in the context of the eighth and ninth pleas, whereby the applicant seeks a reduction in the fine.

127 In those circumstances, the Court considers it appropriate to examine those arguments first, before analysing, more specifically, the breach of the right of access to the file alleged by Hoechst.

a) Breach of the principles of sound administration and equal treatment

128 It must be borne in mind that during an administrative procedure before the Commission, the Commission is required to observe the procedural guarantees provided for by Community law (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 56).

129 Among the guarantees conferred by the Community judicial order in administrative procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86, and *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above, paragraph 99).

130 As regards the principle of equal treatment, the Commission cannot, when assessing the cooperation provided by undertakings, ignore that general principle of Community law, which, according to consistent case-law, is breached when comparable situations are treated differently or when different situations are treated in the same way, unless such treatment is objectively justified (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 237, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 453).

131 In the present case, first, so far as it concerns Hoechst's assertion that the Commission granted Chisso, in autumn 1998, what it at the same time refused the applicant, namely recognition of its oral contributions as acts of cooperation, and for the reasons set out at paragraphs 572 to 578 below, the Court considers, on the one hand, that in the Decision the Commission finally accepts Hoechst's oral contributions as acts of cooperation and, on the other, in any event, that the fact that it was the Commission's intention not to take certain oral contributions into consideration was the consequence of uncertainty as to the actual cooperation provided by Hoechst at the beginning of the procedure. Hoechst's arguments in that regard must therefore be rejected.

132 Second, as regards the Commission's internal note of 9 November 1998, relating in particular to the meeting of 29 October 1998, which states that '[t]he lawyers … have at last agreed to hold the promised meetings, following calls initiated from [the Directorate-General for Competition]', the Court considers that the telephone conversations initiated by the Commission's services were a consequence of the fact that those services had already met Chisso's lawyers on 29 September 1998, without there being any need to determine whether or not Chisso's identity had been officially revealed. As the Commission observes in its internal note of 1 October 1998, it had been agreed that the lawyers would contact the Commission services within two weeks. The fact that, in that context, the Commission services resumed contact is not of such a kind as to cast doubt on the lawfulness of the proceedings in that regard.

133 Third, as regards the fact that Hoechst's requests for further investigations met with no response, it must be noted that Hoechst's request, contained in a letter of 22 January 2003 to the hearing officer, formed part of a request for access to the internal documents relating to the telephone contacts between the Commission and Chisso between September 1998 and April 1999. More specifically, Hoechst requested the hearing officer to investigate those telephone contacts. In fact, it follows from the hearing officer's final report that, '[a]s a result of these claims made by Hoechst and Nutrinova', the hearing officer had 'examined internal notes of the Commission services in so far as these exist[ed]'. Hoechst's assertion that its request met with no response is therefore factually incorrect.

134 Fourth, as regards what the applicant claims to have been a biased approach or unequal treatment in the application of the 1996 Leniency Notice, the Court observes that in an internal note of 9 November 1998 referring to the first meetings held with Chisso and Hoechst, the Commission stated:

'We have obviously not informed them [that is to say, Chisso's lawyers] that other companies are also providing information, nor have these others been informed that … Chisso [had] applied for leniency.'

135 In fact, it follows from the minute of the meeting of 13 November 1998 between Chisso and the Commission that one of the officials responsible for the present case stated that 'fair warning would be given if another company would look like overtaking Chisso under the requirements of [the Leniency Notice]'.

136 It follows, first, that on 9 November 1998 the Commission clearly displayed its intention not to disclose to the cooperating undertakings, in particular to Hoechst, the fact that other undertakings had approached its services in order to obtain immunity from a fine when, on 13 November 1998, that is to say, some days later, it assured Chisso that it would be warned if other undertakings attempted to overtake it in relation to cooperation.

137 Those elements lead the Court to conclude that, in this case, the Commission failed to have regard to the principles of sound administration and equal treatment. The Court would emphasise in that regard that even if the assertion of the official concerned at the meeting of 13 November 1998 does not show that the promise made to Chisso was in fact subsequently kept, it none the less constitutes a breach of those two principles.

138 It must be observed, at this stage, that Hoechst does not claim that the Decision should be annulled in so far as the Commission breached the principles of sound administration and equal treatment. However, since it relied on a breach of those principles in support of the breach of the right of access to the file, which will be examined below, and in so far as Hoechst's arguments are developed again in the context of the eighth and ninth pleas concerning the application of the 1996 Leniency Notice, it is appropriate to ascertain the impact on the content of the Decision of the breach found at paragraph 137 above.

139 In that regard, in the first place, it must be observed that the unlawful act found at paragraph 137 above is not of such a kind as to call in question the infringement found in the Decision, which, moreover, is supported by documentary evidence. Nor has Hoechst put forward any argument to that effect.

140 In the second place, as regard cooperation by undertakings, it follows from recital 440 to the Decision that:

'At a meeting held on 13 November 12998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence … The Commission considers that on that occasion Chisso was the first undertaking to adduce decisive evidence [of] the existence of the cartel which is found in this Decision.'

141 It follows that the Commission relied solely on the oral description of the cartel's activities and on the written evidence submitted at the meeting of 13 November 1998, and not later, as the basis for its conclusion that Chisso had been the first undertaking to adduce evidence of the existence of the cartel.

142 In those circumstances, even on the assumption that Chisso was induced to cooperate further with the Commission after 13 November 1998, the Commission could not have arrived at a different result in the Decision as concerns the application of the 1996 Leniency Notice, subject to examination of the eighth and ninth pleas, whereby Hoechst seeks to demonstrate that, on the substance, the evidence submitted by Chisso on 13 November 1998 was not decisive. The same would apply if Hoechst had been induced further, after 13 November 1998, after becoming aware of Chisso's cooperation.

143 The Court therefore considers that the unlawful act found at paragraph 137 above is not of such a kind as to affect the validity of the Decision in so far as it concerns the finding of the infringement and the fact that Chisso was the first to cooperate.

144 Independently of the question of the impact of the unlawful act found at paragraph 137 above on the right of access to the file, which will be examined below, and therefore the question of the impact of that illegality on the validity of the Decision as a whole, and in so far as Hoechst's arguments are developed again in the context of

the eighth and ninth plea, whereby it seeks a reduction in the fine, the Court, at this stage, reserves its position as to whether the fine should be varied.

b) Breach of the right of access to the file

145 It must be borne in mind at the outset that the right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (see 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 68 and the case-law cited).

146 As regards the inculpatory evidence, the undertaking concerned must demonstrate that the result which the Commission reached in its decision would have been different if a document that was not disclosed on which the Commission relied to make a finding of infringement against that undertaking ought to have been excluded as inculpatory evidence. As regards the exculpatory evidence, the undertaking concerned must establish that its non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertakings was found to have engaged and, accordingly, the level of the fine. The possibility that a document that had not been disclosed might have had an influence on the conduct of the procedure and the content of the Commission's decision can be established only after a provisional examination of certain evidence showing that the undisclosed documents might have had — from the aspect of that evidence — a significance which ought not to have been overlooked (see *Aalborg Portland and Others*, paragraph 145 above, paragraphs 73 to 76 and the case-law cited).

147 Furthermore, it should be emphasised that it is not solely for the Commission, which notifies the objections and adopts the decision imposing a penalty, to determine the documents which are of use to the defence of the undertakings concerned. However, the Commission may exclude from the administrative procedure the evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation. An applicant cannot properly put forward as a ground of annulment the fact that irrelevant documents were not communicated to it (see *Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 126 and the case-law cited).

148 Last, it must be borne in mind that a breach of the right of access to a file can entail annulment of a Commission decision in whole or in part only where the lack of proper access to the investigation file during the administrative procedure had prevented the undertaking or undertakings concerned from perusing documents which were likely to be of use in their defence and had thus infringed their rights of defence. That is the case if disclosure of a document would have had even a slight chance of altering the outcome of the administrative procedure if the undertaking concerned had been able to rely on it during that procedure (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraphs 101 and 131).

149 It is in the light of those considerations that the Court must assess whether Hoechst's right of access to the file was breached in this case as regards, first, Chisso's letter of 17 December 2002 together with the annexes thereto and, second, the internal documents relating to the telephone conversations between the Commission and Chisso between September 1998 and April 1999.

Chisso's letter of 17 December 2002 and the annexes thereto

150 First, it should be observed that the Commission decided to incorporate Chisso's letter of 17 December 2002, together with the annexes thereto, in a non-confidential version, in the investigation file that was made available to the undertakings which were parties to the proceedings. The Commission therefore of necessity considered that those documents were of relevance to the investigation.

151 Second, Chisso's letter of 17 December 2002, together with the annexes thereto, was not used by the Commission in the Decision in order to establish that the undertakings concerned had committed an infringement. Those documents therefore do not constitute inculpatory evidence.

152 Third, it must be noted that Hoechst did in fact have access to the non-confidential version of Chisso's letter of 17 December 2002, together with the annexes. However, in the form made available to Hoechst during the administrative procedure, those documents consisted of 101 pages, virtually all of which were blank and marked 'Business secrets'. No more comprehensible non-confidential version, or even a summary of the content of those documents, was provided during the administrative procedure. Only a list setting out the date, sender and addressee of the documents and, where appropriate, the subject-matter, were mentioned in Chisso's letter of 17 December 2002. In those circumstances, the non-confidential version of Chisso's letter of 17 December 2002, with the annexes, in the form make available to Hoechst during the administrative procedure, bears a close relationship to failure to disclose the documents in question, which, in so far as they formed part of the file, were of relevance to the investigation.

153 Fourth, it must be emphasised that more appropriate access to Chisso's letter of 17 December 2002, together with the annexes, was requested by Hoechst on a number of occasions during the administrative procedure. That access was refused, according to the terms of recital 26 to the Decision, on the ground that Chisso had requested confidential treatment for them. The Commission cannot make a general reference to confidentiality to justify a total refusal to disclose documents in its file (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 1017). The right of undertakings and associations of undertakings to protect their business secrets must be balanced against the safeguarding of the right to have access to the whole of the file (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, (Cement), paragraph 147).

154 In the circumstances of the present case, taking account of Hoechst's express request to that effect, the Commission ought to have drawn up, or to have had drawn up, a non-confidential version of the documents in issue or, where appropriate, if that proved difficult, to have prepared a list of the documents concerned and a sufficiently precise non-confidential summary of their content.

155 For all of those reasons, the Court considers that Hoechst's access to Chisso's letter 17 December 2002, together with the annexes thereto, was not properly organised by the Commission.

156 However, it must be borne in mind that a breach of the right of access to a file can lead to annulment in whole or in part of a Commission decision only where the lack of proper access to the investigation file during the administrative procedure prevented the undertaking or undertakings concerned from perusing the documents that were likely to be of use in their defence and thus infringed their rights of defence.

157 It was in those circumstances that the Court adopted the measures of organisation of procedure set out at paragraphs 32 to 35 above and that Hoechst was able to submit further observations on the complete documents which had thus been made available to it.

158 It must be noted in that regard, by way of preliminary observation, that certain documents in the investigation file, in particular a letter from Chisso dated 11 January 1999, were produced at the request of the Court since the Decision referred to them in order to find that Chisso had supplied an oral description of the cartel's activities and also certain evidence at the meeting of 13 November 1998. It is common ground, moreover, that those documents formed part of the investigation file made available to the parties to the proceedings, which the Commission confirmed in its observations without that point being disputed by Hoechst. In those circumstances, Hoechst cannot validly maintain that there has been a breach of the right of access to the file in that regard.

159 As regards Chisso's letter of 17 December 2002, together with the annexes, Hoechst's further observations specifically concern one of those annexes, namely a letter from Chisso dated 26 March 1999.

160 It must be emphasised, in that regard, that the Commission's final position on which undertaking had been first to adduce decisive evidence was taken, in the present case, at the time when it adopted the Decision. At no point during the procedure did the Commission inform the undertakings whether or not they would be immune from a fine. In those circumstances, the non-disclosure of Chisso's letter of 26 March 1999 could not affect Hoechst's rights of defence during the administrative procedure.

161 In any event, it must be made clear that Chisso's letter of 26 March 1999 cannot alter the Commission's conclusion that Chisso was the first undertaking to adduce decisive evidence of the cartel's existence, independently of whether or not that conclusion was well founded. The purpose of Chisso's letter of 26 March 1999 was to explain why Chisso was late in supplying an 'account of the facts'. That cannot attenuate the fact that, at the meeting of 13 November 1998, and according to the Commission, Chisso provided an oral description of the cartel's activities and also certain written evidence. Likewise, the fact that the Commission was able to grant Chisso further time to provide supplementary factual evidence following the meeting of 13 November 1998 cannot have any effect on the fact that Chisso was the first to cooperate, once that conclusion is based solely on the evidence adduced at that meeting.

162 In light of the foregoing, Hoechst's plea, so far as Chisso's letter of 17 December 2002, together with the annexes, is concerned, must be rejected.

The internal documents relating to the telephone contacts between the Commission and Chisso between September 1998 and April 1999

163 As a preliminary point, it must be noted that during the administrative procedure Hoechst requested access only to the internal documents relating to the telephone conversations between the Commission and Chisso between September 1998 and April 1999. That is clear, in particular, from a letter which Hoechst sent to the hearing officer on 22 January 2003, and was confirmed at the hearing.

164 It must be borne in mind, next, that the right of access to the file implies that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence, with the exception, in particular, of the Commission's internal documents (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 68).

165 The restriction on access to such documents is justified by the need to ensure the proper functioning of the Commission when it deals with infringements of the Treaty competition rules. The Commission's internal documents can be made available only if the exceptional circumstances of the case so require, on the basis of serious indicia which it is for the party concerned to supply (see *Cement*, paragraph 153 above, paragraph 420 and the case-law cited, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 40).

166 In the present case, for the reasons set out at paragraphs 128 to 144 above, the arguments put forward by Hoechst concerning a breach of the principles of sound administration and equal treatment were rejected, save as regards the assurance given to Chisso at the meeting of 13 November 1998 that it would be warned if another undertaking attempted to overtake it in the context of the 1996 Leniency Notice.

167 As stated at paragraph 143 above, however, the illegality found in that regard is not of such a kind as to affect the validity of the Decision as regards, first, the finding of the infringement and, second, the determination of the undertaking which was the first to cooperate and therefore the granting of immunity from a fine.

168 Accordingly, the Court considers that no serious indicia exist, for the purposes of the case-law cited above, that would justify access by Hoechst to the internal documents in question. For that reason, Hoechst's plea, in so far as it concerns the breach of the right of access to the internal documents relating to the telephone conversations between the Commission and Chisso between September 1998 and April 1999, must be rejected.

169 In the interest of completeness, and in the desire to demonstrate the truth in light of the breach of the principles of sound administration and equal treatment referred to above, the Commission was ordered, on the basis of Article 65(b) and the second subparagraph of Article 67(3) of the Rules of Procedure, to produce the internal documents in question to enable the Court to verify them. In accordance with the second subparagraph of Article 67(3) of the Rules of Procedure, the documents transmitted by the Commission were not communicated to the applicant while the Court verified their confidentiality and their relevance to the outcome of the case.

170 In the context of that verification, the Court considered that the internal documents in question did not apparently contain evidence relevant for the result of the case. Consequently, in view of the confidentiality normally attaching to documents of that type, the Court decided to remove them from the file and return them to the Commission (see, to that effect, Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 78, and, by analogy, order in Joined Cases T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293, paragraphs 40, 44 and 45).

171 For all of those reasons, and without there being any need to have recourse to the further measures of organisation or inquiry requested by Hoechst once the Court

considers that it is sufficiently enlightened by the documents in the file, the first plea must be rejected.

B — *The fourth plea, alleging that the hearing officer's final report is incomplete*

1. Arguments of the parties

a) Arguments of Hoechst

172 Hoechst observes that it raised a number of criticisms with the hearing officer concerning the conduct of the administrative procedure and in particular the fact that, first, it was not allowed to cooperate by means of oral testimony whereas that form of cooperation had been permitted in Chisso's case; second, the applicant was refused new meetings with the Commission's agents although such meetings had been proposed to Chisso; and, third, Chisso was unlawfully promised that it would be warned if other parties attempted to 'overtake' it in the context of cooperation.

173 In so far as those criticisms were ignored in the hearing officer's final report, the College of Members of the Commission that adopted the Decision was not correctly informed about the breach of Hoechst's rights of defence.

174 In Hoechst's submission, the hearing officer considered, wrongly — and without stating particular reasons — that whether or not the criticisms set out above were well founded was irrelevant. The applicant refers to *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraph 104), and submits that it is possible that

the lack of objectivity in the conduct of the procedure does not affect the lawfulness of a decision markedly and contrary to the rights of the defence, if that lack of objectivity is not the result of 'biased thinking' on the part of the Commission's agent. On the other hand, Hoechst contends that a different legal assessment must be made where, as in the present case, there are repercussions in procedural acts that unilaterally favour one party.

175 Hoechst concludes that the hearing officer ought to have verified those elements and to have set them out in her final report, in order to provide the Members of the Commission responsible for adopting the Decision with a true picture of the conduct of the proceedings.

b) Arguments of the Commission

176 The purpose of the hearing officer's final report is to supplement the draft decision submitted to the Members of the Commission.

177 The Commission refers to the first paragraph of Article 15 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21; 'the terms of reference') and submits that in the present case the hearing officer's final report fully complied with its function. The report shows that the parties' right to be heard was not infringed from any aspect whatsoever. Referring, moreover, to the judgment of 29 April in *Tokai Carbon and Others* v *Commission*, paragraph 165 above (paragraph 53), the Commission contends that in the final report the hearing officer was not required to address the details of the complaints of a procedural order.

178 In the final report, the hearing officer even went further than was strictly necessary by referring to those complaints and stating why they were not decisive. Thus, the report states that 'procedural defects' were alleged, in particular 'discrimination by comparison with Chisso on a whole series of points linked with cooperation'. In

addition, the hearing officer states that she took advantage of those criticisms to pay 'particular attention' to the findings of the Commission in that regard in the draft decision. It would have been pointless to provide further detail in the final report, particularly since the Decision itself also deals with the criticisms in question (recitals 453 and 458).

2. Findings of the Court

179 Under Article 1 of the terms of reference, the Commission is to appoint one or more hearing officers 'who shall ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission'.

180 Article 13(1) of the terms of reference provides:

'The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time-limits for replying to the statement of objections and the proper conduct of the oral hearing.'

181 According to the first paragraph of Article 15 of the terms of reference:

'The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.'

182 Under Article 16(1) of the terms of reference, '[t]he hearing officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information, as regards the course of the procedure and respect of the right to be heard'.

183 In the present case, it is sufficient to note that the arguments put forward by Hoechst in support of its plea, which reiterate those already invoked in the context of the first plea on the right of access to the file, do not support the view that Hoechst's right to be heard was not respected in the administrative procedure conducted by the Commission.

184 As regards the breach of the principles of sound administration and equal treatment found at paragraph 137 above, it must be emphasised that that breach did not relate to Hoechst's right to be heard within the meaning of the terms of reference.

185 The hearing officer stated, moreover, in her final report that 'the actions of the Commission services vis-à-vis the parties have had no impact on the outcome of the case on [leniency]'. That is consistent with the finding of the Court, in the context of the examination of the first plea, that the illegality found at paragraph 137 above is not of such a kind as to affect the validity of the Decision so far as concerns, in particular, the determination of the undertaking that was the first to cooperate.

186 It should further be noted that in the Decision the Commission sets out, at recital 453, the procedural objections put forward by Hoechst and that it responds to them, in particular, at recital 458. In those circumstances, it cannot be maintained, as Hoechst contends, that the College of Members of the Commission was not sufficiently informed.

187 For all of those reasons, the fourth plea must be rejected.

II — *The 13th plea, seeking annulment of Article 2 of the Decision in so far as it concerns Hoechst*

A — *Arguments of the parties*

1. Arguments of Hoechst

188 Hoechst maintains that the findings of the Commission set out at recital 298 to the Decision, namely that the cartel came to an end in November 1996 at the latest, deprive the order set out in Article 2 of the Decision of its factual basis.

189 If, seven years after the end of the cartel, the Commission still wished to make an order that the infringement should cease, there must be sufficient indicia that the infringement is continuing. Otherwise, the measure in question would be based on mere suspicion, which would be contrary to Article 3 of Regulation No 17. Apart from the adverse effect that that would have on the reputation of the addressee of the Decision, it might cause problems linked with civil actions that third parties might bring against it.

190 Furthermore, the illegality of Article 2 of the Decision is clear, since Hoechst gave up its sorbates business in 1996, when it transferred that business in its entirety to a third company wholly unconnected with its group, Celanese AG.

191 Hoechst concludes that Article 2 of the Decision must be annulled in so far as it relates to it.

2. Arguments of the Commission

192 The Commission submits that, as in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above, Article 2 of the Decision contains an express reservation, namely 'in so far as they have not already done so'. The Court held in that case that, '[as regards the plea raised] by Hoechst … it [was] sufficient to note that Article 2 of the decision [was] expressly addressed to undertakings "which [were] still involved in the PVC sector"' and that '[t]he argument in support of [that] claim [was] manifestly devoid of all foundation, (paragraph 1247).

193 In the present case, the Commission maintains that it was not required to establish definitively whether the infringement which had taken place at a certain time was still continuing at the time when the Decision was adopted or whether it had already come to an end. The Commission emphasises, moreover, that the parties had managed to act in the greatest secrecy for almost two decades (recital 306 to the Decision) and that Article 2 of the Decision was a preventive 'cease and desist' order (recital 307 to the Decision). The fact that Hoechst had transferred its sorbates business did not prevent the Commission from addressing an injunction in terms such that the obligation to bring the infringements to an end affected the undertaking only 'in so far as [it had] not already done so'.

B — *Findings of the Court*

194 By way of preliminary observation, the Court notes that it is clear from the application that, by its 13th plea, Hoechst seeks annulment of Article 2 of the operative part of the Decision in so far as it concerns the applicant.

195 On the substance, it must be held that Article 2 of the operative part of the Decision actually contains two orders.

196 First, that provision requires that the undertakings concerned immediately bring to an end the infringements referred to in Article 1 of the operative part of the Decision, in so far as they have not already done so. On that point, in so far as Hoechst was no longer involved in the sorbates sector at the time of adoption of the Decision, the argument raised against that provision is manifestly devoid of all foundation, since although Hoechst was among the undertakings named in Article 1 of the operative part of the Decision, it was not concerned by the injunction in question (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above, paragraph 1247). That circumstance also renders inoperative Hoechst's arguments as to the slur on its reputation or the possibility that third parties might bring civil actions against it.

197 Second, Article 2 of the operative part of the Decision requires that the named undertakings refrain from repeating any act or conduct described in Article 1 and from adopting any measure having equivalent object or effect.

198 It must be borne in mind, in that regard, that the application of Article 3(1) of Regulation No 17 may include a prohibition on continuing certain activities, practices or situations which have been found to be unlawful, but also a prohibition on adopting similar future conduct. Such obligations on undertakings must not however exceed the limits of what is appropriate and necessary to achieve the aim pursued (see *Cement*, paragraph 153 above, paragraphs 4704 and 4705 and the case-law cited). Furthermore, the Commission's power to issue injunctions is to be applied according to the nature of the infringement found (Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 45; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 298; and Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 82).

199 In the present case, the Commission found, at Article 1 of the operative part of the Decision, that Hoechst, with other undertakings, had infringed Article 81(1) EC and, from 1 January 1994, Article 53(1) of the EEA Agreement, by participating, during what, moreover, was a very long period, in a complex, single and continuous

agreement and concerted practice in the sorbates sector, in which they had agreed to fix target prices and to allocate volume quotas, to define a reporting and monitoring system and not to supply technology to potential market entrants. Hoechst does not challenge the Decision in that regard. In those circumstances, by enjoining the undertakings concerned to refrain in future, in the sorbates market, from any measure capable of having equivalent object or effect, the Commission did not exceed the powers conferred on it by Article 3(1) of Regulation No 17.

200 The fact that Hoechst was no longer involved in the sorbates sector on the date of adoption of the Decision, or that the Commission states at recital 298 to the Decision that the cartel had ended in November 1996 at the latest, cannot call that conclusion in question. An injunction such as that issued in the present case is by nature preventive and does not depend on the situation of the undertakings concerned at the time of adoption of the Decision.

201 For all of those reasons, the 13th plea must be rejected.

III — *The pleas aimed at securing a reduction in Hoechst's fine*

202 The Court considers that the pleas whereby Hoechst seeks a reduction in its fine should be examined in a different order from that followed in the application. Likewise, certain pleas have been grouped together, for the purposes of analysis, since they concern the same substantive problem.

A — *The 12th plea, alleging that the procedure was excessively long*

1. Summary of the administrative procedure

203 It follows from the facts set out in the Decision, and not disputed by Hoechst, that the first request for information pursuant to Article 11 of Regulation No 17 was sent by the Commission on 26 May 1999 to Daicel, Nippon Synthetic and Ueno (recital 6 to the Decision).

204 Further requests for information pursuant to Article 11 of Regulation No 17 were subsequently sent, notably between May and November 2002 (recitals 12 to 18 to the Decision).

205 On 20 December 2002 the Commission sent a statement of objections to the undertakings to which the Decision is addressed (recital 22 to the Decision).

206 On 24 April 2003 the undertakings to which the Decision was addressed took part in the hearing before the Commission (recital 29 to the Decision).

207 On 1 October 2003 the Commission adopted the Decision.

2. Arguments of the parties

a) Arguments of Hoechst

208 Hoechst criticises the Commission for having breached the principle that the procedure must take place within a reasonable time. It refers to Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 170, and submits that that principle forms part of the general principles of Community law and has its origin (through Article 6(2) EU) in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

209 In this case, Hoechst observes that the period between the first request for information addressed to Daicel, Nippon Synthetic and Ueno on 26 May 1999 and the statement of objections, dated 20 December 2002, was more than 42 months. During that time the Commission was completely inactive for almost 31 months, namely between the request for information of 25 October 1999 and the request for information of 14 May 2002, or, in any event, until the interview with Daicel on 21 February 2002.

210 In view of the punitive nature of the fine, it can be acceptable for the investigation and the deliberations to take such a long time only where there are exceptional circumstances. Hoechst contends, however, that such circumstances are not present in the present case.

211 Hoechst infers that the duration of the administrative procedure exceeded the limits of what is reasonable. In those circumstances, referring to Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 48 et seq., Hoechst submits that reasons of procedural economy require that the complaint alleging that the length of the proceedings was excessive has the effect that the Decision must be annulled in so far as it fixes the amount of the fine.

212 Hoechst further submits that the rules on limitation periods laid down in Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) do not preclude a complaint based on the excessive duration of the proceedings. Hoechst emphasises, in that regard, that the rules on limitation periods do not protect an undertaking from excessively long proceedings, since the commencement of an investigation interrupts the limitation period (Article 2 of Regulation No 2988/74).

b) Arguments of the Commission

213 The Commission submits, first of all, that Hoechst's plea is bound to fail merely because it refers to the amount of the fine and not to the Decision in its entirety. The Commission observes, in that regard, that only the rule on limitation periods in Regulation No 2988/74 is decisive.

214 If the fact of exceeding a reasonable period, in particular where it entails breach of the rights of defence of the parsons concerned, were a ground for annulment of a decision finding an infringement of the competition rules, that would not apply where it is the amount of the fines imposed in that decision that is disputed, since the Commission's power to impose fines is governed by Regulation No 2988/74, which establishes a limitation period in that regard.

215 The Commission refers to Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 46 to 49: Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 to 22; and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 139 to 141) and contends that, in the presence of Regulation No 2988/74, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable time.

216 The Commission submits, next, in a desire to be exhaustive, that even if it is proved that the reasonable time has been exceeded, that constitutes a ground for annulment of the decision only if the breach of that principle adversely affected the rights of defence of the undertakings concerned (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 74). In this case, Hoechst has not explained in what way its defence was impeded by what it alleges to have been the Commission's dilatory treatment of the case.

217 Furthermore, the excessive duration of that phase of the administrative procedure is not in itself capable of adversely affecting the rights of the defence, since the persons concerned are not the subject of a formal accusation of infringement of the competition rules until they receive the statement of objections, and therefore have no need to defend themselves (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 78).

218 Last, the Commission maintains that the 'total' duration of the proceedings did not exceed a reasonable time (Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 43).

3. Findings of the Court

219 It must be observed, first of all, that, as the Commission submits, the present plea seeks, according to the actual wording of the application, to obtain 'annulment of the Decision in so far as it fixes the amount of the fine'. This plea therefore seeks, in substance, to obtain annulment of or, at least, a reduction in the amount of the fine imposed on Hoechst.

220 While the fact that a reasonable period is exceeded may, in certain circumstances, justify annulment of a decision finding an infringement of the competition rules, that does not apply where what is being disputed is the amount of the fines imposed by

that decision, since the Commission's power to impose fines is governed by Regulation No 2988/74, which establishes a limitation period for that purpose (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 321).

221 The second recital in the preamble to Regulation No 2988/74 states that the limitation period was introduced to ensure legal certainty. According to that recital, 'for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions imposing fines, penalties or periodic penalty payments; … such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period; [and] in this respect the interests of undertakings and associations of undertakings on the one hand, and the requirements imposed by administrative practice, on the other hand, should be taken into account'. Thus, with regard to the Commission's power to impose fines, Article 1(1)(b) of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of the Community competition rules (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraphs 322 and 323).

222 Under Article 1(2) of that regulation, time is to begin to run upon the day on which the infringement is committed or, in the case of continuing or repeated infringements, on the day on which the infringement ceases. However, the limitation period may be interrupted or suspended, in accordance with Articles 2 and 3, respectively, of Regulation No 2988/74. Under Article 2(1) of Regulation No 2988/74, actions which interrupt the running of the period are to include, in particular, written requests for information by the Commission, the commencement of proceedings by the Commission and notification of the statement of objections. The limitation period is to be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which have participated in the infringement. Under Article 2(3) of Regulation No 2988/74, each interruption is to start time running afresh; however, the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty. The limitation period in proceedings is to be suspended for as long as the Commission's decision is the subject of proceedings pending before the Court of Justice of the European Communities.

223 It follows that Regulation No 2988/74 established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules. In that regard, it must be emphasised that, with respect to fines imposed under the Community competition rules, it follows from Article 2(3) of Regulation No 2988/74 that, subject to any suspension, the limitation period expires in any event after 10 years where it is interrupted pursuant to Article 2(1) of that regulation, so that the Commission cannot put off a decision about fines indefinitely without incurring the risk of the limitation period expiring (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraph 324).

224 In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraph 324; see also, to that effect, Case 48/69 *ICI* v *Commission*, paragraph 215 above, paragraphs 46 to 49, and *Geigy* v *Commission*, paragraph 215 above, paragraphs 20 to 22).

225 In the present case, it is common ground that the infringements in question were continuous. Furthermore, the Commission considered, without that point being disputed by Hoechst, that the infringements found had ceased no later than the end of October 1996. Accordingly, in light of the subsequent actions interrupting the limitation period, in particular the requests for information under Article 11 of Regulation No 17 and the statement of objections, and having regard to the fact that the entire period between the end of October 1996 and the adoption of the Decision on 1 October 2003 did not exceed 10 years, the proceedings were not time barred when the Commission adopted the Decision, a circumstance which Hoechst has not in any way disputed in these proceedings (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 90).

226 For those reasons, Hoechst's present plea, in that it seeks 'annulment of the Decision in so far as it fixes the amount of the fine', must be rejected.

227 In any event, it must be borne in mind that the fact that a reasonable time is exceeded, even on the assumption that it is established, does not necessarily constitute a ground for annulment of the Decision. For the purposes of the application of the competition rules, the fact of exceeding a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements, provided that it has been established that the breach of that principle adversely affected the rights of defence of the undertakings concerned. Other than in that specific case, failure to observe the duty to deal with the matter within a reasonable time has no effect on the validity of the administrative procedure under Regulation No 17 (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 152 above, paragraph 122; Case T-62/99 *Sodima* v *Commission* [2001] ECR II-655, paragraph 94; and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 74; see also, to that effect, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elktrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 42 to 44).

228 Hoechst has not maintained that the fact that a reasonable time was exceeded in the present case adversely affected its rights of defence. Furthermore, even on the assumption that Hoechst's application may be interpreted in that sense, the arguments put forward in that regard must be regarded as general arguments and would not be of such a kind as to establish that there was an actual breach of its rights of defence, which must be examined by reference to the specific circumstances of each case (see, to that effect, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 227 above, paragraph 59).

229 For all of those reasons, the 12th plea must be rejected.

B — *The 13th plea, alleging improper concealment of certain grounds of the Decision*

1. Summary of the Decision

230 At recital 37 to the Decision, the Commission states:

'… Chisso's total worldwide turnover in 2002 was [Japanese yen] 117,711 million (EUR 973.4 million).'

231 At recital 42 to the Decision, the Commission states:

'… Daicel's total worldwide turnover in the fiscal year 2002 was [Japanese yen] 271,341 million (EUR 2,243.9 million).'

232 At recital 50 to the Decision, the Commission states:

'… Nippon [Synthetic]'s total worldwide turnover in the fiscal year 2002 was [Japanese yen] 38,872 million (EUR 321.5 million).'

233 At recital 55 to the Decision, the Commission states:

'… Ueno's total worldwide turnover in 2002 was [Japanese yen] 25,034 million (EUR 199.5 million).'

234 Table I of the Decision is set out as follows:

Size and relative importance in the sorbates market

Undertaking	Worldwide sorbates turnover (in EUR million) and estimated market shares for the year 1995	EEA sorbates turnover (in EUR million) and estimated market shares for the year 1995
Chisso	… (more than 9.5% and less than de 15%)	… (more than 4% and less than 15%)
Daicel	… (more than 9.5% and less than 15%)	… (more than 4% and less than 15%)
Hoechst	42. 4 (23.6%)	21. 6 (48%)
Nippon Synthetic	… (more than 9.5% and less than 15%)	… (more than 4% and less than 15%)
Ueno	… (more than 9.5% and less than 15%)	… (more than 4% and less than 15%)
Others including Cheminova and Eastman	… (less than 30%)	… (less than 16%)
Total	180 (100%)	45 (100%)

235 Last, recital 352 to the Decision is worded as follows:

'Table I shows that in 1995 Hoechst was by far the largest producer of sorbates in the worldwide market with a market share [above 20%] (in the EEA [above 45%]). It is therefore placed in the first group. Daicel, Chisso[,] Nippon [Synthetic] and Ueno all have market shares between [9.5%] and [15%] (in the EEA between [4%] and [15%]). Therefore, they are placed in the second group.'

236 The sign '…' in recitals 37, 42, 50 and 55 and in Table I of the Decision corresponds to a passage concealed by the Commission for reasons of confidentiality, according to the explanation given in the Decision.

2. Arguments of the parties

a) Arguments of Hoechst

237 Hoechst contends that in a final decision in which a fine is imposed, at the latest in the version notified to the persons concerned, there must no longer be any deleted passages containing evidence or assessments of fact or of law. Otherwise, there is a breach of the rights of the defence. Hoechst submits that the obligation to communicate the reasoning on which the Decision is based applies to the addressee of the decision. The situation is fundamentally different from any general interest which the parties to the proceedings may have in maintaining the confidentiality of the evidence vis-à-vis third parties.

238 In this case, recitals 37, 42, 50 and 55 to the Decision contain deleted passages. In particular, in Table I of the Decision the market shares for the determining year (1995) are concealed in such a way that Hoechst can reconstruct only its own market

share and not the market conditions applicable to the other undertakings concerned. In so far as, at recital 352 to the Decision, the calculation of the starting amount of the fine is determined by the size of the undertakings and by the market conditions as defined in Table I of the Decision, Hoechst and the Court are unable to understand sufficiently an essential point of the Decision. Furthermore, data relating to 1995 are historical data which can no longer be confidential, even in the public version of the decision appearing in the *Official Journal of the European Union*. The fact that confidential treatment was requested and granted during the administrative procedure has no effect on the question whether the concealed passages in question are still justified in the context of the Decision adopted and notified, as the Commission appears to consider in its letter of 30 October 2003. Hoechst wonders what justification there can be for keeping such data confidential, specifically vis-à-vis Hoechst, when it transferred its sorbates business long ago and has withdrawn from the market in question.

239 Even if the Commission is under no obligation to carry out an arithmetical calculation of the amount of the fines, that does not mean that it does not have the option to do so. On the other hand, where the Commission does carry out such calculations, it is required to communicate them to the addressees of the decision.

240 Referring to the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above (paragraphs 219 and 227 et seq.), Hoechst contends that any addressee of a decision imposing a fine is entitled to non-discriminatory treatment which complies with the principle of equal treatment in the context of a calculation of fines based on categories determined by reference to market shares. It is clear that errors in the process are of concern not only to the undertakings which, being in the second category, were ordered to pay excessive fines, but also to those in the first category on which excessive fines were perhaps imposed. The disproportionate nature of the bases for calculation for undertakings which were placed in the first category of fines might be the direct consequence of the relatively low amount of the bases for calculation used in the second category, and vice versa.

241 Hoechst emphasises, moreover, that none of the deleted passages was replaced by summaries or by sufficiently precise figures that would have enabled the grounds of the Decision to be understood precisely.

242 Hoechst also states that, by letter of 10 October 2003 to the hearing officer and to the Commission, it challenged the fact that the passages of the Decision referred to above were wrongly deleted. The Commission responded to that request by a letter of refusal received by Hoechst on 10 November 2003. Hoechst replied by letter of 11 November 2003 and the Commission, by letter of 17 November 2003, informed Hoechst that the decision as notified was complete. Should the Commission maintain that it adopted a decision addressed solely to Hoechst, it would be appropriate to request the minutes of the meeting of the Commission of 1 October 2003 in order to ascertain the number and the form of the decisions adopted on that date in the present case. That is particularly appropriate, since the Commission has departed from its normal procedure in comparable proceedings, which affects the formal regularity of the Decision. Even in that case, however, the deletion of the recitals cited above would have been unjustified.

243 Hoechst concludes that the Decision is vitiated by a serious failure to state reasons, which also constitutes a breach of the rights of the defence in the context of the calculation of its fine, in so far as it is impossible to reconstruct the factual premisses on which the Commission relied. Hoechst emphasises in that regard that the Court, in its judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, carried out a thorough check of the method which the Commission used in order to place the undertakings in categories and corrected numerous errors in its calculations. In doing so, the Court considered that the market share differentiations of 2% constituted sufficient ground to annul the Commission's initial decisions relating to the division into categories and the starting amount of the fines. The Commission is therefore strictly bound by the criteria for fixing the amount of fines used during the administrative procedure, the non-discriminatory application of which is subject to unlimited individual judicial review.

b) Arguments of the Commission

244 In the Commission's submission, the legitimate interests of the undertakings concerned in the protection of their business secrets must be taken into account not only during the administrative procedure and at the time of publication of the decision pursuant to Article 21(2) of Regulation No 17, but also when it is notified. Notification of the decision does not constitute a derogation.

245 The passages deleted from recitals 37, 42, 50 and 55 and in Table I of the Decision contain information relating to the undertakings involved in the proceedings; those undertakings had requested confidential treatment, which was granted by the Commission during the administrative procedure. The fact that Hoechst is an addressee of the Decision does not deprive the other addressees of their legitimate interest in the maintenance of confidentiality. The Commission emphasises that Hoechst itself, by letter of 16 December 2003, requested that the turnover and market shares relating to it be deleted from the version of the Decision intended for publication and, if necessary, that they be replaced by a sufficiently wide turnover bracket.

246 It is irrelevant that the Commission could have challenged that position when preparing for the adoption of the Decision, on the ground that the information in question no longer constituted business secrets. In the Commission's submission, the Decision, as adopted and notified to Hoechst, satisfied the requirements of Article 253 EC as regards a statement of the reasons on which it was based.

247 First of all, referring to the judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above (paragraphs 463 and 464), and to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above (paragraph 1558), the Commission submits that the obligation to state the reasons on which a decision imposing a fine is based is fulfilled when the Commission indicates the factors which enabled it to determine the gravity and duration of the infringement. It is not even necessary to indicate in the decision any calculations which may have been carried out for the purpose of applying those factors.

248 In any event, even if it were necessary to provide that type of information, the Commission fully complied with that requirement. In this case, the Commission began by making general findings on the gravity of the infringement and presenting the particular aspects of the cartel from which it was apparent that this was a very serious infringement (recital 344 to the Decision), for which the likely fine was at least EUR 20 million (recital 354 to the Decision). Next, emphasising the considerable differences between the undertakings' market positions, the Commission explained that it was necessary to adjust that amount by reference to the relative importance of the undertakings concerned on the relevant market and therefore by reference to their capacity to cause serious harm to competition (recitals 345 and 346 to the Decision). The factors which it took into account for the purpose of making

that adjustment, in particular for dividing the undertakings into two groups, are set out in the Decision at recitals 349 to 353.

249 It follows, in light of the data in Table I of the Decision, that Hoechst's market share was considerably higher than that of the other parties to the proceedings. That difference led to Hoechst being placed in the first group. In that regard, it follows from recital 352 et seq. to the Decision that, on account of Hoechst's position on the market, the Commission began with that undertaking when it calculated the starting amount of the fines for each undertaking. The starting amount of the fines for the other undertakings was then determined. That amount is lower, since the undertakings were in a less strong position on the market than Hoechst. As Hoechst does not dispute that it was by far the most important undertaking on the market, the precise data relating to the other undertakings' market shares play no part in justifying the starting amount of the fine imposed on Hoechst. They can be of importance solely from the point of view of the other undertakings, since they enable them to know exactly where they stand in relation to Hoechst.

250 Furthermore, Hoechst is perfectly capable of determining for itself the difference between its position and that of the undertakings in the second group, on the basis of the presentation of Table I of the Decision. The precise market shares of the undertakings in the second group are of interest solely from the aspect of any further distinction within the second category, which the Commission decided against, as explained at recital 353 to the Decision. The Commission submits that that has no adverse effect on Hoechst.

251 As regards the reference to the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, the Commission contends that Hoechst seeks to infer from a possible error in treatment concerning the undertakings placed in the second category that it was itself the victim of discrimination. The Commission submits in that regard that the Court concluded in that case that one undertaking ought to be placed in a different category and confined itself to placing it in a different category, while maintaining the categories established in the Commission decision. An error consisting in placing an undertaking in one category therefore entails solely the reclassification of that undertaking in a different category and not annulment of the classification of all the undertakings.

252 The Commission therefore maintains that any discrimination within the second category cannot constitute discrimination against Hoechst as an undertaking in the first category.

3. Findings of the Court

253 The Court considers, first of all, in the light of the terms used by Hoechst in its pleadings, that the present plea seeks, in substance, to establish a failure to state reasons as regards recitals 37, 42, 50 and 55 and Table I of the Decision. Thus, Hoechst states that the fact that certain passages in the Decision were deleted constitutes a breach of the Commission's duty to provide its decisions with comprehensible reasoning. That, it contends, makes it impossible for Hoechst and the Court to understand sufficiently an essential point of the Decision. That failure to state reasons must be analysed, in Hoechst's submission, by reference to recital 352 to the Decision, which deals with the classification of the undertakings concerned in different categories for the purposes of determining the starting amount of the fine. Consequently, Hoechst maintains that the failure to state reasons referred to above led to a breach of the rights of the defence.

254 It must be emphasised, moreover, that in so far as the failure to state reasons alleged by Hoechst concerns factors which enabled the Commission to determine the gravity of the infringement, the present plea seeks, in substance, to obtain a reduction in the amount of the fine.

255 First of all, it should be observed that Article 21 of Regulation No 17, which provides that certain decisions are to be published, places the Commission under an obligation to take account of the undertakings' legitimate interest in their business secrets not being published.

256 Next, it must be borne in mind that the statement of reasons for an individual decision must disclose, clearly and unequivocally, the reasoning of the institution which adopted the measure, in such a way as to allow those concerned to know the grounds

of the measure adopted and the competent court to exercise its power of review. The requirement to state reasons must be assessed by reference to the circumstances of the case. The reasoning is not required to go into all the relevant facts and points of law, since the question whether it meets the requirements of Article 253 EC must be assessed by reference not only to the wording of the act in question but also to the context in which the act was adopted (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

257 The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73, and judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v Commission, paragraph 208 above, paragraph 463).

258 In the present case, without there being any need to determine whether or not the deleted passages contained business secrets, it must be observed that recitals 37, 42, 50 and 55 and Table I of the Decision, read in the light of recital 352, satisfy the Commission's obligation to state reasons.

259 First, recital 352 to the Decision contains factors which enabled the Commission to place the undertakings concerned in two categories, in the context of the determination of the starting amount of the fines, on the basis of the gravity of the infringement.

260 At recital 352 to the Decision, the Commission thus states that Hoechst was by far the largest producer of sorbates in the worldwide market. The Commission also mentions Hoechst's place on the sorbates market in the EEA. Consequently, the Commission concluded that Hoechst must be placed in the first group of undertakings.

261 In order to arrive at that conclusion, the Commission took as its basis the worldwide market shares for 1995 set out in Table I of the Decision, which were obtained on the basis of the worldwide turnover for the relevant product (recital 351 to the Decision).

262 It is the deleted passages in Table I that are disputed by Hoechst.

263 However, Table I of the Decision contains a sufficiently comprehensible record of the factors to serve as a basis for the conclusion which the Commission drew at recital 352 to the Decision.

264 It will be recalled that the conclusion reached at recital 352 to the Decision is based, as stated above, on the 1995 worldwide market shares for the relevant product.

265 In that regard, Table I of the Decision contains brackets of market shares, for 1995, which enabled the Commission to distinguish two types of undertakings: first, the Japanese undertakings, whose market shares were between 9.5 and 15% in 1995, and, second, Hoechst, whose market share was over 20%. Those factors, read in the light of the conclusion which the Commission reached at recital 352 to the Decision, are sufficiently comprehensible.

266 Furthermore, even if the turnover of the undertakings concerned were deleted in Table I of the Decision, it is possible to determine their extent by reference to the brackets of turnover in that table. Table I of the Decision contains a row entitled 'Total', which shows the total turnover and total market shares of the undertakings concerned. On that basis, a bracket of the turnover of each of the undertakings concerned can be calculated.

267 For those reasons, without prejudice to whether the Commission made an error in that regard, which will be examined in the context of the fifth plea, it must be held that Table I of and recital 352 to the Decision contain the factors which enabled the Commission to determine the gravity of the infringement.

268 As regards recitals 37, 42, 50 and 55 to the Decision, it must be observed that those recitals are not referred to by recital 352 to the Decision, the only recital invoked by Hoechst which dealt with the gravity of the infringement and the classification of the undertakings concerned into groups.

269 Furthermore, Hoechst has not stated how those recitals contain elements of assessment that were used by the Commission for the purpose of assessing the gravity, or indeed the duration of the infringement. Hoechst merely indicates that recitals 37, 42, 50 and 55 to the Decision contain deleted passages.

270 In those circumstances, there is no reason to think that the information deleted from recitals 37, 42, 50 and 55 to the Decision ought to lead to the conclusion that the Commission failed, in this case, to fulfil its obligation to state reasons within the meaning of the case-law cited above.

271 In any event, the deleted passages in recitals 37, 42, 50 and 55 to the Decision cover, in part, the same data as those set out in Table I of the Decision. In effect, recitals 37, 42, 50 and 55 to the Decision contain data relating to Chisso, Daicel, Nippon Synthetic and Ueno respectively and correspond to recital 46 to the Decision so far as Hoechst is concerned. According to the version of the Decision notified to Hoechst, which forms the subject-matter of the present action, recital 46 to the Decision contains, in particular, as regards Hoechst, data relating to its worldwide and EEA turnover for 1995 on the sorbates market, which correspond to the data in Table I of the Decision. Accordingly, for the reasons set out at paragraphs 263 to 267 above, no failure to state reasons can be found in that regard.

272 Furthermore, it must be observed that the reasons stated for placing Hoechst in the first group are not vitiated by any defect, since Hoechst does not deny that it had a larger worldwide market share in 1995 than that of the other undertakings concerned. Accordingly, any error in the classification of the other undertakings in the second group is inoperative.

273 In the light of those factors, Hoechst's assertion of a lack of reasoning in the Decision must be rejected. It also follows that the breach of the rights of the defence which is alleged to result from that supposed failure to state reasons cannot be upheld.

274 As regards, last, Hoechst's assertion that the Commission served on the undertakings concerned a decision which differed as to form, it is sufficient to observe that those differences in form are linked to the protection of the business secrets of the undertakings concerned. However, the fact that certain information in the Decision was deleted, for reasons of confidentiality, at the time of final notification to the undertakings concerned does not support the conclusion that its adoption is affected by any irregularity in that regard. In any event, Hoechst submits no precise details from which it might be concluded that the Decision, as notified to the undertakings concerned, contained, in particular, differences in reasoning. In those circumstances, there is no need to grant Hoechst's request for production of the minutes of the meeting of the College of Members of the Commission of 1 October 2003.

275 For all of those reasons, the third plea must be rejected.

C — *Fifth plea, alleging an error of law in the determination of the basic amount of the fine*

1. Summary of the Decision

276 At recital 321 to the Decision, the Commission states that the basic amount of the fine is determined according to the gravity and duration of the infringement.

277 First, in order to determine the gravity of the infringement, the Commission relies on the nature of the infringement (recitals 323 to 326 to the Decision), the actual impact of the infringement on the sorbates market in the EEA (recitals 327 to 342 to the Decision) and the size of the relevant geographic market (recital 343 to the Decision).

278 As regards the nature of the infringement, the Commission observes that the infringement in question consisted mainly of price-fixing and market-sharing practices. The Commission further stated that the collusive agreements were mostly conceived, directed and encouraged at a very high level of the undertakings concerned and operated entirely for the benefit of the participating producers and to the detriment of their customers and ultimately the general public (recital 323 to the Decision).

279 As regards the actual impact of the infringement on the sorbates market, the Commission indicates in particular that there is no need to take into account the actual effects of an agreement when it appears to have as its object the prevention, restriction or distortion of competition within the common market. The Commission states, however, that in this case the infringement had an actual impact on the sorbates market in the EEA (recital 327 to the Decision).

280 The Commission concludes that, in this case, the infringement may be classified as very serious (recital 344 to the Decision).

281 Next, the Commission distinguishes between the undertakings according to their position on the sorbates market in 1995 (recitals 345 to 355 to the Decision). The Commission states that in 1995 Hoechst was by far the largest producer of sorbates in the worldwide market, with a market share of above 20% (above 45% in the EEA). For that reason, Hoechst was placed in the first group. Daicel, Chisso, Nippon Synthetic and Ueno all held market shares of between 9.5 and 15% (between 4 and 15% in the EEA). They were placed in the second group (recital 352 to the Decision).

282 At recital 354 to the Decision, the Commission states that the likely fine for very serious infringements is above EUR 20 million.

283 In those circumstances, at recital 355 to the Decision, the Commission fixes the starting amount of the fine at EUR 20 million for the undertakings in the first group (Hoechst) and EUR 6.66 million for the undertakings in the second group (Daicel, Chisso, Nippon Synthetic and Ueno).

284 Last, in order to ensure that the fine has a sufficient deterrent effect on large undertakings and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from that conduct under competition law, the Commission makes a further adjustment to the starting amount of Hoechst's fine. At recital 357 to the Decision, the Commission observes, in that regard, that the starting amount of the fine, calculated on the basis of the criterion of relative importance in the market concerned, should be increased to take account of the 'size and overall importance' of the undertaking. In those circumstances, the starting amount of Hoechst's fine is increased by 100% to EUR 40 million.

285 Second, as regards the duration of the infringement, the Commission observes that Chisso, Daicel, Hoechst and Ueno infringed Article 81(1) EC and Article 53(1) of the EEA Agreement between 31 December 1978 and 31 October 1996. Those undertakings therefore committed a long-term infringement of 17 years and 10 months. The Commission concludes that the starting amount must be increased by 175% (recital 361 to the Decision).

286 Taking into account the gravity and duration of the infringement, the Commission set the basic amount of Hoechst's fine at EUR 110 million (recital 361 to the Decision).

2. Arguments of the parties

a) Arguments of Hoechst

287 In its fifth plea, Hoechst disputes the nature and the duration of the infringement on which the Commission based its determination of the amount of the fine in this case.

288 Hoechst submits, first of all, that the amount of the fine calculated before its cooperation was taken into account, namely EUR 198 million, corresponds to almost five times the total volume of the market for sorbates in the EEA for 1995 as stated in Table I of the Decision, namely EUR 44.6 million. Such a fine is wholly disproportionate.

289 Hoechst further submits that the Commission has a discretion under Regulation No 17 when fixing the amount of the fine, but the exercise of that discretion is not entirely free owing to the general principles of Community law and also to the Guidelines with which the Commission is required to comply when calculating the

fine (Hoechst refers in particular to Case T-230/00 *Daesang and Seewon Europe* v *Commission* [2003] ECR II-2733, paragraph 38).

The nature of the infringement

290 Referring first of all in particular to Section 1 A of the Guidelines and to *Daesang and Sewon Europe* v *Commission*, paragraph 289 above (paragraph 38), Hoechst submits that the basic amount of the fine is fixed according to the gravity and duration of the infringement. The gravity of the infringement is determined according to a number of criteria set out in the Guidelines. Those criteria include the nature of the infringement, its actual impact on the market and the size of the geographical market, and also the actual economic capacity of the undertaking to cause significant damage to its competitors and to consumers.

291 On the substance, Hoechst takes issue in four respects with the finding in the Decision that the infringement was very serious. First, Hoechst contends that the assessment of the gravity of the infringement wrongly attributes damaging effects to it. Second, it submits that none of its directors at a very high level participated in the infringement. Third, Hoechst maintains that the Commission made an error of law in dividing the undertakings into different categories. Fourth, it criticises the multiplier for deterrence used by the Commission.

— The effects of the infringement

292 Hoechst submits that the Commission presumes that the cartel caused harm to consumers. That presumption is an essential ground that led to the imposition of a heavy penalty on the undertakings concerned. Hoechst refers, in that regard, to

recitals 333 to 336 and 341 and 341 to the decision and also to a Commission press release dated 1 October 2003.

293 In particular, Hoechst maintains that what are alleged to be the harmful effects of the cartel in question were stated to be one of the three factors (nature of the infringement, its impact and the fact that the cartel covered the whole of the EEA) that served to determine the gravity of the infringement (recital 344 to the Decision). Since no weighting of those factors is to be found in the Decision, Hoechst concludes that one third of the total amount of the fine was fixed on the basis of what are alleged to be the harmful effects of the cartel. In fact the Commission has not succeeded in adducing evidence of a negative impact of the infringement in this case.

294 Thus, recitals 105, 109, 333 to 337 and 342 to the Decision contain no evidence that the infringement had a negative impact.

295 As regards recital 105 to the Decision, Hoechst maintains that the fact that for long periods the target prices were not reached should rather be regarded as indicating or as providing evidence that the price agreements did not work. That is apparent, in particular, from recitals 163 to 188 to the Decision. Hoechst refers, moreover, to the information set out at recitals 210, 217, 224 and 228 to the Decision and emphasises that for five consecutive years no increase in the target prices was obtained.

296 As regards recital 109 to the Decision, it is based solely on an estimate on the part of Chisso.

297 As regards recitals 333 and 334 to the Decision, Hoechst emphasises that the Commission recognises that the effects of the cartel on the relevant market in this case cannot be measured precisely. However, the Commission also finds that the agreement in issue undoubtedly had an actual impact on the sorbates market in the EEA. The explanations provided by the Commission in that regard are far from being probative. In particular, Hoechst is unable to see how a concerted reduction

in prices, to which the Commission refers, might have harmful effects for competition, and still less how it might serve to prove that harm was caused to third parties. Hoechst emphasises, moreover, that an actual impact can be found only where, first, it was established that the target prices were higher than the hypothetical market prices and, second, those prices had been achieved, at least in part. Those factors are not present in this case.

298 As regards recital 335 to the Decision, Hoechst contends that the fact that the sales volumes found in the table in recital 112 to the Decision (Table II) coincide with the agreed quotas might indicate that the agreements had operated properly if there had not been any 'grey quantities', that is to say, quantities sold and not declared to the members of the cartel. In this case, such sales of 'grey quantities' were made, in particular by Hoechst. Furthermore, Hoechst maintains that the Commission ought to have proved, in addition, that agreements on volumes had led to an artificial scarcity of supply and thus to abusive prices being charged to buyers.

299 As regards recital 336 to the Decision, it is incorrect to presume that sorbates producers were able to control not only the sorbates market but also to a large extent the preservatives market. Hoechst asserts in that regard that there is no single market for preservatives.

300 As regards, last, recitals 337 and 342 to the Decision, it is contradictory to claim, on the one hand, that the agreements in question were implemented throughout the infringement period and, on the other, that the existence of external factors, which may themselves also have influenced the evolution of prices for the product, means that it is difficult to reach conclusions as to the relative importance of all possible causes. The conclusion set out at recital 341 to the Decision, that the conscious implementation of the cartel agreements had an actual impact on the sorbates market in the EEA is, in those circumstances, incorrect.

— The participation of high-level directors in the anti-competitive agreements

301 The Commission contends that the anti-competitive agreements were conceived, directed and encouraged by the directors of the undertakings concerned at a very high level (recital 323 to the Decision).

302 Hoechst maintains that that assertion is contrary to the obligation to state reasons imposed on the Commission under Article 253 EC. In particular, the Commission ought to have established what factors were at the basis of its conclusion (Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 210).

303 It is not true, moreover, that the persons who participated in the cartel were directors at a very high level, at least so far as Hoechst is concerned. Referring to the grounds of the judgment in *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraphs 33 to 38), Hoechst emphasises that its two most senior employees, referred to at recital 96 to the Decision, were sales directors of one of Hoechst's 8 to 12 business areas. They both reported to a sector director and to a sales director of the business sector concerned, and both were at below-director level. The other employees named in the decision were junior management or had no management role.

304 Last, even if employees of other undertakings concerned were to be considered to be directors at a very high level, that could not lead to an increase in the basic amount of Hoechst's fine. In effect, the gravity of Hoechst's infringement cannot depend on the position of the employees of the other undertakings that took part in the infringement.

— The division of the undertakings into categories

305 Hoechst claims that the distinction between the starting amounts, EUR 20 million for Hoechst and EUR 6.66 million for all the other undertakings concerned, is unacceptable in the light of the nature of the infringement, which is the same for all the undertakings.

306 Furthermore, referring to *CMA CGM and Others* v *Commission*, paragraph 220 above (paragraph 405 et seq.), Hoechst asserts that the division of the undertakings into categories, in the context of the calculation of the starting amount, should first and foremost observe the principle of equal treatment.

307 In this case, the Commission differentiated the undertakings' starting amounts according to their supposed capacity to harm competition and according to the damage alleged to have been caused to competition (recital 349 to the Decision). It chose as a yardstick the market share of each undertaking on the worldwide sorbates market (recital 350 to the Decision).

308 In that regard, first, Hoechst observes that the four Japanese producers each held market shares of up to 15%, which, taken together, might constitute a worldwide market share equivalent to more than twice Hoechst's share. In the light of the solidity of the Japanese producers' export cartel and their always perfectly concerted conduct at cartel meetings, Hoechst was of secondary importance in the evolution of the worldwide market. Thus, on the basis of the bracket of the Japanese producers' market shares, Hoechst contends that the basic amount for those producers ought to have been between 1.61 and 2.54 times higher than for Hoechst. That would have corresponded, assuming an appropriate fine for the Japanese producers (including Chisso), to a basic amount of between EUR 10.4 million and EUR 16.65 million and therefore — all other things remaining unaltered — to a reduction of between EUR 16.58 million and EUR 47.52 million in Hoechst's fine.

309 Second, in any event, and even if each Japanese producer's market share were to be considered separately, the calculation of the fine per 1% market share would correspond to a starting amount of between EUR 0.44 million and EUR 0.7 million. Hoechst submits that it was at a disadvantage, since, if the Commission had applied the same criteria to it, its starting amount ought to have been between EUR 10.38 million and EUR 16.52 million. All other things remaining equal, its fine was between EUR 17.3 million and EUR 47.62 million higher than it ought to have been.

310 Third, a comparison with other recent decisions shows that the Commission departed in this case from its principles relating to the fixing of fines by categories. Hoechst refers in that regard to Commission Decision 2006/460/EC of 17 December 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement against SGL Carbon AG, Le Carbone-Lorraine SA, Ibiden Co., Ltd, Tokai Carbon Co., Ltd, Toyo Tanso Co., Ltd, GrafTech International, Ltd, NSCC Techno Carbon Co., Ltd, Nippon Steel Chemical Co., Ltd, Intech EDM BV and Intech EDM AG (Case COMP/E-2/37.667 — Specialty graphites), which forms the subject-matter of the judgment of 15 June 2005 in Case T-71/03 *Tokai Carbon and Others* v *Commission*, paragraph 118 above. In that decision, the Commission, inter alia, fixed fines with a starting amount of EUR 20 million for an undertaking with a market share of between 30 and 40% and at EUR 14 million for an undertaking with a market share of between 21 and 27%. Furthermore, in the same decision, because they had participated in a different cartel relating to extruded specialty graphite, the two undertakings concerned, whose market shares were between 25 and 30%, were given fines with a starting amount of EUR 15 million. By way of proof, Hoechst offers the non-confidential version of that decision (after publication) and also the testimony of a Commission official. In the light of those principles, Hoechst contends that its basic amount in the present case ought to have been much lower (EUR 24.75 million or EUR 29.7 million, depending on whether the starting amount was EUR 14 million or EUR 15 million, all other things being equal).

— The increase to take account of Hoechst's size and worldwide resources

311 The Commission again subjected Hoechst to unequal treatment when it multiplied its starting amount of EUR 20 million by a group factor of 2. Other undertakings

concerned by the Decision were and still are large undertakings operating at international level. Furthermore, the significant reduction in Hoechst's size which has taken place in the meantime and which reduced its group turnover to approximately EUR 9 billion for the reference year 2002, together with the fact that it is restricted to holding activities and has sold its sorbates business to third parties, renders void the justification for a steep increase in its fine. In any event, a factor of 2 should not have been used as a multiplier.

The duration of the infringement

312 Hoechst contends that the increase of 175% decided upon by the Commission to reflect the duration of the infringement is exorbitant and disproportionate.

313 First, increases for the duration of the infringement which exceed 100% are fundamentally contrary to the method for calculating fines established by the Commission in the Guidelines. Hoechst notes that the factors associated with the gravity of the infringement enable a basic amount to be fixed, which, in the second stage, is adjusted according to the duration of the infringement. Under the latter aspect, Section 1 B of the Guidelines provides only for a 'heavy increase' in the basic amount, and not for the fixing of an entirely new amount of a size completely different from that of the basic amount.

314 Second, the increase for the duration of the infringement takes account, for a second time, of the gravity of the infringement. Hoechst contends, in that regard, that cartels on prices and volumes are typically infringements of long duration. Consequently, if the Commission places those cartels in the highest category of 'very serious infringements' it cannot take the serious nature of the infringement into account for a second time when assessing the duration of the infringement.

315 Third, Hoechst fundamentally challenges the fact that a directly proportionate increase, at a flat rate of 10% per annum, can be applied over a long period for the purpose of penalising a cartel. Hoechst emphasises in that regard that in the context of long-term infringements regarded as a single infringement, all sanctions systems provide for *facteurs de majoration* of the penalty at a rate which reduces exponentially as the duration increases. That approach, moreover, observes the principle of proportionality. If it is fair that offences committed in the distant past become time-barred at a given time, then the sanction imposed cannot ignore the same principle. Hoechst further submits that even if the 'principle of the link of continuity' enshrined in Article 1(2) of Regulation No 2988/74 were still applied in Community law, it could not lead to endless increases in the fines imposed.

316 Last, the increase is disproportionate by comparison with the Commission's previous practice.

317 Hoechst refers first of all to Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/35.733 — VW) (OJ 1998 L 124, p. 60), where the Commission decided that an increase of 10% for each year of the infringement is appropriate only if the gravity of the infringement remains the same throughout the infringement period. In this case, nothing to prove or demonstrate such a fact has been put forward, which is contrary to the Commission's obligation to state reasons.

318 Hoechst refers, next, to a number of decisions in which the Commission increased the basic amount from the second year only, since the Guidelines make provision for an increase only for infringement periods in excess of what is regarded as an 'average' duration. In particular, Hoechst refers to the increase applied in Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (IV/35.691/E.4 — Pre-insulated pipes) (OJ 1999 L 24, p. 1), and refers also to the judgment in Case T-220/00 *Cheil Jedang Corporation* v *Commission* [2003] ECR II-2473, paragraph 137). Hoechst concludes that only an increase of 165% was foreseeable in this case.

b) Arguments of the Commission

319 As a preliminary observation, and in response to the arguments developed by Hoechst by way of introduction to its fifth plea, the Commission submits that the comparison between the fine and the overall turnover of sorbates on the EEA market in 1995 is not valid. The turnover achieved on the market in one year does not reveal the negative impact which a cartel that has lasted more than 17 years may have had. Furthermore, the amount of the fine before Hoechst's cooperation is taken into account may be explained in this case by a whole range of factors. In addition, EUR 20 million corresponds to the minimum starting amount envisaged in the Guidelines for very serious infringements. That sum is also consistent with the Commission's practice in taking decisions. Last, the Commission emphasises that the specific starting amount is merely an intermediate amount which, when the method defined by the Guidelines is applied, is then adapted to reflect the duration of the infringement and any aggravating or attenuating circumstances (*Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 95).

The effects of the infringement

320 The Commission contends that it was entitled to assume that the prices charged by the cartel were in principle at least higher than market prices, in any event so far as Hoechst was concerned. The Commission emphasises in that regard that Hoechst had the opportunity to comment on the conclusions set out at recitals 105, 109 and 288 to the Decision, which correspond to paragraphs 78, 82 and 265 of the statement of objections. In the statement of objections, the Commission also indicated that it would take account of the 'impact on the market', in accordance with the Guidelines (paragraphs 291 and 295). In its response to the statement of objections, Hoechst merely stated, concerning that impact, that it was of no relevance to the establishment of the existence of the infringement. Hoechst thus expressly stated in its response that it did not substantially contest the facts of the sorbates cartel, as described in the Commission's statement of objections (recitals 29 and 451 to the Decision).

321 The Commission emphasises, next, that in this case the undertakings concerned had discussed target prices that customers would accept to pay (recital 102 to the Decision). Those prices do not correspond to a free determination by each member of the cartel. Nor does Hoechst seriously deny that the monitoring mechanisms actually allowed the target prices to be reached generally or at least that the parties actively endeavoured to achieve them (recitals 331 and 334 to the Decision). In the Commission's submission, the target prices had to be used systematically as a basis for negotiation (recital 104 to the Decision). Sometimes the participants expressly stated that the target prices had been achieved (recital 205 to the Decision).

322 However, the Commission left open the question of the differential between the prices imposed by the cartel and those that might have been achieved in a situation of normal competition (recitals 333 and 340 to 342 to the Decision). The Decision does not state that prices had increased continuously, but only that the target prices had been fixed in such a way as to enable prices higher than market prices to be achieved. In the Commission's submission, that could include price reductions, the effect of which, however, was only to attenuate the impact of the reduction of market prices for members of the cartel (recital 224 to the Decision).

323 As regards the cartel's consequences for sales volumes, Hoechst does not specifically challenge the figures in Table II in the Decision. Hoechst's assertion (contrary to recital 419 to the Decision) that there were higher sales of 'grey quantities' by other producers than by Ueno, notably by Hoechst, is wholly inaccurate. Furthermore, the problem of grey quantities became apparent only at the end of 1992, and therefore towards the end of the cartel (recitals 112 and 193 to the Decision). The Commission also observes that in this case supply was adjusted to demand, and refers to recitals 108 and 109 to the Decision.

324 As regards Hoechst's comments on the markets in question, the Commission states that it merely observed, at recital 336 to the Decision, that sorbates were the most-used preservatives and that no other preservative constituted a perfect substitute. It was therefore permissible to conclude that sorbates manufacturers were in a position to control the preservatives sector 'to a great extent'. The Commission further

submits that it did not definitively establish whether there was a separate market for sorbates. Even if that were so, the Commission's finding would remain valid.

325 Last, as regards the significance of the harmful consequences of the infringement for the determination of the amount of the fine, Hoechst's argument that those consequences account for exactly one third is wholly unfounded. The Commission's press release to which Hoechst refers contains merely an abridged presentation of the Decision and must not be taken to mean that the impacts in question played a decisive role in the calculation of the fines. That aspect is not even mentioned in the part of the press release entitled 'Calculation of the fines'. Furthermore, factors relating to the object of conduct may be more significant than those relating to its effects, particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 636).

The participation in the anti-competitive agreements of directors at a very high level

326 As regards the grounds of the Decision, the Commission contends that Hoechst obviously understood what is covered by the expression 'at a very high level' and that, moreover, the statement of objections makes clear that the agreements had been conceived, directed and encouraged at a very high level in the undertakings concerned. Hoechst did not dispute those findings and there was no need to develop that point in greater detail.

327 On the substance, *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above, does not provide a definition of the concept of 'a very high level', applicable to all situations and excluding anyone carrying out lower-level duties than those at issue in that judgment. At recital 323 to the Decision, the Commission seeks to demonstrate that the cartel was not organised by junior staff but by persons at a level capable of conferring authority and stability on the cartel. The sales managers of the Hoechst division concerned satisfy those conditions.

The division of the undertakings into categories

328 Hoechst ignores the fact that the Guidelines are based on the specific weight of each undertaking (Section 1 A, fourth, sixth and seventh paragraphs). The fact that the Japanese manufacturers held regular meetings before the joint meetings and normally also met after those meetings does not necessarily mean that they constitute one and the same undertaking.

329 Furthermore, the Commission observes that, in dividing the undertakings into categories, it began with Hoechst, on which it imposed the minimum fine recommended for very serious infringements. Hoechst's argument that the starting amount of the fine for the undertakings in the second category, which is one third of its own starting amount, is too low, cannot be accepted, since no one can rely to his own advantage on an unlawful act committed in favour of another (Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 350). In addition, when fixing the amount of each fine, the Commission has a discretion and cannot be required to apply a precise mathematical formula for that purpose (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraphs 252 and 383). It is therefore immaterial that the starting amount of the fine for the undertakings in the second category was not adapted in precise proportion to the market shares of the undertakings concerned.

330 As regards the practice in taking decisions on which Hoechst relies, the Commission contends that that practice does not in itself serve as a legal framework for fines in competition matters, which is defined solely in Regulation No 17, and that the factors for comparison can be no more than indicative when the circumstances of competition cases, such as markets, products, countries, undertakings and periods concerned are not the same. The Commission refers, on those points, to *JCB Service* v *Commission*, paragraph 218 above (paragraphs 187 and 188). The comparison drawn by Hoechst is therefore irrelevant.

The increase to take account of Hoechst's size and global resources

331 The Commission contends that fixing a factor for deterrence is consistent with the case-law and with its practice in taking decisions. The Commission refers, in particular, to *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraph 162 et seq.).

332 That factor takes account of the size and resources of the undertaking concerned, which go hand in hand with its importance. In 2002 Hoechst was at least four times as large as Daicel, the next-largest undertaking in terms of turnover. On the other hand, the nature of Hoechst's activity at the time of the adoption of the Decision is irrelevant. The fact that Hoechst transferred its sorbates business to a third party was already taken into consideration when the relevant comparison of the size of the undertakings concerned was made.

The duration of the infringement

333 As regards Hoechst's arguments relating to the method laid down in the Guidelines, the Commission submits that an increase of 10% per annum is provided for at Section 1 B of the Guidelines, with the object of really penalising the restrictions which produced harmful effects on a lasting basis. The Court of Justice has again had occasion recently to emphasise that it is consistent with the general interest to avoid anti-competitive practices, to discover them and to impose sanctions (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 54).

334 The Commission emphasises, moreover, that the increase envisaged for the duration of the infringement is not subject to an absolute maximum (as the 100% suggested by Hoechst) and refers, on that point, to its practice in taking decisions in a number of cases.

335 Furthermore, the criteria of gravity and duration of the infringement exist autonomously alongside each other. Together, they enable the basic amount to be determined. To define the increase for the duration of the infringement by reference to the criterion of gravity would be contrary to the autonomy of the two criteria and therefore inappropriate.

336 Furthermore, contrary to Hoechst's opinion, the category of very serious infringements is not reserved for long-term horizontal infringements. It is therefore appropriate to take the actual duration of the infringement fully into account.

337 Nor are the considerations on limitation relevant. In the case of lasting or continuous infringements time begins to run only on the date on which the infringement comes to an end.

338 As regards the argument that in any event only an increase of 165% was foreseeable, on the ground that the first year of the infringement does not count, the Commission replies that the increase of 10% per annum is perfectly consistent with the principles laid down in the Guidelines. The only provision in that regard is that, for infringements of short duration, in general less than one year, no increase is applied (*Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 133). A comparison of the wording of the second and third indents of Section 1 B of the Guidelines shows that, where an infringement lasts more than one year, the increase is supposed to be applied 'per year' of the infringement, thus including the first year.

339 As regards, last, the decision-taking practice to which Hoechst refers, whereby an increase of less than 10% per year was imposed, the Commission observes that *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, had the particular characteristic that the increase for duration came to 10% for some undertakings and less than 10% for others, so that the decision was not consistent (paragraph 139 of the judgment). The Commission adds that the fact that it may in the past have applied a certain rate of increase to the fine, by reference to the duration of the infringement, cannot deprive it of the option of raising that rate within the limits indicated by Regulation No 17 and the Guidelines, if that is necessary to ensure the implementation of

Community competition policy (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 277).

340 Furthermore, in the last decisions to which Hoechst refers, the Commission undoubtedly increased the fine by 10% per year for the duration of the infringement. It is necessary, on that point, to reject Hoechst's assertion that the increase of 10% per year is in any event inadequate since the intensity of the infringement varied. The passage in the Decision which Hoechst cites in order to demonstrate that change in the intensity of the infringement does not permit the slightest conclusion to that effect. In addition, the increase in the fine by 10% per year of the infringement is justified even if the intensity of the infringement may have varied during the period concerned, once the very serious infringement was pursued (*Michelin* v *Commission*, paragraph 339 above, paragraph 278).

3. Findings of the Court

341 As a preliminary point, it should be noted that Hoechst's fifth plea is supported by two parts. The first part is entitled 'Nature of the infringement' and the second 'Duration of the infringement'. However, the first part is aimed, in fact, at the constituent elements of the 'gravity' of the infringement, which incorporates the nature of the infringement. Hoechst must therefore be taken to challenge, in the first part, the elements identified by the Commission as to the gravity of the infringement.

342 Next, it is appropriate to reject Hoechst's general argument that the amount of its fine, calculated before the application of the 1996 Leniency Notice, is disproportionate in so far as it amounts to almost five times the overall volume of the EEA market, for 1995, set out in Table I of the Decision. It must be borne in mind, in that regard, that when determining the amount of each fine, the Commission has a discretion (Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47, and Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 151). Furthermore, under Article 15(2) of Regulation No 17, the amount of the fine is to be determined on the basis of the gravity of the infringement and its duration. In addition, that amount is the result of a series of arithmetical

calculations performed by the Commission in accordance with the Guidelines. That amount is set, inter alia, on the basis of various factors linked to the individual conduct of the undertaking in question, such as the existence of aggravating or attenuating circumstances (Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraphs 82 and 85). It cannot be inferred from that legal framework that the Commission must ensure a proportion between the amount of the fine, as thus calculated, and the overall volume of the relevant product market in the EEA, for a given year of the infringement (in this case 1995), when the infringement in question lasted more than 17 years and when the amount of the fine also depends on other factors linked to the individual conduct of the undertaking. It follows that Hoechst's general argument in that regard must be rejected.

a) The gravity of the infringement

343 It must be borne in mind that the Guidelines state, inter alia, that in assessing the gravity of the infringement account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements are thus put into one of three categories: minor infringements, serious infringements and very serious infringements (Section 1A, first and second paragraphs).

344 It must also be borne in mind that the gravity of infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of criteria to be applied has been drawn up (judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above, paragraph 465, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 241).

The effect of the cartel on the sorbates market in the EEA

345 As a preliminary point, it must be noted that the three aspects of the assessment of the gravity of the infringement which are referred to at paragraph 343 above do not have the same weight in the context of the global examination. The nature of the infringement plays a preponderant role, in particular, in characterising 'very serious' infringements. In that regard, it follows from the description of very serious infringements in the Guidelines that agreements or concerted practices aimed in particular, as in this case, at setting target prices or the allocation of sales quotas by volume may entail, solely on the basis of their very nature, the characterisation as 'very serious', without there being any need to characterise such conduct by a particular impact (see, to that effect, Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 178).

346 In the present case, first, it must be observed that Hoechst does not call in question the unlawful nature of the cartel, namely the setting of target prices, the allocation of sales quotas by volume, the definition of a system of information and control and also the refusal to supply technology to undertakings seeking to enter the market.

347 Second, it must be observed that, in the Decision, the Commission took into consideration the actual impact of the cartel on the market when it assessed the gravity of the infringement. While the Commission asserts, at recital 327 to the Decision, that there is no need to take into account the actual effects when a cartel is shown to have an anti-competitive object, it none the less states, at recitals 333 to 336 to the Decision, that such effects exist in the present case, even though it asserts at recital 333 that it is not possible to measure them in a precise manner. Those effects are the consequence, in particular, of the implementation of the agreements in question. The Commission observes, in that regard, at recitals 330 to 332 to the Decision, referring to Part I of the Decision, that the agreements in question were carefully implemented. Recitals 334 and 336, which deal with the actual effects of the cartel on the market, also refer to the implementation of the agreements in question. At recital 337 to the Decision, which contains the finding concerning the developments devoted to the actual impact of the cartel on the market, the Commission states that that 'continuous implementation has had an impact on the sorbates market'.

348 The Commission's finding concerning the implementation of the cartel is not challenged by Hoechst before the Court. It must be emphasised, in that regard, that in the particular case of a price cartel it is permissible for the Commission to draw the inference that the infringement has had effects from the fact that the members of the cartel took measures to apply the agreed prices. On the other hand, when the implementation of a cartel is established, the Commission cannot be required to demonstrate systematically that the agreements actually allowed the undertakings concerned to attain a higher level of prices than that which would have prevailed in the absence of a cartel (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above, paragraphs 743 to 745). Accordingly, Hoechst's arguments cannot upset the Commission's finding concerning the effects of the cartel flowing from the implementation of the agreement in issue.

349 In addition, it must be observed that the cartel had as its object, inter alia, price-fixing. It must be borne in mind, in that regard, that setting a price, even one that is merely indicative, affects competition because it allows all the participants in the cartel to foresee with a reasonable degree of certainty what pricing policy will be pursued by their competitors. More generally, such cartels entail direct interference with the essential parameters of competition on the relevant market. In expressing a common intention to apply a certain level of prices to their products, the producers concerned no longer determine their policy on the market in an autonomous manner, thus adversely affecting the concept inherent in the Treaty provisions on competition (Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraph 81). It follows that, by fixing, inter alia, target prices, the cartel in issue necessarily affected the play of competition.

350 Furthermore, Table II of the Decision shows that the sales quotas agreed between the parties to the cartel were implemented, as the Commission states at recital 335. The figures set out in the table are not disputed by Hoechst, which observes only that 'grey material' — that is to say, quantities sold and not declared to the members of the cartel — cast doubt on the proper functioning of the agreements in question. It follows from recitals 112 and 193 to the Decision that the discussions of the members of the cartel concerning any 'grey material' related to sales volumes of the Japanese producers which were not included in the 'official statistics', that is to say the published export data of those producers. In particular, at recital 335 to the Decision, the Commission states that such 'grey material' can be attributed to Ueno.

Therefore, even on the assumption that such 'grey material' did have an impact on Ueno's sales figures, or on those of other Japanese producers, set out in Table II of the Decision, those quantities would have no impact on Hoechst's sales figures. In those circumstances, the cartel would have had, at least, the effect of limiting or controlling the outlets of a competitor present on the EEA market. In that regard, as regards Hoechst's assertions that it also sold 'grey material' of the product concerned, it is sufficient to observe that they are not supported by any objective element, which, moreover, was not provided to the Commission in good time.

351 In the light of the foregoing, Hoechst's arguments concerning the effect of the cartel on the sorbates market in the EEA must be rejected.

The participation of Hoechst's high-level directors in the cartel

352 As a preliminary point, it must be noted that the Commission's finding that the collusive agreements in issue were essentially conceived, directed and encouraged at high level in the undertakings concerned is repeated in the context of the assessment of the nature of the infringements in issue.

353 However, there is no ground for concluding that that finding, if it proved incorrect for Hoechst, could in itself call in question the Commission's conclusion that the infringements in question, which were characterised in particular by the setting of target prices and the allocation of sales quotas by volume, were by their very nature very serious.

354 In any event, it is sufficient to observe that the Commission's finding clearly relies on the lists of employees of the undertakings concerned who participated in the meetings, which are set out at recitals 88, 91 and 96 to 98 to the Decision. As regards Hoechst, at recital 96 to the Decision the Commission states that its representatives at the joint meetings were, in particular, the sales directors or sales managers for the product concerned. Hoechst's assertion that the Commission failed to state reasons must therefore be rejected in that regard.

355 It must also be observed that the list of Hoechst's employees set out at recital 96 to the Decision already appeared at paragraph 62 of the statement of objections. Furthermore, at paragraph 295 of the statement of objections the Commission clearly stated that it would take account of the fact that the collusive agreements were conceived, directed and encouraged at top level in the undertakings concerned.

356 Those facts were not disputed by Hoechst during the administrative procedure.

357 There is no ground for the view that the Commission made a manifest error of assessment in concluding that 'sales directors' belonged to the 'top level' in the organisation of the undertakings concerned. In particular, Hoechst merely challenges that conclusion by stating that sales directors are themselves accountable to other directors, without adducing firm evidence to support that assertion, which was not in any event presented to the Commission in good time. Besides, the fact that the sales directors are themselves accountable to other directors does not necessarily mean, in itself, that they were not 'top level' directors.

358 As regards, last, Hoechst's reference to *ABB Asea Brown Boveri* v *Commission*, paragraph 75 above (paragraphs 33 to 38), it is sufficient to state that in that case the Commission had been referring to the role played by the 'group directorate' of the undertaking concerned, which distinguishes that case from the present case.

359 In the light of those factors, Hoechst's arguments concerning the participation of its top level directors in the cartel must be rejected.

The division of the undertakings concerned into categories.

360 As a preliminary point, it must be borne in mind that the differentiation made in respect of the cartel on the sorbates market consisted in determining, in accordance with Section 1 A, third, fourth and sixth paragraphs, of the Guidelines, the individual contribution of each undertaking, in terms of actual economic capacity, to the success of the cartel for the purpose of its classification in the appropriate category (see, to that effect, judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 225).

361 At recital 349 to the Decision, the Commission states, in that regard, that the method chosen makes it possible to estimate the relative capacity of each undertaking, its contribution to the overall damage caused to competition in the EEA and its contribution to the effectiveness of the cartel as a whole.

362 In this case, the Commission assessed the individual contribution of the undertakings concerned on the basis of the market share held by each of them in 1995 for the relevant product on a worldwide scale.

363 Hoechst does not take issue with the fact that the Commission divided the undertakings concerned into categories, or the method used in order to do so. Hoechst submits principally that it received unequal treatment by comparison with the Japanese undertakings as regards the starting amounts chosen according to the categories.

364 It must be borne in mind, in that regard, that when the Commission divides undertakings into categories, it must observe the principle of equal treatment, which provides that it is prohibited to treat comparable situations differently and different situations in the same way, unless such treatment is objectively justified (*CMA CGM and Others* v *Commission*, paragraph 220 above, paragraph 406, and judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, paragraph 219).

365 First, it is clear from the Decision that, after concluding that the infringement in question was 'very serious' (recital 344 to the Decision), the Commission considered that in 1995 Hoechst was the largest producer of sorbates in the worldwide market and placed it in the first category of undertakings (recital 352 to the Decision). Hoechst does not dispute the finding that it was the largest producer of sorbates for 1995, which, moreover, is confirmed by the data in Table I of the Decision. As regards Hoechst's argument that it ought to have been compared with the four Japanese producers taken together, it must be recalled that the Decision, although drafted in the form of a single decision, must be analysed as a bundle of individual decisions finding in respect of each of the undertakings to which it is addressed the infringements alleged and imposing fines on them, where appropriate, as supported, moreover, by the wording of the operative part, and in particular Articles 1 and 3 thereof (order in *Hoechst* v *Commission*, paragraph 31 above, paragraph 16). In those circumstances, the Commission cannot be criticised for having analysed individually the situation of the Japanese undertakings concerned.

366 Second, at recital 354 to the Decision, the Commission states that the likely fine for very serious infringements is above EUR 20 million.

367 Third, at recital 355 to the Decision, the Commission fixes the starting amount of the fines at EUR 20 million for the undertakings in the first group (Hoechst) and at EUR 6.66 million for the undertakings in the second group (Daicel, Chisso, Nippon Synthetic and Ueno).

368 It follows that, in order to apply differentiated treatment to the undertakings concerned, the Commission began by fixing, for the undertakings in the first category (that is to say, Hoechst, which, according to the Decision, was the largest producer of sorbates in 1995), the amount of EUR 20 million envisaged by the Guidelines. The Commission then determined, on the same basis, the amount for the undertakings in the second category.

369 There is nothing in the Decision to permit the conclusion that the amount set for the undertakings in the first category was fixed by reference to the amount set for the undertakings in the second category. Nor is there anything in the Decision to permit the conclusion that the amount of EUR 20 million set for the undertakings in the first category was the result of a mathematical formula applying a starting amount per level of turnover, contrary to Hoechst's apparent suggestion.

370 In those circumstances, even on the assumption that the amount of EUR 6.66 million set for the undertakings in the second category is too low or that certain undertakings classified in the second category ought to have been placed in the first category, that would constitute an unlawful act committed in favour of the undertakings in the second category.

371 It must be emphasised that respect for the principle of equal treatment must be reconciled with respect for the principle of legality, according which no one may rely to his own advantage on an unlawful act committed in favour of a third party (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 160, and *Lögstör Rör* v *Commission*, paragraph 329 above, paragraph 350).

372 Last, as regards the Commission's practice in taking decisions, on which Hoechst relies, it must be borne in mind that that practice does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see *Michelin* v *Commission*, paragraph 339 above, paragraph 292 and the case-law cited) and that, furthermore, operators cannot place a legitimate expectation in the maintenance of an existing situation that might be altered by the Commission in the exercise of its discretion (see Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33 and the case-law cited, and *Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 171).

373 In those circumstances, and without there being any need to grant Hoechst's request to have witnesses called when the Court considers that it has sufficient information

from the documents in the file, Hoechst's arguments concerning the division of the undertakings concerned into categories must be rejected.

The increase to take account of Hoechst's size and overall resources

374 In order to take account of Hoechst's 'size and overall resources', the starting amount of its fine was increased by 100% to EUR 40 million (recital 357 to the Decision).

375 That increase, according to recital 356 to the Decision, is intended to ensure a sufficient deterrent effect on large undertakings and to take account of the fact that those undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from that conduct under competition law.

376 In that regard, the Guidelines provide that, in addition to the nature of the infringement, its actual impact on the market and the size of the relevant geographic market, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph).

377 Account may also be taken of the fact that large undertakings are in a better position to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from it under competition law (Section 1 A, fifth paragraph).

378 In the present case, although recitals 356 and 357 to the Decision appear under the heading 'Sufficient deterrence', it follows from recital 356 to the Decision that the Commission took account, first, of the need to ensure that the fine had a sufficient deterrent effect, within the meaning of Section 1 A, fourth paragraph, of the Guidelines and, second, of the fact that large undertakings, like Hoechst, are better able to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from it under competition law, within the meaning of Section 1 A, fifth paragraph, of the Guidelines, in order to apply an increase of 100% to the starting amount of the fine.

379 As regards the first factor, namely the need to ensure that the fine has a sufficient deterrent effect, it requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality. The Court thus observed, in the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, that owing to its enormous worldwide turnover by comparison with that of the other members of the cartel, one of the undertakings concerned in that case would find it easier to find the funds necessary to pay its fine, which, in order to ensure that the fine was sufficiently deterrent, justified the application of a multiplier (paragraph 241). In that context, the financial resources of the undertaking must be assessed, in order to achieve properly the objective of deterrence, while observing the principle of proportionality, on the date on which the fine is imposed. In that regard, for the same reasons, it must be noted that, in the context of Article 15(2) of Regulation No 17, the upper limit of the fine, fixed at 10% of the turnover of the undertaking concerned, is determined by reference to the turnover achieved during the business year preceding the decision (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 85).

380 It should be noted, in that regard, that in the Decision the Commission does not specify what data were used as a basis for its conclusion that it was necessary to ensure that Hoechst's fine was sufficiently deterrent.

381 However, in the Decision the Commission sets out the worldwide turnover of the undertakings concerned for 2002 (recitals 37, 42, 46, 50 and 55), the year

corresponding to the last business year preceding the adoption of the Decision. The Commission also refers to 2002 in its written pleadings before the Court. The worldwide turnover for 2002 came to EUR 9.2 billion for Hoechst, EUR 2.243 billion for Daicel, EUR 973.4 million for Chisso, EUR 321.5 million for Nippon Synthetic and EUR 199.5 million for Ueno. Thus in 2002 Hoechst was by far the largest of the undertakings concerned by the Decision. In particular, its worldwide turnover was at least five times that of the second undertaking concerned, by size, namely Daicel. In those circumstances, the Commission was entitled to seek to ensure that the fine had a deterrent effect on Hoechst.

382 As regards the second factor taken into account by the Commission for the purposes of increasing the starting amount of the fine, namely the legal and economic infrastructures which place undertakings in a better position to recognise that their conduct constitutes an infringement, it must be emphasised, in contrast to what has been set out previously, that that factor is intended to impose a more severe penalty on large undertakings, which are presumed to have knowledge and sufficient structural means to be aware that their conduct constitutes an infringement and to evaluate the advantages to be gained from it. It must be considered that, in that hypothesis, the turnover on the basis of which the Commission determines the size of the undertakings concerned, and therefore their ability to determine the nature and the consequences of their conduct, must relate to their situation at the time of the infringement.

383 In this case, in the Decision, the Commission does not specify what data were used to found its conclusion that Hoechst was in a better position to recognise that its conduct constituted an infringement and to be aware of the consequences stemming from that conduct under competition law.

384 However, it is common ground that Hoechst's worldwide turnover was EUR 28.181 billion in 1995, the last full year before the end of the infringement (recital 46 to the Decision). It cannot be maintained that, on that basis, Hoechst did not have the legal and economic infrastructures available to large undertakings, and Hoechst does not claim that it did not. The fact that the other undertakings concerned may also have been large undertakings in 1995 cannot affect the Commission's assessment in that regard.

385 It follows from the foregoing that the Commission did not err in deciding to apply an increase in this case.

386 The other arguments put forward by Hoechst cannot alter that finding. In particular, the fact that Hoechst contracted and its turnover fell to EUR 9 billion in 2002, or that it transferred its sorbates business before the adoption of the Decision, cannot influence the legality of the application of the increase in this case. The reduction in Hoechst's size does not alter the fact that its worldwide turnover was EUR 28.181 billion in 1995, the last full year of the infringement; and the fact that it transferred its sorbates business does not alter the fact that in 2002, the year corresponding to the last business year before the adoption of the Decision, Hoechst was the largest of the undertakings concerned.

387 As regards Hoechst's assertion that a factor of 100% should not have been applied in this case, it is not founded on any detailed element. In any event, first, there is no reason to consider that the increase applied by the Commission exceeds the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines. Second, it must be borne in mind that Hoechst's worldwide turnover in 2002 was at least four times that of the second undertaking concerned, by size, namely Daicel. The factor applied by the Commission reflects the difference in worldwide turnover in 2002 between Hoechst and the other undertakings concerned. Furthermore, as regards the fact that Hoechst had, in 1995, legal and economic infrastructures which meant that it was better able to recognise that its conduct constituted an infringement and to be aware of the consequences stemming from it, and on the assumption that the other undertakings concerned were also large undertakings in 1995, there is no need, in that regard, to draw a distinction between two undertakings whose turnover is such that they can be characterised in any event as large undertakings with such infrastructures. It follows from those elements that the factor of 100% applied by the Commission cannot be regarded in this case as disproportionate.

388 In the light of those elements, Hoechst's arguments against the application of an increase of 100% to take account if the undertaking's size and overall resources must be rejected.

389 The first part of the fifth plea must therefore be rejected.

b) The duration of the infringement

390 Under Article 15(2) of Regulation No 17, the duration of the infringement is one of the factors to be taken into consideration when determining the amount of the fine to be imposed on undertakings which have infringed the competition rules.

391 As regards the factor relating to the duration of the infringement, the Guidelines distinguish between infringements of short duration (in general, less than one year), for which the starting amount determined for gravity should not be increased; infringements of medium duration (in general, one to five years), for which the starting amount may be increased by 50%; and infringements of long duration (in general, more than five years), for which the starting amount may be increased by 10% per year (Section 1 B, first paragraph, first to third indents).

392 In this case, in the Decision, the Commission states at recital 359 that Chisso, Daicel, Hoechst and Ueno infringed Article 81(1) EC and Article 53(1) of the EEA Agreement from 31 December 1978 until 31 October 1996. Hoechst does not dispute that finding, or the fact that the infringement was characterised by the Commission as a 'long-term' infringement.

393 It follows that, as the Commission correctly observes in the Decision, the infringement in question lasted 17 years and 10 months.

394 The increase of 175% applied in Hoechst's case is therefore not in itself contrary to the Guidelines (see, to that effect, *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 137).

395 As regards Hoechst's argument that the Guidelines make provision for only a 'significant increase' and not for an entirely new amount, there is no reason to consider that the increase applied by the Commission exceeds the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines. The use of the words 'significant increase' does not permit the conclusion, as Hoechst maintains, that an increase in excess of 100% would be contrary to the calculation method provided for in the Guidelines. It must be emphasised in that regard that the powers conferred on the Commission by Regulation No 17 are designed to enable it to carry out the task entrusted to it by Article 81 EC of ensuring compliance with the competition rules in the common market. In that context, it is consistent with the general interest to avoid anti-competitive practices and agreements, to uncover them and to impose sanctions (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 54).

396 Furthermore, it must be observed that even though the third indent of Section 1 B of the Guidelines does not provide for an automatic increase of 10% per year for long-term infringements, it leaves a margin of discretion to the Commission in that regard (see, to that effect, *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 134). The arguments which Hoechst puts forward in support of its plea do not seek to demonstrate that the Commission made a manifest error of assessment in that regard. It should further be emphasised that, in so far as the Guidelines provide that infringements lasting more than five years are to be regarded as long-term infringements, and that such infringements warrant an increase which may be fixed at 10% per year of the amount decided on to reflect the gravity of the infringement, no breach of the principle of proportionality can be found in the determination of the duration of the infringement in which Hoechst took part (see, to that effect, Case T-65/99 *Strintzis Lines Shipping* v *Commission* [2003] ECR II-5433, paragraph 194).

397 As regards Hoechst's assertion that agreements on prices and volumes are typically long-term infringements and that, accordingly, an increase for the duration of the infringement takes the gravity of the infringement into account for a second time, it must be borne in mind that, even on the assumption that certain types of cartels are intrinsically conceived in order to last, a distinction must always be drawn, in application of Article 15(2) of Regulation No 17, between the duration of their actual functioning and their gravity as resulting from their actual nature (judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 275). The increase for the duration of the infringement therefore does not take account of the gravity of the infringement for a second time.

398 As regards the contention that events which took place in the distant past become time-barred at a given time and that, accordingly, the level of the fine should reduce exponentially with the passing of time, it is sufficient to recall that the increase applied by the Commission does not exceed the limits laid down in Article 15(2) of Regulation No 17 and in the Guidelines and that the Commission's action was not time-barred in this case in the light of Regulation No 2988/74 (see paragraph 225 above).

399 As regards, last, the Commission's previous practice, and in particular the fact that in certain cases it increased the starting amount of the fine only from the second year, it must be borne in mind that that practice does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see *Michelin* v *Commission*, paragraph 339 above, paragraph 292 and the case-law cited) and that, furthermore, operators cannot have a legitimate expectation in the maintenance of an existing situation that might be modified by the Commission in the exercise of its discretion (see *Delacre and Others* v *Commission*, paragraph 372 above, paragraph 33 and the case-law cited, and *Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 171). In addition, it is only in the case of infringements of short duration (in general, less than one year) that the Guidelines state that no increase will be applied. For infringements of long duration, on the other hand, the Guidelines provide that an increase of 10% 'per year' may be applied. In view of the terms used in the Guidelines in that regard, there is no reason to consider that the first year of the infringement must be systematically ignored in the Commission's calculation (see, to that effect, for infringements of medium duration, *Cheil Jedang Corporation* v *Commission*, paragraph 318 above, paragraph 133).

400 For all of those reasons, the second part of the fifth plea and, accordingly, the fifth plea in its entirety must be rejected.

D — *The second and sixth pleas, relating to the objection concerning the role as leader of the cartel which, according to the Decision constituted an aggravating circumstance*

401 By its second plea, Hoechst claims that there has been a breach of its right to be heard in respect of the objection relating to its role as a leader of the cartel, which, according to the Decision, constituted an aggravating circumstance. By its sixth plea, Hoechst contends that the increase based on its capacity as a leader is unwarranted.

402 The Court will examine the second plea first.

1. Summary of the Decision

403 At recitals 363 to 367 to the Decision, read in the light of recitals 92 to 95, the Commission states that, in Hoechst's case, the gravity of the infringement is aggravated by Hoechst's role as a leader of the cartel.

404 More particularly, in the Decision the Commission observes that Hoechst, along with Daicel, was an important driving force and one of the most active members of the cartel, in the light, particularly, of its position on the market. Hoechst thus succeeded in gaining the most from the cartel and in imposing its proposals on the Japanese producers, for example in 1992, when it proposed to establish a price difference between sorbic acid and potassium sorbates, a proposal which was followed by the Japanese producers in 1994.

405 Furthermore, the Commission states in the Decision that Hoechst, along with Daicel, was responsible for scheduling and chairing the joint meetings. It acted as host for the meetings in Europe, which it organised and paid for. Hoechst also organised some meetings outside the Community. It had regular contacts with Daicel in order

to exchange information. In addition, Hoechst took several initiatives to ensure effective monitoring of volume quotas (for example, by proposing the creation in Switzerland of a neutral organisation responsible for collecting the sales figures of the Japanese producers or by unilaterally adding 600 tonnes to its quota in 1995 on account of the existence of 'grey material'). Furthermore, as a member of the Chemical Industrial Products Export Cooperative (CIPEC), Hoechst had access to statistics on Japanese exports.

406 Hoechst also succeeded, according to the Decision, in ensuring control of the European branch of the cartel, in particular by maintaining regular and exclusive contacts with the only other European undertaking in the sector.

407 Last, the Commission states in the Decision that in November 1996, when the last joint meeting took place, Hoechst, along with Daicel, tried to convince the other members to continue with the meetings and the agreements.

408 In the light of those factors, and in order to take account of Hoechst's role as a leader of the cartel, the Commission increased the basic amount of the fine by 30% to take account of the aggravating circumstances.

2. Arguments of the parties

a) Arguments of Hoechst

409 Hoechst observes that the Commission took account of what it alleged to have been the applicant's position as 'co-leader' when setting its fine.

410 Hoechst takes issue with the Commission for not having heard it on the legal assessment which it proposed to make of the applicant's alleged conduct as a leader. In particular, Hoechst submits that the Commission did not address a statement of objections to it on that point.

411 Before adopting a decision imposing a fine, the Commission ought to give the undertakings the opportunity to defend themselves sufficiently against the objections made in respect of them. That means that the criticisms in fact and in law that the Commission intends to address to them must be communicated to the future addressees of the decision by means of a statement of objections (Hoechst refers, in that regard, to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraphs 193 and 194).

412 In the present case, there was nothing in the statement of objections addressed to Hoechst to indicate that the Commission would apply the aggravating circumstance of leader of the cartel. Nor did the Commission, after issuing the statement of objections, inform the applicant that it intended to extend its objections in respect of Hoechst by characterising it as a leader. Hoechst also emphasised that, in the absence of objections on that point, it saw no need to address the question of characterisation as a leader (Hoechst refers to its response to the statement of objections). Hoechst submits that it made the same observations at the hearing on 24 April 2003.

413 That oblique approach on the Commission's part is all the more incomprehensible because the arguments relied on in that regard in the Decision could have been presented at the time of the statement of objections, since they are not based on matters which only subsequently came to the Commission's attention. The Commission has not only breached Hoechst's rights of defence but has also breached the right to a fair trial. The principle of equality of arms requires that the essential elements of the subsequent decision be transmitted at the same time as the statement of objections only with respect to facts and evidence invoked later, but also with respect to their legal assessment.

414 It is clear that if Hoechst had been aware of such an objection against it, it would not have awaited the judicial proceedings but would have defended itself at the stage of the administrative procedure. It is absurd, moreover, that the parties concerned

should submit observations *pro domo*, as a precautionary measure, on the fact that the requisite factual conditions are not satisfied.

415 Hoechst concludes that the characterisation as a leader applied by the Commission in the Decision cannot be maintained. The increase in the fine on the basis of that characterisation is therefore unlawful. The same applies to the arguments put forward in the grounds of the Decision that, owing to its position as a 'leader', the application of Title B of the 1996 Leniency Notice was precluded by law.

b) Arguments of the Commission

416 The Commission contends that the rights of the defence have been respected since, in the Decision, it does not hold the undertakings concerned responsible for different infringements from those referred to in the account of the objections and had regard only to facts on which those concerned had the opportunity to provide an explanation. The account of the objections satisfied that requirement since it sets out, albeit succinctly, but clearly, the essential facts on which the Commission relies (the Commission refers to Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 26 and 94, and to *Atlantic Container Line and Others* v *Commission*, paragraph 70 above, paragraphs 138 and 191 et seq.).

417 In the present case, the statement of objections already contained a description of the circumstances of law and of fact taken into account in the Decision for the purposes of the calculation of the fine. Thus, at paragraph 295 of the statement of objections, the Commission stated that it would take account, in particular, of 'the role played by each participant, in particular the leading role played by some companies'. At paragraph 60 of the statement of objections, Hoechst is expressly criticised for having been a 'leader' of joint meetings together with Daicel (the Commission also refers to paragraph 64 of the statement of objections). At paragraph 282 of the statement of objections, Hoechst is presented as one of the 'main actors' in the cartel.

418 Furthermore, Hoechst was given advance notice of all the facts on the basis of which it was characterised as a leader of the cartel, by means of the statement of objections (in particular paragraphs 60, 77, 79, 94, 166, 178, 179, 210 et seq. and 282 of the statement of objections). The Commission also refers to recitals 347 to 367 to the Decision, where there is a reference to recitals 92 to 95.

419 The Commission concludes that Hoechst had the opportunity before the Decision was adopted to express its views on the objection relating to its role as leader, and did so, moreover, both in its response to the statement of objections and at the hearing. The fact that Hoechst did not agree with that objection and that it sought to refute it in its response to the statement of objections does not alter the fact that the objection was levelled against it.

3. Findings of the Court

420 It must be borne in mind that respect for the rights of the defence in any proceedings which might lead to the imposition of penalties, notably fines or periodic penalties, constitutes a fundamental principle of Community law, which must be observed, even in the context of administrative proceedings (Case 85/76 *Hoffmann-Laroche* v *Commission* [1979] ECR 461, paragraph 9; Case C-176/99 P *Arbed* v *Commission* [2003] ECR I-10687, paragraph 19; and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraph 32).

421 That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see *Arbed* v *Commission*, paragraph 420 above, paragraph 20 and the case-law cited).

422 As regards, more particularly, the calculation of the fines, the Commission fulfils its obligation to respect the undertakings' right to be heard provided that it indicates expressly in the statement of objections that it is going to consider whether it is appropriate to impose fines on the undertakings concerned and provided that it sets out the main elements of fact and of law which might entail a fine, such as the gravity and duration of the alleged infringement and the fact that the infringement was committed 'deliberately or negligently'. In doing so, the Commission provides the undertakings concerned with the necessary material to defend themselves not only against a finding of infringement but also against the imposition of a fine (*Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 428; see also Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 199 and the case-law cited; judgment of 15 June 2005 in *Tokai Carbon* v *Commission*, paragraph 118 above, paragraph 139; see also, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

423 It must also be borne in mind that the role of 'leader' played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the fine, since the undertakings which have played such a role must for that reason bear particular responsibility by comparison with the other undertakings (judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, paragraph 301, and *BASF* v *Commission*, paragraph 120 above, paragraph 281; see also, to that effect, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 291). In accordance with those principles, Section 2 of the Guidelines establishes, under the heading 'Aggravating circumstances', a non-exhaustive list of circumstances which may justify an increase in the basic amount of the fine, including, inter alia, the 'role of leader in, or instigator of the infringement' (third indent). In that context, in order to be characterised as a leader, the undertaking in question must have represented a significant driving force in the cartel (see, to that effect, *BASF* v *Commission*, paragraph 120 above, paragraph 374).

424 In the present case, first, it must be observed that, although all the elements of fact on which the Commission relied in the Decision to substantiate the objection that the applicant was a leader of the cartel were already to be found in the statement of objections, they were set out at various points in that statement of objections, without any link being established between them and without being characterised in any particular way by the Commission. It was only at the stage of the Decision that those elements were brought together in a single part and that the objection that Hoechst was a leader was clearly apparent.

425 More specifically, only paragraph 60 of the statement of objections, among the paragraphs on which the Commission relies in support of its defence, uses the word 'leader' ('führende Rolle' in the German version of the statement of objections) with respect to Hoechst. However, the sentence concerned, as a whole, reads as follows: 'Hoechst was a leader … of the joint meetings held with the four Japanese producers, together with Daicel'. A similar sentence was set out at paragraph 64 of the statement of objections, concerning Daicel ('[Daicel] … was a leader of the joint meetings, along with Hoechst'). However, the abovementioned sentence at paragraph 60 of the statement of objections may mean that Hoechst had had a particular role in arranging the joint meetings — as is demonstrated, moreover, by the other matters set out at the same paragraph, which deal with the actual organisation of those meetings — without giving the clear impression that Hoechst was a 'leader of the infringement' for the purposes of the Guidelines. That interpretation is borne out, furthermore, by the fact that the Commission changed the terminology used in the Decision. Thus, at recital 92 to the Decision the Commission states: 'Along with Daicel, Hoechst was in charge of scheduling and chairing the joint meetings'. The same change was made with respect to Daicel; the Commission states in the Decision: 'Along with Hoechst, [Daicel] was in charge of scheduling and chairing the joint meetings' (recital 89). In addition, although the Commission states in the Decision that Hoechst, along with Daicel, was in charge of 'scheduling' the joint meetings, in the statement of objections that role seemed to be attributed solely to Daicel, as may be seen from paragraph 64 of the statement of objections, which reads: '[Daicel] organised the pre-meetings, it was in charge of scheduling the joint meetings and was a leader of the joint meetings, along with Hoechst'.

426 Second, as regards the fact, stated at paragraph 77 of the statement of objections, that Hoechst was 'usually' the first to announce the new price in Europe, followed by the Japanese producers, it must be emphasised that the mere fact that a member of a cartel was the first to announce a new price or a price increase cannot be regarded as indicating that it had the role of leader of the cartel when the circumstances of the case show that the price or price increase in question was previously fixed by joint agreement with the other members of the cartel and when those other members also decided which of them would be first to make the announcement, such a designation showing that the fact of being first to announce the price or price increase is merely an act of strict observance of a plan predefined by common intention and not a spontaneous initiative giving an impetus to the cartel (*BASF* v *Commission*, paragraph 120 above, paragraph 427). In this case, as shown at paragraphs 150, 158 and 190 of the statement of objections, certain price announcements were scheduled by the members of the cartel, who decided which undertaking would be the first to make them. Paragraph 77 of the statement of objections therefore does not

permit the clear conclusion, in the light of the other elements in that document, that the price announcements made by Hoechst corresponded to a spontaneous initiative giving impetus to the cartel.

427 Third, as regards the fact, described at paragraph 94 of the statement of objections, that Daicel and Hoechst agreed on the agenda for the joint meetings, it must be noted, as shown by paragraph 207 of the statement of objections, that the agenda for the joint meetings were first of all prepared by the Japanese producers during the preparatory meetings and then proposed to Hoechst. Those preparatory meetings also enabled the Japanese producers, as may be seen from paragraph 204 of the statement of objections, to agree upon the target prices and volume allocations, which were then proposed to Hoechst.

428 Fourth, the fact, set out at paragraph 166 of the statement of objections, that Hoechst, as a member of CIPEC, had access to the Japanese export statistics, whereas the Japanese producers could not have access to the official German statistics, cannot be interpreted as meaning in itself that Hoechst represented a driving force for the cartel.

429 Fifth, concerning the bilateral meetings between Hoechst and the Japanese producers referred to at paragraphs 210 and 211 of the statement of objections, it must be observed that even if those contacts were to a large extent with Daicel, Hoechst also maintained relations with Ueno and Nippon Synthetic, as stated at paragraph 211 of the statement of objections. As regards the other bilateral contacts referred to at paragraph 212 et seq. of the statement of objections, it must be held that, as stated in particular at paragraphs 219 and 220 of the statement of objections, certain of those contacts were the result of the intention of all the members of the cartel, or indeed of the Japanese producers alone.

430 Sixth, as regards the sentence set out at paragraph 282 of the statement of objections, and highlighted by the Commission, namely that Hoechst was one of the main players in the cartel, it must be placed in its context. Paragraph 21 et seq. of the statement of objections is clearly intended to specify the extent of the responsibilities of

Hoechst and those of Nutrinova, in so far as Nutrinova took over Hoechst's sorbates business from September 1997. That sentence could not be taken, in any event in a sufficiently precise manner, as delimiting any role as leader played by Hoechst.

431 Admittedly, certain factual elements set out in the statement of objections, notably at paragraphs 79 (a proposal to establish a price difference between sorbic acid and potassium sorbates), 178 (a proposal to increase Hoechst's volume quota) and 179 (a proposal to provide the Japanese producers' sales figures to a neutral organisation), reflect occasional initiatives on Hoechst's part. Taken together, however, the elements mentioned by the Commission in the statement of objections, and on which the Commission based its conclusion in the Decision that Hoechst had played a role as leader, were insufficiently precise as to their scope and their characterisation.

432 Furthermore, even though the Commission gave the impression, at paragraph 295 of the statement of objections, that it would take account of the leading role played by 'some companies', that indication was not sufficient, in light of the lack of precision of the rest of the statement of objections, to allow Hoechst to determine whether or not it was concerned by any characterisation as leader.

433 For all of the foregoing reasons, it must be considered that, even though the facts in respect of which Hoechst is criticised were addressed in the statement of objections, the Commission did not characterise them sufficiently precisely to enable the applicant to defend itself properly.

434 It should further be observed in that regard that, in its response to the statement of objections, Hoechst stated:

'Hoechst/Nutrinova did not play a determining role in the cartel. The word "leader" used in para. 60 of the [statement of objections] is unclear in this respect. … The

language referring to "leader" in para. 60 of the [statement of objections] concerns exclusively Hoechst/Nutrinova's role as host and organiser of those joint meetings held in Europe.'

435 Likewise, at the hearing on 24 April 2003, counsel for Hoechst and Nutrinova declared that that undertaking satisfied all the conditions for obtaining immunity from a fine, stating that:

'As regards the role played by Hoechst and Nutrinova as hosts of the joint meetings held in Europe, it must be emphasised that as my clients were the only European undertaking to have participated in those joint meetings, it was quite natural that they should be responsible for organisation of the meetings in Europe. However, that does not mean that they played any role as leader of the cartel.'

436 It follows that the lack of precision in the statement of objections concerning the characterisation of Hoechst as a leader led that undertaking to focus on the organisation of the joint meetings, the only topic initially addressed by the Commission at paragraph 60 of the statement of objections. In the absence of greater precision, and as the other factual elements were scattered throughout the statement of objections, Hoechst was not placed in a position to adopt an effective defence on that point.

437 It must further be borne in mind that the Commission was aware of the lack of precision of the word 'leader' used at paragraph 60 of the statement of objections. That may be seen, in particular, from the fact that the Commission altered the wording used in the Decision.

438 For all of those reasons, the second plea must be upheld. Accordingly, without there being any need to analyse the sixth plea, the Decision must be varied in that it establishes the aggravating circumstance of having been a leader of the cartel as against Hoechst.

439 The consequences of that variation will be determined below.

E — *The seventh plea, alleging that the increase in the fine imposed for a repeated infringement was unjustified*

1. Summary of the Decision

440 Recital 363 to the Decision reads as follows:

'The gravity of the infringement is aggravated in Hoechst's case by the following circumstances:

(a) Hoechst's role as a leader of the cartel (recitals 92 to 95);

(b) Hoechst has been subject to previous decisions finding an infringement of the same type.'

441 Footnote 211, which accompanies recital 363 to the Decision, reads as follows:

'See Commission Decisions 94/599/EC (*PVC II*) (OJ L 239, 14.9.1994, p. 14), 89/191/EEC (*PVC I*) (OJ L 74, 17.3.1989, p. 21), 86/398/EEC (*Polypropylene*) (OJ L 230, 18.8.1986, p. 1) and 69/243/EEC (*Dyestuffs*) ([*Journal officiel*, 7.8.1969, p. 11]).

442 At recital 368 to the Decision, the Commission states:

'It is necessary to ensure that the level of the fine has sufficient deterrent effect. The Commission notes that previous Decisions addressed to Hoechst ordered the company to put an end to its anti-competitive conduct and to refrain from repeating it (see recital 363). This should have prompted it to pay special attention to compliance with Community competition law and refrain from all deliberate violations. The fact that it repeated the same conduct shows that the previous fines were not such a deterrent as to make it change its conduct.'

443 In response to the arguments put forward by Hoechst, the Commission states at recital 372 to the Decision:

'Concerning Hoechst's position as recidivist, the Commission notes that the last decision ordering Hoechst to put an end to its anti-competitive conduct and to refrain from repeating it dates from July 1994. After that decision Hoechst continued the infringement which is the subject of these proceedings for more than two years. This clearly shows that the previous decision did not deter Hoechst from continuing its participation in a similar cartel.'

444 In the light of those facts, and to take account of the fact that Hoechst's conduct constituted a repeated infringement, the Commission increased the basic amount off the fine by 50% to reflect the aggravating circumstances (recital 373 to the Decision).

2. Arguments of the parties

a) Arguments of Hoechst

445 Hoechst states that the Commission increased the basic amount of its fine, EUR 110 million, by 50% because this was a repeated infringement. Hoechst contends that that increase is disproportionate and is unable to see on what ground it could be subjected to an increase for repeated infringement connected with past infringements.

446 First, Hoechst contends that the old proceedings referred to at recital 363 to the Decision (namely the proceedings that led, respectively, to the adoption of Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC) (OJ 1994 L 239, p. 14), 'the PVC II decision'; Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866 — LdPE) (OJ 1989 L 74, p. 21), 'the PVC I decision'; Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1); and Commission Decision 69/243/EEC of 24 July 1969 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/26.267 — Dyestuffs) (*Journal official* 1969 L 195, p. 11) are wholly unconnected with the present case. More particularly, Hoechst maintains that the *PVC II* decision merely reiterates the *PVC I* decision, which was declared non-existent by the Court of First Instance and then annulled by the Court of Justice. Furthermore, the *PVC I* and *PVC II* decisions relate to old facts, since the facts ceased in 1984. The Commission is therefore wrong to seek, at recital 372 to the Decision, to establish a connection between the *PVC II* decision and the present case. In addition, Hoechst's former activities in the animal feedingstuffs additives sector have no bearing on its activities in the PVC sector. Hoechst also submits that the Commission recently undertook to establish joint group liability by imposing increases of 10% per year for the period between the decision imposing a fine in one case and the end of the infringement forming the subject-matter of another case. Hoechst refers, in that regard, to Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case COMP/E-1/37.152 — Plasterboard) (OJ

2005 L 166, p. 8). That practice is appropriate in connection with new infringements knowingly committed by one and the same group management, notwithstanding that parallel conduct has been found to constitute an infringement. In the present case, however, the fact that the *PVC II* decision and the infringement at issue in the present case relate to the same period results from the fact that the Commission was not in a position to adopt the *PVC II* decision until 11 years after the infringement at issue in that case had ceased.

447 Second, the cases to which the Commission refers at recital 363 to the Decision concern conduct which came to an end in 1984 at the latest. The facts are therefore time-barred. Hoechst contends that the *Dyestuffs* decision became final more than 30 years ago, by a judgment of the Court of Justice. That decision is too old to support the 'repeated infringement' argument. Hoechst further submits that the facts referred to by the *Polypropylene* decision were definitively settled only in July 1999, and those referred to by the *PVC I and PVC II* decisions in October 2002, thus long after the facts of the present case had come to an end.

448 Third, even if it should ultimately be held that different infringements committed independently within a group and without any subjective connection between them constitute an aggravating circumstance, the increase applied is disproportionate. In particular, the fact that Hoechst is part of a group has already been taken into account twice by the Commission: first when the Commission fixed the starting amount of the fine at EUR 20 million and second when it increased that amount by 100% on account of the size of the Hoechst group. It cannot be fair to add further increases. By way of comparison, Hoechst had to bear a starting amount practically 14 times Daicel's, on account of its group structure, while its turnover is only four times as high. Hoechst also emphasises that in the proceedings leading to the *Plasterboard* decision, an increase of 10% per year had been imposed for the period between the preceding decision imposing a fine and the end of the infringement concerning the relevant product. In this case the increase is 22% per year.

449 In the alternative, Hoechst contends that an increase for repeated infringement is unfair when the undertaking concerned cooperates fully during the administrative procedure. The purpose of the penalty cannot justify that increase.

b) Arguments of the Commission

450 The Commission refers to *Thyssen Stahl* v *Commission*, paragraph 325 above (paragraph 617), and *Michelin* v *Commission*, paragraph 339 above (paragraph 284), and contends that the concept of repeated infringement, as understood in a number of national legal orders, implies that a person has committed new infringements after being punished for similar infringements.

451 In this case, the proceedings culminating in the *PVC I*, *PVC II* and *Dyestuffs* decisions referred to in the Decision all concerned cartels on prices or quotas. The infringements in those cases were therefore similar to the one forming the subject-matter of the present case.

452 It is immaterial, in that context, that certain infringements (such as that giving rise to the *Dyestuffs* decision) are old. The increase for repeated infringement does not serve to increase ex post facto penalties imposed in the past, but to pursue cases of repeated infringement effectively. The Commission emphasises in particular that it must ensure that its action has a deterrent effect (*Irish Sugar* v *Commission*, paragraph 198 above, paragraph 245) and that repeated infringement is among the relevant criteria used to determine the fine (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 91). The Commission further submits that there is no doubt in this case as to the continuity of the undertaking to which the decisions mentioned at recital 363 to the Decision were addressed.

453 Contrary to Hoechst's contention, moreover, the Commission maintains that an increase for repeated infringement may be imposed when the infringement at issue was committed even when the infringement in respect of which a sanction had previously been imposed had not yet become final. A warning is given immediately the Commission's decision is notified and not just when the decision becomes final. Likewise, the fact that the starting amount was increased on account of the size of the Hoechst group does not prevent the basic amount from being increased on account of repeated infringement. The increase imposed on account of the size of the group has no connection with the punishment of past infringements. The fact that past infringements are taken into account does not therefore constitute a 'double penalty'.

454 It is also immaterial that Hoechst discontinued its own commercial operations on the relevant market before the infringement ceased, since it was active on that market throughout the infringement.

455 Last, it is irrelevant that the earlier infringements concerned sectors other than the sorbates sector. The penalties applied to collusive activities relating to a product are intended to deter undertakings from breaching the prohibition in question, irrespective of the product at issue.

456 As regards the amount of the increase for repeated infringement, the Commission observes that it has a margin of discretion when fixing the amount of the fine (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59), and that it is not required to apply a precise mathematical formula. The Commission refers in that regard to a number of decisions in other cases implementing Article 81 EC, and also to *Michelin* v *Commission*, paragraph 339 above (paragraph 292), where increases of 50% were applied or authorised.

457 The comparison which the applicant draws between the present case and the *Plasterboard* case is irrelevant since, between 1969 and 1994, Hoechst was 'warned' on several occasions, without drawing the necessary consequences. It is therefore not excessive to increase the basic amount of the fine by 50%.

458 Last, the fact that the 1996 Leniency Notice was applied does not mean that Hoechst's repeated infringement ceases to be an aggravating circumstance. In the Commission's submission, the 1996 Leniency Notice defines the conditions in which undertakings which have cooperated with the Commission may have their fines reduced. That notice cannot however justify the absence of a penalty in the case of a repeated infringement.

3. Findings of the Court

459 Section 2 of the Guidelines refers, as an example of aggravating circumstances, to 'repeated infringement of the same type by the same undertaking(s)'.

460 Repeated infringement, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements (*Thyssen Stahl* v *Commission*, paragraph 325 above, paragraph 617, and *Michelin* v *Commission*, paragraph 339 above, paragraph 284).

461 Any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 91, and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 26).

462 The Commission has a discretion as regards the choice of factors to be taken into account for determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account. The finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and the Commission cannot be bound by any limitation period when making such a finding (*Groupe Danone* v *Commission*, paragraph 461 above, paragraphs 37 and 38).

463 In the present case, Hoechst does not deny that the four earlier decisions to which the Commission refers in the Decision to support its finding that this was a repeated infringement concerned Hoechst and related to an infringement of the same type as that in the present case.

464 As regards the *Dyestuffs* decision (adopted on 24 July 1969) and the *Polypropylene* decision (adopted on 23 April 1986), it must be observed that the infringement found in the Decision began 10 years after the adoption of the *Dyestuffs* decision, while the *Polypropylene* decision was adopted while that infringement was continuing. Furthermore, although Hoechst was the subject of a finding of infringement in the context of the *Polypropylene* decision in 1986, it continued for 10 years to engage in its unlawful conduct on the sorbates market. The fact that Hoechst repeated its unlawful conduct shows a propensity on its part not to draw the appropriate consequences from a finding that it had infringed the Community competition rules (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission*, paragraph 130 above, paragraph 355). In the light of those factors, Hoechst could expect that the Commission would take account of the earlier decisions referred to above when considering whether the infringement in the present case constituted a repeated infringement. Accordingly, there was nothing to prevent the Commission from relying on the *Dyestuffs* and the *Polypropylene* decisions for the purpose of finding that Hoechst had committed a repeated infringement in the present case.

465 As regards the *PVC I* decision (adopted on 21 December 1988), it must be noted that that decision was declared non-existent by the Court of First Instance (Joined Cases T-79/89, T-84/90 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315) and ultimately annulled by the Court of Justice (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555), before the Commission adopted the Decision in the present case. It should be noted in that regard that, as regards the annulment of the *PVC I* decision by the Court of Justice, Article 231 EC provides that if the action is well founded, the Court of Justice is to declare the contested act void. Furthermore, although the *PVC II* decision, which was adopted by the Commission following the annulment of the *PVC I* decision, to a large extent sets out the factual elements of the latter decision, it may be distinguished from that decision, in particular, by the fact that it finds that the agreement or concerted practice in question dated from around August 1980, whereas the *PVC I* decision stated that the agreement or concerted practice in question dated from approximately September 1976. The same applies to the amount of the fines imposed on Hoechst (ECU 1 million in the *PVC I* decision and EUR 1.5 million in the *PVC II* decision). It follows that the two decisions cannot be regarded as identical. In those circumstances, it must be held that the Commission erred in referring to the *PVC I* decision, in the Decision, for the purpose of finding that Hoechst's conduct constituted a repeated infringement.

466 As regards the *PVC II* decision, it was indeed adopted on 27 July 1994, or during the period of the infringement, but it was the subject of judicial proceedings which

culminated, after the end of the infringement at issue in the present case, in the judgments of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 208 above, and of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 153 above. It must be emphasised, however, that at Community level, and in accordance with the first paragraph of Article 256 EC, the *PVC II* decision was enforceable, provided that it imposed a pecuniary burden on persons other than the States, notwithstanding the action for annulment of that decision initiated under Article 230 EC. In effect, under Article 242 EC an action before the Community judicature does not have suspensory effect (Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraphs 50 and 51; see also, to that effect, Case T-28/03 *Holcim (Deutschland)* v *Commission* [2005] ECR II-1357, paragraph 121). It is common ground, moreover, that Hoechst did not seek a stay of execution of the *PVC II* decision pursuant to the second sentence of Article 242 EC. Last, it must be observed that the judgments of the Court of First Instance and of the Court of Justice, which, moreover, confirmed the decision, were delivered before the adoption of the Decision. It follows that the Commission was entitled to rely on the *PVC II* decision to find that Hoechst's conduct constituted a repeated infringement.

467 In the light of those factors, it must be concluded that, in finding that Hoechst's conduct constituted a repeated infringement, the Commission was entitled to rely on the *Dyestuffs*, *Polypropylene* and *PVC II* decisions but not on the *PVC I* decision.

468 However, the error on the Commission's part concerning the *PVC I* decision cannot call in question the characterisation of Hoechst's conduct as a repeated infringement in the present case or even the rate of the increase applied.

469 As regards the characterisation of the infringement as a repeated infringement, it is sufficiently supported by the *Dyestuffs*, *Polypropylene* and *PVC II* decisions.

470 As regards the rate of the increase applied in the present case, there is nothing in the Decision to indicate that the Commission's finding that the repeated infringement followed a number of previous infringements gave rise to a greater increase in the fine for an aggravating circumstance than would have been determined if

only a single previous infringement had been identified (see, to that effect, judgment of 25 October 2005 in *Groupe Danone* v *Commission*, paragraph 130 above, paragraph 366).

471 Furthermore, as regards Hoechst's argument that the increase applied is disproportionate, including by comparison with the other undertakings at which the Decision was addressed, it is sufficient to bear in mind that the Commission has a discretion when setting the fine and that it is not required to apply a precise mathematical formula. In addition, when determining the amount of the fine the Commission must ensure that its action is deterrent. A repeated infringement is a circumstance that justifies a considerable increase in the basic amount of the fine. Repeated infringement is proof that the penalty previously imposed was not sufficiently deterrent. In this case, there is no reason to consider that the increase of 50% in the basic amount of the fine designed to steer Hoechst's conduct towards respect for the competition rules is disproportionate (see, to that effect, *Michelin* v *Commission*, paragraph 339 above, paragraph 293).

472 It must therefore be held that the characterisation of the applicant's conduct as a repeated infringement in the present case and the rate of increase applied are well founded.

473 The other arguments put forward by Hoechst cannot affect that conclusion.

474 As regards the fact that Hoechst's former activity in the feedingstuffs additives sector had nothing to do with its activities in the PVC sector, it must be emphasised that the Guidelines refer to an 'infringement of the same type' by the same undertaking. In those circumstances, once an undertaking commits an infringement of the same type, even though the economic sector concerned is a different one, the Commission may find that there is an aggravating circumstance. Hoechst's argument in that regard cannot therefore be upheld.

475 As regards the fact that, in another case preceding the Decision, the Commission undertook to establish joint group liability by imposing increases of 10% per year for the period between the decision imposing a fine in one case and the end of the infringement in another case, it must be borne in mind that the Commission's previous practice in taking decisions does not in itself serve as a legal framework for fines in competition matters, since that framework is defined solely in Regulation No 17 and in the Guidelines (see *Michelin* v *Commission*, paragraph 339 above, paragraph 292 and the case-law cited) and that, furthermore, operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Commission in the exercise of its discretionary power will be maintained (see *Delacre and Others* v *Commission*, paragraph 372 above, paragraph 33 and the case-law cited, and *Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 171).

476 Last, as the Commission emphasises, the fact that the 1996 Leniency Notice was applied does not mean that Hoechst's repeated infringement ceases to be an aggravating circumstance. Therefore Hoechst's argument that an increase for repeated infringement is unfair when the undertaking concerned cooperates in full during the administrative procedure is inoperative.

477 For all of those reasons, the seventh plea must be rejected.

F — *The 10th plea, claiming that the 2002 Leniency Notice should be applied by analogy, under a 'most favourable provision' principle*

1. Summary of the Decision

478 At Section 12.2.3 of the Decision, which deals with the application of the 1996 Leniency Notice, the Commission observes that Hoechst considers that the 2002

Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') should be applicable in this case.

479 First of all, the Commission rejects Hoechst's arguments, on the ground that Section 28 of the 2002 Leniency Notice provides that that notice is to apply from 14 February 2002 for all cases for which no undertaking has relied on the 1996 Leniency Notice. In this case, a number of undertakings — including Hoechst — contacted the Commission on the basis of the 1996 Leniency Notice. The 2002 Leniency Notice is therefore not applicable (recitals 431 and 432 to the Decision).

480 Next, as regards the 'most favourable provision' principle on which Hoechst relies, first, the Commission states that the Leniency Notices do not affect the legal framework established by Article 15(2) of Regulation No 17. Since the 'most favourable provision' principle requires a modification of the legal framework determining the amount of fines, that principle does not apply in this case (recital 434 to the Decision). Furthermore, the undertakings concerned which offered to cooperate with the Commission acquired a legitimate expectation that their cooperation would be based solely on the 1996 Leniency Notice, the only one applicable at that time (recital 435 to the Decision).

481 Second, the Commission emphasises that the approach taken in Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/F — 3/33.708 — British Sugar plc, Case IV/F — 3/33.709 — Tate & Lyle plc, Case IV/F — 3/33.710 — Napier Brown & Company Ltd, Case IV/F — 3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1) cannot to be transposed to this case, as the situations are different. The Commission points out on that point that in the *British Sugar/Tate & Lyle* case no leniency regime was yet in force when the Commission decided to apply, by analogy, the provisions of the 1996 Leniency Notice (recital 436 to the Decision).

482 Third, it is not possible to conclude that the 2002 Leniency Notice is, overall, more favourable to undertakings than the 1996 Leniency Notice. Whether or not the resulting amendments procure an advantage to a given undertaking is highly dependent in its individual situation (recital 437 to the Decision).

2. Arguments of the parties

a) Arguments of Hoechst

483 Hoechst claims that it ought to have obtained immunity, in application, by analogy, of the 2002 Leniency Notice. It submits that it has already set out those arguments in its response to the statement of objections.

484 Hoechst observes that it had already begun to cooperate in autumn 1998, when only the 1996 Leniency Notice existed. However, it is necessary to take into account the fact that, according to the general principles of criminal law, the most favourable rules should be applied. Where the 2002 Leniency Notice is more favourable than the 1996 Leniency Notice, it is the former that ought to be applied.

485 According to the 2002 Leniency Notice, every undertaking which has participated in a cartel, and therefore even a 'leader', can apply for immunity. Hoechst emphasises that the provision in Section B of the 1996 Leniency Notice under which a significant reduction in the fine cannot be granted in the case of leaders was not followed in the 2002 Leniency Notice. Furthermore, the 2002 Leniency Notice is more favourable to the first undertaking to cooperate, in the sense that it is no longer a requirement that that undertaking submits evidence enabling the Commission to take a decision ordering an investigation under Article 14(3) of Regulation No 17. For the application for immunity to succeed, it is not even necessary to submit all the evidence

which the undertaking has. Such evidence may also be submitted orally, according to the Commission's consistent practice, if the undertaking relies on a risk that the evidence will be communicated to the United States.

486 In this case, the information which Hoechst provided on 29 October 1998 was sufficient for it to be granted immunity under the 2002 Leniency Notice. Thus, Hoechst was the first to submit a formal request for immunity and was also the first to make the necessary oral statements to the Commission. If the 2002 Leniency Notice had been applicable, the Commission would in those circumstances have sent Hoechst a letter at the beginning of 1999 granting provisional immunity. Its application for immunity would thus have succeeded on the basis of the 2002 Leniency Notice, contrary to what the Commission asserts at recital 437 to the Decision.

487 Hoechst then submits that, as a general principle of law, the 'most favourable provision' principle is applicable both in criminal proceedings and in administrative proceedings. Hoechst refers in particular to Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), which provides that '[n]o administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it' and that '[i]n the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively'.

488 Hoechst further submits that the 'most favourable provision' principle was applied by the Court of Justice in Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraphs 40 and 41, and that it is part of the legal tradition common to the Member States. Hoechst submits a comparative study which was produced during the administrative procedure.

489 Hoechst further submits that the Commission recognised the principle in the *British Sugar/Tate & Lyle* decision, paragraph 481 above, where it stated that 'a direct application of [the 1996 Leniency Notice] is only possible for cooperation which took

place after the publication of the notice in the Official Journal on 18 July 1996' and that '[i]n all other cases of cooperation, the notice will be applicable by analogy, meaning in this context essentially an extension ratione temporis. Such analogous application means that favourable treatment in line with [the 1996 Leniency Notice] will depend on fulfilment of all the substantive requirements of cooperation as set out in that Notice'.

490 Hoechst contends that the Court of First Instance confirmed those principles in Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 157 et seq.).

491 Likewise, Hoechst submits that in Commission Decision 2004/421/EC of 16 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Wieland Werke AG, Outokumpu Copper Products OY, Outokumpu Oyj, KM Europa Metal AG, Tréfimétaux SA and Europa Metalli SpA (Case COMP/E-1/38.240 — Industrial tubes) (OJ 2004 L 125, p. 50), 'the industrial copper tubes decision', the Commission stated that, 'unlike point 23 of the 2002 Leniency Notice, the 1996 Leniency Notice does not provide for any specific reward to a leniency applicant that discloses facts previously unknown to the Commission and affecting the gravity or duration of the cartel' and that '[i]t is therefore appropriate to consider any such cooperation under the attenuating factors' (recital 384 to the industrial copper tubes decision). In consequence, the Commission reduced the basic amount of the fine imposed on one undertaking (Outokumpu) from EUR 38.98 million by EUR 22.22 million 'for effective cooperation outside the 1996 Leniency Notice' (recital 387 to the industrial copper tubes decision). The Commission observed, in that regard, that 'Outokumpu should not be penalised for its cooperation by imposing on it a higher fine than the one that it would have had to pay without its cooperation' and that '[t]herefore, the basic amount of Outokumpu's fine [was] reduced by a lump sum of EUR 22.22 million so that it [would] be the same as the hypothetical amount of fine that would have been imposed on Outokumpu for a four-year infringement' (recital 386 to the industrial copper tubes decision).

492 Hoechst further submits that, even on the principle that the 1996 Leniency Notice does create legitimate expectations on the part of third parties that must be

protected, that point is immaterial in the present case. Only Chisso could claim to be a third party deserving of protection. However, Chisso was not alleged to have been a leader and its oral contributions were not denied recognition as acts of cooperation. On the contrary, Chisso had the possibility, and was recognised as having the right, to rely on the fact that the oral and written contributions which it made during the investigation would be taken into account as attenuating circumstances. Nor would Chisso's legitimate expectation have been frustrated if the Commission had applied those principles to Hoechst and if Hoechst had thus been exempted from a fine under one or other Leniency Notice (or under both). In both cases, Hoechst's acts of cooperation ought to have entailed an exemption from the fine whereas Chisso's acts of cooperation, which came about subsequently, ought to have entailed a reduction in the fine.

493 Hoechst concludes that if the Commission was not obliged to grant immunity from a fine under the 1996 Leniency Notice, it ought to have done so in application, by analogy, of the 2002 Leniency Notice.

494 Hoechst further submits that, contrary to the Commission's answer to a question put by the Court, the application of the 2002 Leniency Notice would have allowed it to obtain immunity.

495 First, in Hoechst's contention, in October/November 1998 Chisso did not provide all the documents that could have been submitted. That objection ought therefore not to be addressed solely to Hoechst. In addition, Hoechst states that the Commission officials responsible for the file did not immediately require the submission of the documents declared and submitted later. Nor did they require, at the time, a list of documents that would be submitted later.

496 Second, it is absurd to consider that the material communicated by Hoechst on 29 October 1998 was not sufficient for the purpose of adopting a decision ordering investigations under Article 14(3) of Regulation No 17. Hoechst emphasises, in that

regard, that the Commission was in a position to prove the existence of the cartel without there being any need to order an investigation. As regards the fact that the Commission did not have specific information about the undertakings concerned (in particular the addresses of their offices), Hoechst observes that the Commission sent requests for information to those undertakings. It therefore already knew, at the time and on account of Hoechst's cooperation, to whom to address such requests for information.

b) Arguments of the Commission

497 The Commission contends that the application of the 'most favourable provision' principle presupposes an amendment of the legal basis which determines the imposition of the fine. No amendment of that type took place. In particular, Article 15(2) of Regulation No 17 was not amended by the 2002 Leniency Notice. That notice defines only the criteria for the grant of preferential treatment to certain undertakings wishing to cooperate with the Commission, but does not alter the legal framework which determines the fines to be imposed. In that regard, the Commission refers, by analogy, to *LR AF 1998* v *Commission*, paragraph 422 above (paragraph 233).

498 The Commission also submits that, even though it is bound in the exercise of its discretion by the Leniency Notice in force, it is so bound only while those rules are applicable. The Commission emphasises at this point that those rules create a legitimate expectation on the part of the undertakings concerned. In this case, the undertakings' legitimate expectation that they would be given favourable treatment as a consequence of their cooperation was based solely on the Leniency Notice then in force, namely the 1996 Leniency Notice. In so far as the 1996 Leniency Notice did not create a legitimate expectation solely on the part of Hoechst, the application of the 2002 Leniency Notice is precluded.

499 Nor does the present case concern actual criminal provisions, but provisions capable of justifying the imposition of a penalty. The 'most favourable provisions' principle cannot apply with respect to a Leniency Notice. Both the former and the new

provisions proceed from the principle that immunity can be granted only to a single undertaking. An application of the 'most favourable provision' principle would have the consequence that, where two undertakings entered into unlawful agreements and sought immunity, one undertaking having been the first to cooperate under the 1996 Leniency Notice and the other the first to do so under the 2002 Leniency Notice, both undertakings would have to be granted immunity. That would lead to a complete lack of penalty for both parties to the agreement, which cannot be the object of a Leniency Notice.

500 Furthermore, the present case may be distinguished from the case in which the Commission adopted Decision 1999/210 (paragraph 481 above). At the time, the Commission applied the 1996 Leniency Notice by analogy in the pending proceedings during which the undertakings concerned had cooperated before the publication of that notice. In the present case, according to the Commission, such an approach was not indicated, since the 2002 Leniency Notice itself contains, at paragraph 28, clear guidelines concerning the treatment of transitional cases. Those guidelines ensure that all the undertakings concerned are treated equally.

501 As regards the industrial copper tubes decision, referred to at paragraph 491 above and relied on by Hoechst, the Commission states that it did not apply the 'most favourable provision' principle with respect to the 2002 Leniency Notice. It merely considered, in accordance with Section 3, sixth indent, of the Guidelines, that a circumstance which, under the new regime, justified a particular reward constituted effective cooperation by the undertaking in the proceedings, outside the scope of the 1996 Leniency Notice.

502 The Commission further submits, in answer to a question put by the Court, that even on the hypothesis that the 2002 Leniency Notice was applicable in this case, Hoechst would not have benefited from immunity, or indeed from a greater reduction of the fine imposed on it.

503 As regards immunity from a fine, first, the Commission observes that Hoechst did not provide, in October/November 1998, all the evidence available to it, contrary to paragraph 13(a) of the 2002 Leniency Notice. For the same reasons, paragraph 13(b) of that notice could not apply, since the Commission did not receive a descriptive list accurately reflecting the nature and content of the relevant evidence. In addition, Hoechst ought to have undertaken to disclose that evidence at a 'later agreed date'. Accordingly, in the Commission's submission, in autumn 1998 Hoechst did not satisfy the conditions laid down in paragraph 13 of the 2002 Leniency Notice. On the basis of the finding that Hoechst provided in March and April 1999 all the evidence available to it, it cannot have satisfied the conditions laid down in paragraph 13 of the 2002 Leniency Notice until then. In fact, the Commission already had sufficient evidence to find an infringement of Article 81 EC, which, in light of paragraph 10 of the 2002 Leniency Notice, prevented Hoechst from benefiting from immunity from a fine.

504 Second, in the absence of detailed information concerning the persons who had taken part in the cartel, and also of the location of the offices, the Commission was unable, according to paragraph 8(a) of the 2002 Leniency Notice, to adopt a decision ordering an investigation in the sense of Article 14(3) of Regulation No 17. That applies *a fortiori* because the other undertakings involved were Japanese and because Hoechst stated, furthermore, that there was no indication that the only other European operator had participated in the cartel.

505 Third, the Commission refers to recital 456 to the Decision and contends that at the meeting of 29 October 1998 Hoechst provided an imprecise version of the facts and that it misleadingly emphasised the moderate nature of the cartel. That description cannot be regarded as 'evidence' enabling the Commission to find an infringement of Article 81 EC within the meaning of paragraph 8(b) of the 2002 Leniency Notice.

506 As regards a reduction in the fine, the Commission emphasises that it cannot be greater than 50% under the 2002 Leniency Notice and that it may even be smaller. That reduction takes account of the date and the degree of added value of the evidence in question. On that basis, the Commission maintains that Hoechst's

misleading statement as to the moderate nature of the cartel was used against it and that a reduction of under 50% was granted to it.

3. Findings of the Court

507 As a preliminary point, any application 'by analogy' of the 2002 Leniency Notice must be rejected, since Hoechst's cooperation during the proceedings was governed by the 1996 Leniency Notice. The present situation may be distinguished, in that regard, from the cases referred to by Hoechst in which the 1996 Leniency Notice was applied by analogy to situations which had commenced before the adoption of that notice but which were not subject to any other legal rule.

508 In so far as Hoechst's plea may be taken to raise, in reality, the question as to which provision was applicable at the material time, it is sufficient to state that such a question cannot arise. Paragraph 28 of the 2002 Leniency Notice clearly provides that that notice is to apply from 14 February 2002 for all cases in which no undertaking has sought to 'take advantage of [the 1996 Leniency Notice]'. In this case, the undertakings concerned, including Hoechst, sought to take advantage of the 1996 Leniency Notice.

509 It must be observed, moreover, that the cooperation on the part of the undertakings concerned began at the end of 1998, that is to say at a time when only the 1996 Leniency Notice was applicable, but continued after publication of the 2002 Leniency Notice, as the Commission's last request for information was issued on 13 December 2002. It should be emphasised, furthermore, that it was only at the stage of the adoption of the Decision that the Commission definitively ruled on the cooperation of the undertakings concerned and, in particular, on the question of which undertaking, if any, could benefit from immunity from a fine. Accordingly, the acts of cooperation of the undertakings concerned, in the context of the 1996 Leniency Notice, produced their effects after the adoption of the 2002 Leniency Notice. However, in the case of

legal situations which have not yet exhausted their effects, a new rule applies immediately to the future effects of a situation which arose under the former rule 'in the absence of transitional provisions' (Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 46). As such transitional provisions were in place in this case, it is necessary to take those provisions into account and to consider that the 1996 Leniency Notice was applicable.

510 That conclusion also enables the principles of legal certainty and legitimate expectations to be satisfied. It must be emphasised, in that regard, that a Leniency Notice gives rise to a legitimate expectation in being able to benefit from a certain percentage of reduction (*Dansk Rørindustri and Others* v *Commission*, paragraph 344 above, paragraph 188). Furthermore, regard being had to the wording of section B(b) of the 1996 Leniency Notice, that notice is designed to reward by a very substantial reduction in the fine only the single undertaking which is the 'first' to adduce decisive evidence (see *BASF* v *Commission*, paragraph 120 above, paragraph 550 and the case-law cited).

511 In addition, and without there being any need to determine whether the principle on which Hoechst relies might apply to the Commission's Leniency Notices, it is sufficient to state that the 2002 Leniency Notice is complex, in that it amends the 1996 Leniency Notice on several points, as regards both the substantial rules and the procedural rules. Some amendments are more favourable to the undertakings concerned, while others are less favourable. In addition, the application of the 2002 Leniency Notice varies according to the case. It is not therefore possible to characterise the 2002 Leniency Notice as being more favourable overall than the 1996 Leniency Notice.

512 Furthermore, and specifically, the application of the 2002 Leniency Notice to the present case would not necessarily result in a more favourable result for Hoechst.

513 In that regard, it must be observed that, in order to benefit from immunity from a fine under the 2002 Leniency Notice, the undertaking must 'immediately' provide the Commission with all the evidence relating to the suspected infringement available to

it at the time of the submission, 'or' initially present this evidence in hypothetical terms, in which case the undertaking must present a descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence (paragraph 13(a) and (b) of the 2002 Leniency Notice).

514 In the present case, and for the reasons set out at paragraphs 574 to 578 below, it must be held that Hoechst did not immediately provide all the evidence available to it. Nor is it apparent from the documents in the file that Hoechst provided evidence which allowed the Commission to know the nature and content of the evidence in its possession and which could have been disclosed later.

515 Accordingly, the application of the 2002 Leniency Notice to the present case would not necessarily have led to a reduction in Hoechst's fine.

516 Furthermore, and in so far as the 2002 Leniency Notice provides, in addition to immunity, for a reduction in the fine of up to 50%, its application would not necessarily have led to a greater reduction in Hoechst's fine than that already granted.

517 For all of those reasons, the 10th plea must be rejected.

G — *The eighth and ninth pleas, relating to the application of the Leniency Notice*

518 By its eighth plea, Hoechst maintains that the Commission made an error of assessment in determining the undertaking which was the first to cooperate in this case. By

its ninth plea, Hoechst contends that the Commission erred in assessing the content of its cooperation.

519 The Court will examine the eighth plea first.

1. Summary of the Decision

520 At section 12.2.3 of the Decision, relating to the application of the 1996 Leniency Notice, the following statement is to be found (recital 440 to the Decision):

'At a meeting held on 13 November 1998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence … The Commission considers that on that occasion Chisso was the first undertaking to adduce decisive evidence on the existence of the cartel which is found in this Decision. The evidence handed over to the Commission on 13 November 1998 consisted, in particular, of handwritten notes on a number of cartel meetings. The oral description of the cartel's activities allowed the Commission to put the documents in their real context. The information provided by Chisso enabled the Commission to establish the existence, content and the participants of most of the cartel meetings, as described in Part I.'

521 As regards Hoechst, it is stated at recital 451 to the Decision that '[a]lthough it was not the first company to provide the Commission with decisive evidence, [Hoechst] contributed, at an early stage, to establishing important aspects of the case and, after having received the statement of objections, it did not substantially contest the facts on which the Commission based its allegations'.

2. Arguments of the parties

a) Arguments of Hoechst

522 While accepting that the 1996 Leniency Notice was applicable, Hoechst contends that it ought to have been considered the first undertaking to have cooperated with the Commission and to have provided the essential evidence of the cartel.

523 Hoechst carries out a chronological analysis of the facts and submits that Chisso's lawyers met the Commission on 29 September 1998, in connection with another case. It is apparent from the minute of that meeting that Chisso's lawyers mentioned that they also represented another undertaking which had expressed its desire to cooperate with the Commission concerning a cartel relating to sorbic acid.

524 However, Chisso's lawyers were not prepared, or authorised, to disclose the identity of that undertaking on that date. That is apparent, in particular, from the two Commission internal memos dated 1 and 2 October 1998. The fact that the author of the internal memos joined the meeting after it had begun does not permit the conclusion that Chisso's identity had been disclosed beforehand, in particular to the Commission's then Deputy Director-General for Competition. Furthermore, the reference to another undertaking in the internal memo of 2 October 1998 is not a typographical error on the Commission's part and therefore does not refer, in fact, to Chisso.

525 Hoechst also contends that no request was formulated, on that date, that satisfied the requirements of Section E.1 of the 1996 Leniency Notice, and that no evidence was offered or handed over at that meeting. Furthermore, no aspect of the infringement was described and the names of the participating undertakings were not even provided.

526 On 23 October 1998, the lawyers representing Hoechst and Nutrinova contacted the Commission by telephone in order to request a meeting.

527 On 29 October 1998, during the meeting with the Commission, the lawyers representing Hoechst and Nutrinova formally requested that the undertakings which they represented be treated as principle witnesses of the cooperation. In that context, they described the essential aspects of the sorbates cartel, namely the relevant products, the undertakings involved, the anti-competitive conduct and the period in question. That oral description of the essential facts was then accepted by the Commission as an act of cooperation. A comparison with the subsequent findings of the Decision shows that the information provided by Hoechst on that date had been used without restriction in the Decision. In particular, the Commission made no findings in the Decision concerning the structure of the cartel that were fundamentally different from the information provided by Hoechst on 29 October 1998.

528 On 13 November 1998, Chisso's lawyers gave, for the first time, an oral account of the sorbates cartel. It was only on that date that Chisso's identity was disclosed.

529 Hoechst subsequently sent a number of written communications to the Commission, namely in December 1998, March and April 1999 and till later on various occasions. Hoechst's contribution of 19 March 1999 was the first written contribution confirming, in the form of a 'company statement', the constituent elements of the cartel.

530 The first company statement from Chisso was not made until 20 April 1999. None of the other undertakings which participated in the infringement contacted the Commission during that first stage of the procedure.

531 Those facts show that Hoechst was the first to provide the Commission with 'decisive evidence' within the meaning of the 1996 Leniency Notice, and it did so orally.

532 Hoechst adds that it is consistent with the Commission's practice for an undertaking to be regarded as being the first to cooperate, even if it initially provides oral evidence, provided that that evidence satisfies the 'decisive evidence' criterion and that it is then confirmed in writing and supplemented. That oral evidence already enables the Commission to carry out an inquiry and to undertake inspections or send requests for information. The written form of cooperation is not required either by the 1996 Leniency Notice or by the 2002 Leniency Notice.

533 Hoechst contends at this point that the Commission has been obstructive in so far as, first, it promised to warn Chisso if any other undertakings should overtake it and, second, it abruptly refused to recognise the oral contributions as acts of cooperation, thus going back on its earlier approach. Hoechst refers, on the latter point, to the Commission's letter of 19 January 1999 in which it considered that Hoechst had ceased to cooperate, to Hoechst's letter of 28 January 1999 expressing its incomprehension on that matter, to the telephone interview of 5 March 1999 during which the Commission indicated that the time for 'inconclusive' meetings was over, and also to the Commission's letter of 29 March 1999 in which it refused to receive oral testimony from Hoechst. That approach constitutes a breach of the right to a fair hearing and of the principle of sound administration. Hoechst also observes that since then the Commission's practice has been to accept undertakings' requests and acts of cooperation in oral form. The Commission's approach also gives an impression of unfairness in so far as, on the contrary, Chisso's oral testimony was accepted.

534 In any event, even if the Commission — contrary to its then practice and to its more recent practice — were to consider only the written information, Hoechst's written communication of 19 March 1999 was the first written document submitted on behalf of an undertaking and confirming information given orally.

535 The production of minutes of meetings by Chisso on 13 November 1998 cannot be characterised as the first written cooperation, since those documents are incomprehensible and make sense only by reference to the account of the facts first provided by Hoechst on 29 October 1998. The lack of probative force of the documents provided by Chisso is also apparent from the fact that the Commission considered it necessary to conduct a further hearing of Chisso's employees on 9 December 1998. Furthermore, the minutes provided by Chisso refer to only some meetings in 1995 and 1996. For the longer period from 1978 to 1994, Chisso did not submit any written document on 13 November 1998. In addition, that 'evidence' is not used in the Decision to establish the activity of the cartel and is therefore not 'decisive'.

536 Hoechst emphasises, in that regard, that in a Commission internal memo of 9 November 1998, communicated in the context of access to the file, it is stated that Chisso's lawyers 'were the first to offer their cooperation and were then overtaken by subsequent events in which other undertakings provided useful information before them'.

537 Hoechst further submits that the Commission cannot criticise it on the ground that the explanations provided on the agreements differ on certain points from those used in the Decision and at the same time accept that the information provided by Chisso, which thereby obtained immunity, does not cover the entire infringement period or all the details of the cartel.

b) Arguments of the Commission

538 The Commission emphasises primarily, as regards its internal memo of 9 November 1998 on which Hoechst relies, that the Commission officials' informal assessment at an early stage of the proceedings cannot prejudge the decision adopted by the Commission itself.

539 For the remainder, the Commission takes pains to correct the way in which Hoechst describes the course of the events in this case.

540 First, as regards the meeting of 29 September 1998 — which concerned two cases, including the sorbates case, and which was held between 16.30 and 18.30 —, the Commission asserts that the lawyers were acting on behalf of Chisso, as may be seen from recital 4 to the Decision.

541 The Commission observes, in that regard, that there are two internal memos relating to that meeting.

542 As regards, the internal memo dated 2 October 1998, relating to a meeting on sorbic acid, the Commission states that the Commission's then Deputy Director-General for Competition met Chisso's lawyers between 16.30 and 17.30. The Commission also observes that that internal memo mentions the 'company Chisso'. That proves that Chisso's lawyers referred to their client by name. Had they not done so, the author of the memo would not have been made aware of the identity of that undertaking. The fact that the internal memo of 2 October 1998 makes reference to an 'undertaking unknown' is not inconsistent. That indicates solely the reference under which the meeting with the lawyers had been agreed. Furthermore, the fact that that memo mentions another undertaking involved in the context of another procedure is a mere typographical error. The undertaking referred to was really Chisso.

543 As regards the internal memo dated 1 October 1998 (which covers two cases, including the sorbic acid case), the Commission emphasises that two officials joined the meeting from 17.30. The explanation for the fact that that internal memo mentions that the undertaking wishing to provide information on a cartel in the sorbates sector was not identified lies in the fact that Chisso was not named before the two officials concerned, one of whom is the author of the internal memo.

544 Second, it is incorrect to assert that Hoechst described the main aspects of the sorbates cartel at the meeting of 29 October 1998. Hoechst itself stated in a letter of 27 October 1998, moreover, that it proposed a 'first discussion designed to clarify the other details'. According to the Commission's internal memo of 6 November 1998, Hoechst stated at the beginning of the meeting that it needed more time to obtain information in sufficient detail, in order to supply full information.

545 The information provided by Hoechst at that meeting of 29 October 1998 was very general and the facts were described in very vague terms. Furthermore, Hoechst mentioned half-yearly meetings at which no specific agreement had been concluded. It also referred to the informal and social nature of the meetings (recital 456 to the Decision).

546 In the relevant part of the section of the Decision devoted to the description of the events (recitals 79 to 251), the Commission did not refer once to the statements made by Hoechst on 29 October 1998. Hoechst's comments concerning the agreements also differed considerably from the facts indicated in the Decision.

547 Third, the Commission contends that Hoechst was not ready to cooperate fully until 19 March 1999. That is clear from the letters of 21 December 1998 and 28 January 1999 in which Hoechst informed the Commission that, owing to the criminal and civil proceedings pending in the United States, it had decided not to provide all the useful information at that time, or the documents or evidence of the cartel available to it. In the letter of 19 January 1999, the Commission stated however that that attitude constituted a refusal to cooperate within the meaning of the 1996 Leniency Notice. In acting as it did, Hoechst assumed the risk of being fined.

548 Contrary to what Hoechst appears to contend, the Commission emphasises that the failure to take the oral contributions into account was not inconsistent with the practice observed at the time. That practice changed only after the adoption of the 2002 Leniency Notice.

549 Furthermore, as regards the objection relating to obstruction during the proceedings, the Commission emphasises that, in its letter of 29 March 1999, on which Hoechst relies, it stated that if Hoechst wished to benefit from the 1996 Leniency Notice it must at least provide information, documents or other evidence contributing to establishing the existence of the cartel. Those words are the words of Section D, paragraph 2, first indent, of the 1996 Leniency Notice. The letter of 29 March 1999 therefore indicates that, in the Commission officials' view, Hoechst did not thus far even fulfil the conditions of that first indent. The minute drawn up by Hoechst's lawyers of certain parts of the telephone conversation of 5 March 1999 with the Commission official responsible for the case does not indicate otherwise. That does not constitute obstruction, but provides a true account of the situation in accordance with the 1996 Leniency Notice.

550 Fourth, the Commission submits that it is incorrect to assert that Chisso handed over a small number of documents at the meeting of 13 November 1998. In the internal memo of 19 November 1998, the Commission refers to several documents relating to contacts between competitors in 1995 and 1996. Those documents are agenda of meetings and personal notes. Furthermore, Chisso submitted tables with the target prices agreed for the entire period of the cartel. That written evidence, which was also explained orally, assumed decisive importance for the Commission in the adoption of the Decision (recital 440 to the Decision), since, for the first time during the administrative procedure, they made it possible to prove the infringement, even though that evidence did not cover all the period found or all the details of the cartel. It cannot be inferred from the promise given to Chisso at that meeting to warn it that that undertaking did not yet satisfy the conditions to benefit from immunity. The very most that can be inferred is that it was not certain that Chisso would obtain immunity on the basis of its acts of cooperation at that time.

551 On the other hand, it was not until 19 March 1999 that Hoechst provided the Commission with information that might be regarded as the beginning of effective cooperation. However, the written communication of 19 March 1999 does not contain a detailed description of the meetings and procedures of the cartel. Hoechst did not provide those details until 28 April 1999, in answer to specific questions from the Commission.

3. Findings of the Court

552 It must be borne in mind that Section B of the 1996 Leniency Notice provides, among other conditions, that the undertaking which 'is the first to adduce decisive evidence of the cartel's existence' (Section B(b) of the 1996 Leniency Notice) will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if it had not cooperated.

553 It follows from the very wording of Section B(b) of the 1996 Leniency Notice that the 'first' undertaking is not required to have provided all the evidence proving all the details of the functioning of the cartel, but that it is sufficient for it to adduce 'decisive evidence'. That text does not require that the evidence adduced is in itself 'sufficient' for the purpose of drafting a statement of objections, or indeed for the adoption of a final decision finding an infringement (judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 362). However, although the evidence referred to in Section B(b) of the 1996 Leniency Notice need not necessarily be sufficient in itself to establish the existence of the cartel, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement (*BASF* v *Commission*, paragraph 120 above, paragraph 493).

554 It must be further emphasised that decisive evidence within the meaning of Section B(b) of the 1996 Leniency Notice may also be adduced orally (*BASF* v *Commission*, paragraph 120 above, paragraph 506).

555 Last, it must be borne in mind that the Commission has a certain discretion in determining whether the cooperation in question was 'decisive' in facilitating its task of finding the existence of an infringement and putting an end to it and it is only where it manifestly exceeds that discretion that it may be criticised (judgment of 15 June 2005 in *Tokai Carbon and Others* v *Commission*, paragraph 118 above, paragraph 362).

556 It is in the light of the foregoing considerations that the Court must examine whether, in this case, the Commission made a manifest error of assessment in finding that Chisso had been the first undertaking to adduce decisive evidence of the cartel's existence.

557 In that regard, it must be borne in mind that, at recital 440 to the Decision, the Commission states that '[a]t a meeting held on 13 November 1998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence' and that it 'considers that on that occasion Chisso was the first undertaking to adduce decisive evidence [of] the existence of the cartel which is found in this Decision'. It follows that the Commission relied solely on the oral description of the cartel's activities and on the documentary evidence provided at the meeting of 13 November 1998, and not later, in order to find that Chisso had been the first undertaking to adduce decisive evidence of the cartel's existence.

558 Second, it must be observed that, at the meeting of 13 November 1998, Chisso provided a detailed oral description of the cartel's activities. It follows from the minute of that meeting, drawn up by the Commission, that Chisso stated who were the participants in the cartel, the duration of the cartel, 19 dates of meetings and the places at which they were held, the object and the functioning of the cartel. On the last two points, Chisso stated, in particular, that the undertakings concerned had concluded agreements on prices and volumes of sorbates and that, while the cartel was in force, they were aware that their activities were unlawful. Chisso also described the method of fixing quotas and any problems encountered, the conduct of the meetings and the preparatory meetings between the Japanese producers, the names of Chisso's employees who had participated in the meetings and the names of certain employees of the other undertakings concerned, the terms of the contacts between Hoechst and Daicel and the system of monitoring the meetings and the method of setting target prices.

559 Third, it must be emphasised that, in addition to a detailed oral description of the cartel's activities, Chisso also provided at the meeting of 13 November 1998 documentary evidence which is found in the case-file (156 pages in all). More particularly, Chisso sent detailed notes (handwritten in Japanese with a translation into English) taken at the cartel meetings in spring and autumn 1995 and 1996 (which reflected

the level of target prices fixed between the members of the cartel), the agenda of those meetings, the visiting cards of the persons who participated in the meetings and the sales quota volumes agreed for 1992 to 1995.

560 Contrary to Hoechst's contention, those documents were used by the Commission, since a number of pages are referred to in the Decision, in connection, in particular, with the conduct of and the actual results of the joint meetings (see, in particular, footnotes 82, 140, 141, 144 and 150 to the Decision). Accordingly, those documents were relevant for the purpose of proving, for the purposes of the 1996 Leniency Notice, the 'cartel's existence'.

561 In addition, contrary to Hoechst's contention, those documents were sufficiently clear, in spite of the fact that an employee of Chisso who had participated in the joint meetings provided further information about them at a meeting held with the Commission's services on 9 December 1998. As shown in the minute of that meeting drawn up by the Commission, the information relating to those documents was provided not with a view to their general comprehension but in order to explain certain details connected, in particular, with the use of abbreviations.

562 Fourth, it must be observed that Hoechst met the Commission's services on 29 October 1998, that is to say before Chisso, to provide an oral description of the meetings in question. In particular, Hoechst mentioned the participants in the meetings, the approximate duration of the meetings (from the end of the 1970s/beginning of the 1980s until 1995/1996), the frequency of the meetings and their object.

563 However, it must be emphasised that at that meeting Hoechst provided no written document to support its statements. In that regard, according to the minute drawn up by the Commission and not contested by Hoechst, Hoechst's representative mentioned 'the great difficulties which Nutrinova had in finding all the relevant details of those meetings'.

564 In the same minute, moreover, it is stated that 'the object of those meetings was to share customers or fix prices, within the strict meaning of the word' and that 'no monitoring system existed' or again that Hoechst's lawyer 'was categoric about the fact that the level of the agreements at those meetings was moderate and not typical of a price-fixing or market-sharing cartel'.

565 Likewise, in the minute of the meeting of 29 October 1998 drawn up by Hoechst, it is stated that 'the discussions between Hoechst/Nutrinova and the Japanese were not about customer-sharing, agreements on calls for tenders or price-fixing in the strict sense of the term'.

566 At no time during the meeting of 29 October 1998 did Hoechst state that the joint meetings had the object of allocating sales volume quotas for Europe to the undertakings concerned, or that a system for monitoring the meetings had been set up, as was concluded in the Decision, in Article 1 of the operative part, on the basis of the statement of objections, without those elements being disputed by Hoechst. As regards the sales quotas, Hoechst mentioned only in the minute referred to above, under the heading 'rate of increase', that 'competitors had discussions on the way in which they see market growth and which would be capable of supplying increased demand'.

567 Last, Hoechst stated in its minute of the meeting of 29 October 1998 that 'the meetings were not organised systematically and that the agenda were very similar'.

568 It follows from all of those factors that, first, at the meeting of 13 November 1998 Chisso provided a detailed description of the activities and functioning of the cartel. Second, Chisso's description was supported by documentary evidence which was relevant for the purpose of proving the cartel's existence. Third, it follows from the meeting of 29 October 1998 that Hoechst did indeed give an account of the meetings in question, but that that account was less detailed than Chisso's, it did not

accurately reflect the object and the functioning of the cartel in issue and, last, it was not supported by any documentary evidence.

569 In the light of the foregoing, it must be concluded that the Commission did not make a manifest error of assessment when it considered that Chisso had been the first undertaking to adduce decisive evidence of the existence of the cartel.

570 None of the arguments put forward by Hoechst can upset that conclusion.

571 As regards the fact that the Commission promised Chisso at the meeting of 13 November 1998 that it would warn it if any other undertakings were overtaking it, and as already stated in the context of the analysis of the first plea, that fact cannot affect the finding of fact that Chisso was, on the occasion of that meeting, the first undertaking to adduce decisive evidence of the existence of the cartel.

572 As regards the fact that the Commission bluntly refused to recognise Hoechst's oral contributions as acts of cooperation, in particular the evidence provided by Hoechst during the meeting of 29 October 1998, it must be observed that, at recital 5 to the Decision, the Commission expressly states that at a meeting on 29 October 1998 between the legal representatives of Hoechst and Nutrinova and the Commission services, an oral description of the product market, the producers, market shares, the proceedings in the United States and the cartel's activity was provided. At no point in the Decision is it stated that Hoechst's oral contribution at the meeting of 29 October 1998 was not taken into account. The fact that the Commission was able to take the view, at a particular time during the proceedings, that Hoechst's cooperation did not satisfy the requirements of the 1996 Leniency Notice does not alter the finding that Hoechst's oral contribution at the meeting of 29 October 1998 was ultimately taken into account in the context of the Decision.

573 In any event, it must be observed that Hoechst refers in its written submissions to a letter from the Commission dated 19 January 1999 in which the Commission stated:

'The Commission services can only take note that your position has been reversed and that Nutrinova does not now intend to cooperate in the terms of [the 1996 Leniency Notice] … Such information on sorbates as has been delivered by Nutrinova to date cannot be considered to have been provided within the framework of this Notice.'

574 It must be observed in that regard that at the meeting with the Commission's services on 29 October 1998 Hoechst hoped to be able to provide a written contribution by the end of 1998. However, in a letter of 21 December 1998, to which the Commission specifically responds in the letter of 19 January 1999, Hoechst stated, in addition to the fact that cooperation by means of oral testimony could not be contemplated, the following:

'Unfortunately, we cannot keep our promise of providing you with a full report of the facts by the end of this year … With the proceedings in the [United States] remaining open, we have been advised by [United States] counsel that a full disclosure to the Commission as initially contemplated in our discussions in October would seriously compromise the interests of Nutrinova (and certain individuals) in the [United States].'

575 It follows that Hoechst clearly indicated that at that stage of the proceedings it was unable to cooperate further with the Commission, whether in the form of written cooperation or by oral testimony. In those circumstances, the Commission cannot be criticised for having taken the view, at that stage of the proceedings, that Hoechst was not fully cooperating and that, accordingly, the previous acts of cooperation could, where appropriate, be considered insufficient in the context of the 1996 Leniency Notice.

576 Hoechst's position was subsequently reiterated in a letter of 28 January 1999, in which it stated:

'Nutrinova whilst wishing to cooperate fully and immediately with the Commission cannot do so at present without creating serious and unbearable risks for itself and its current and/or former employees under [United States] law.'

577 The fact that the Commission, in a telephone conversation on 5 March 1999 or by letter dated 29 March 1999, stated that a new oral contribution would not be sufficient was the result of uncertainty as to Hoechst's cooperation at that stage of the proceedings and was intended to draw Hoechst's attention to the fact that, in order to benefit from the 1996 Leniency Notice, it must adduce further probative evidence of the existence of the cartel.

578 It follows from those considerations that, in the Decision, the Commission ultimately accepts Hoechst's oral contributions as acts of cooperation and that, in any event, the Commission's position during the administrative procedure was the result of uncertainty as to Hoechst's effective cooperation at the beginning of the proceedings, Hoechst having stated, initially, that it could not be contemplated that its employees would provide testimony before the Commission.

579 For all of those reasons, the arguments put forward in the context of the eighth plea must be rejected.

580 In those circumstances, there is no need to examine Hoechst's ninth plea, since, as it was not the first undertaking to adduce decisive evidence of the existence of the cartel, Hoechst could not expect to obtain a greater reduction in its fine than that granted under Section D of the 1996 Leniency Notice, namely 50% of the amount of the fine that would have been imposed if it had not cooperated.

581 However, it must be observed that certain procedural irregularities can sometimes justify a reduction in the fine even though they cannot lead to the annulment of the contested decision (see, to that effect, *Baustahlgewebe* v *Commission*, paragraph 211 above, paragraphs 26 to 48, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 216 above, paragraphs 436 to 438).

582 In this case, it is necessary to take account of the breach of the principles of sound administration and equal treatment in the application of the 1996 Leniency Notice, established at paragraph 137 above, and on which Hoechst also relied in the eighth and ninth pleas. Accordingly, in light of the importance of the observance by the Commission of those principles in administrative procedures, and in the exercise of its unlimited jurisdiction, the Court decides to reduce the fine imposed on Hoechst by 10%.

583 The specific consequences of that adjustment will be determined below.

H — *The 11th plea, alleging breach of the principle* non bis in idem

1. Summary of the Decision

584 At recitals 314 to 316 to the Decision, the Commission states, in substance, that the exercise by the United States (or any non-member country) of its jurisdiction against a cartel can in no way limit or exclude the Commission's jurisdiction under Community competition law. More importantly, the Commission has no intention in any event of imposing penalties on the undertakings concerned for the same facts as the United States and Canadian authorities. Likewise, the proceedings conducted and the sanctions imposed by the Commission, on the one hand, and the United States and Canadian authorities, on the other hand, clearly do not pursue the same objectives.

2. Arguments of the parties

a) Arguments of Hoechst

585 Hoechst contends that the Commission breached the principle *non bis in idem* when, at recital 315 to the Decision, it considered that it was not required to deduct the penalty imposed in the United States in the same case. Hoechst asserts that the Commission expressed the view that, in any event, the principle *non bis in idem* cannot be applied in the context of the relationship between Community law and United States law on cartels. In Hoechst's submission, no judgment to date has stated that the principle *non bis in idem* could never be applied in such circumstances.

586 More specifically, Hoechst infers from the grounds of the judgment in Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281 that the principle *non bis in idem* is applicable in the context of the relationship between Community law and United States law on cartels. Furthermore, the second sentence of the summary of the judgment in that case states that '[t]he fact that the Commission takes into account a penalty imposed by the authorities of a third State presupposes that the facts established against the undertaking accused by the Commission, on the one hand, and the authorities of the third State in question, on the other, are identical'.

587 In the present case, the Commission does not dispute that the penalties imposed on Hoechst in the United States concerned a situation of fact identical to that forming the basis of the Decision. In that regard, in the Decision, the Commission makes no comment on the elements of the joint meetings and the agreements which related to non-European markets. However, at recitals 4, 65 to 72, 81, 90, 92, 100, 107, 120, 121, 138, 217, 232, 246, 349, 352, 397 and 450 to the Decision the Commission clearly indicates that the infringement was a single infringement.

588 If the Commission should dispute the existence of an '*idem*' in the present case, Hoechst offers, as proof, the agreement concluded with the United States Department of Justice on 3 May 1999 and requests that the prosecutor responsible for the

case in the United States and another individual who could be called by Hoechst's intermediary be called as witnesses.

589 In any event, Hoechst maintains that the penalty imposed in the United States must be deducted on grounds of fairness, in application of the principle of 'natural justice' which has applied since the *Wilhelm* decision (Case 14/68 *Wilhelm and Others* [1969] ECR 1).

b) Arguments of the Commission

590 First of all, the Commission observes that Hoechst no longer appears to wish to raise the issue of the penalty imposed by Canada, but only that imposed by the United States.

591 Next, referring in particular to *Aalborg Portland and Others* v *Commission*, paragraph 145 above (paragraph 338), the Commission states that the application of the principle *non bis in idem* is subject to a threefold condition, namely identity of the facts, identity of the offender and identity of the protected legal asset. That principle therefore precludes the same person being penalised more than once for the same unlawful conduct in order to protect the same legal asset.

592 In the present case, neither the facts nor the protected legal asset are identical.

593 As regards the facts, paragraph 4(d) of the plea agreement concluded with the United States Department of Justice on 3 May 1999 states expressly that the sorbates affected by that cartel were sold by Hoechst or its subsidiaries, and by other members of the cartel, to customers in the Northern District of California. It follows that the act penalised by the plea agreement is not the collusive agreement per se but

its implementation in the United States. The Commission observes in that regard that the principle of territoriality applies both in United States law and in European law on cartels. It does not follow from the plea agreement between Hoechst and the United States that it also covers the implementing measures and the effects of the collusive agreement outside the country, and in particular in the EEA. The finding made at recital 315 to the Decision is therefore correct. Furthermore, *Boehringer Mannheim* v *Commission*, paragraph 586 above, also establishes that there is no breach of the principle *non bis in idem* when there is no identity of the facts in such a situation.

594 As regards the protected legal asset, the Commission refers to recital 316 to the Decision and to Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 (paragraph 90), and submits that the procedures and penalties of the Community authorities and those of the United States authorities do not have the same objective. While in the former case the aim is to protect undistorted competition on the territory of the European Union or in the EEA, in the latter case the protection sought concerns the United States market.

595 The Commission observes, moreover, that in the judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above (paragraphs 130 to 148), the Court expressly stated that it was permissible for the Commission to impose a fine within the limits set by Article 15(2) of Regulation No 17 without being required to take account of the corresponding United States penalties when determining those limits. Those considerations apply to the present case.

596 The Commission adds, in the interest of completeness, that no consideration of fairness argues in favour of the deduction of the United States penalty. A situation such as that which led the Court of Justice, in *Wilhelm and Others*, paragraph 589 above (paragraph 11), to take account, in Community law, of the first penalties imposed by taking guidance from Article 90(2) CS, in light of the close interdependence between the national markets of the Member States and the common market, does not exist in relations between the European Union and the United States (the Commission refers, in that regard, to *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 594, paragraph 99).

3. Findings of the Court

597 As a preliminary point, it should be noted that the present plea was raised solely with respect to the fact that the fine imposed in the United States was not deducted from the fine imposed in the Community. It must therefore be considered that the present plea does not concern the fine imposed in Canada.

598 The principle *non bis in idem*, which is also enshrined in Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, is a fundamental principle of Community law, compliance with which the Courts ensure (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 26).

599 Furthermore, far from having decided the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member State where the facts with which the Commission charges an undertaking are the same as those alleged by those authorities, the Court regarded the identity of the facts alleged by the Commission and the authorities of the non-member State as a precondition of that question (see, to that effect, Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraphs 48 and 49, and *SGL Carbon* v *Commission*, paragraph 598 above, paragraph 27).

600 More specifically, the Court of Justice recalled that the application of the principle *non bis in idem* was subject to a threefold condition of identity of the facts, unity of the offender and unity of the protected legal interest. That principle therefore precludes a penalty being imposed on the same person more than once for the same unlawful conduct for the purpose of protecting the same legal asset (*Aalborg Portland and Others* v *Commission*, paragraph 145 above, paragraph 338).

601 In that regard, it must be emphasised that the principle *non bis in idem* does not apply to situations in which the legal orders and the competition authorities of

non-member States intervened in the exercise of their own powers (see, to that effect, *SGL Carbon* v *Commission*, paragraph 598 above, paragraph 32).

602 In the present case, even though at certain recitals to the Decision highlighted by Hoechst the Commission states that the facts in question have their origin in the same set of agreements and that the sorbates market could be assessed at world-wide level, first, it must be observed that the application of Community law on cartels presupposes the existence of an agreement, decision or concerted practice 'capable of affecting trade between Member States' or 'between the Contracting Parties' to the EEA Agreement and of 'preventing, restricting or distorting competition within the common market' or within the 'territory' covered by the EEA Agreement (Article 81(1) EC and Article 53(1) of the EEA Agreement). The Commission's action is thus intended to safeguard free competition within the common market, which, under Article 3(1)(g) EC, is a fundamental objective of the Community (see, to that effect, *SGL Carbon* v *Commission*, paragraph 598 above, paragraph 31). The Commission concludes, in that regard, that the anti-competitive conduct at issue had the object and the effect of restricting competition within the Community and the EEA (recitals 280 to 288 to the Decision) and on that basis, in Article 1 of the operative part of the Decision, the Commission finds that the undertakings concerned infringed Article 81(1) EC and, from 1 January 1994, Article 53(1) of the EEA Agreement.

603 Furthermore, although it is clear from the plea agreement concluded on 3 May 1999 between Hoechst and the United States Department of Justice that the facts concerned an agreement covering sorbates sold 'in the United States and elsewhere', it must be borne in mind, first, that the plea agreement also states that the sorbates concerned were sold by Hoechst or its subsidiaries to customers in the Northern District of California and, second, that it has in no way been shown that the proceedings in the United States related to the application of the cartel or its effects other than in the United States, and in the EEA in particular, which, moreover, would have clearly encroached on the territorial jurisdiction of the Commission (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 594 above, paragraph 103, and judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 165 above, paragraph 143).

604 Accordingly, the decisions of the United States and the Community competition authorities differ, in this case, as to the legal interest protected.

605 In those circumstances, the principle *non bis in idem* is not applicable. For the same reasons, considerations relating to fairness, which in Hoechst's submission mean that the fine imposed in the United States must be taken into account in the determination of the fine imposed by the Commission, must be rejected. Furthermore, as the Court considers that it has sufficient information from the documents in the file, there is no need to grant Hoechst's request to call witnesses.

606 For all of those reasons, the 11th plea must be rejected.

IV — *The final amount of the fine imposed on Hoechst*

607 As follows from paragraphs 420 to 439 above, the Decision must be varied in that it takes Hoechst's role as a leader into account as an aggravating circumstance.

608 Furthermore, as follows from paragraph 582 above, and in order to take account of the breach of the principles of sound administration and equal treatment in the context of the application of the 1996 Leniency Notice set out at paragraph 137 above, Hoechst's fine should be reduced by 10%.

609 For the remainder, the Commission's considerations in the Decision, and the calculation method which it applied, remain unaltered.

610 The final amount of the fine imposed on the applicant is therefore calculated as follows: the starting amount of the fine (EUR 20 million) is increased by 100% to reflect Hoechst's size and overall resources in 1995 and 2002, giving a total of EUR 40 million. In order to take account of the duration of the infringement, that amount is increased by 175%. The basic amount of the fine is therefore EUR 110 million. That basic amount of the fine is increased by 50% to take account of Hoechst's repeated infringement, giving a total amount of EUR 165 million. Last, that total amount is reduced by 50% under the 1996 Leniency Notice, that is to say, by EUR 82.5 million, and then by 10% to take account of the breach of the principles of sound administration and equal treatment in the context of the application of the 1996 Leniency Notice established at paragraph 137 above, which brings the final amount of the fine to EUR 74.25 million.

Costs

611 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs. In the circumstances of the present case, the Court decides that each party must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Sets the amount of the fine imposed on Hoechst GmbH at EUR 74.25 million;

2. Dismisses the remainder of the action;

3. Orders the parties to bear their own costs.

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 18 June 2008.

E. Coulon M. Vilaras

Registrar for the President

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