# OPINION OF ADVOCATE GENERAL
# BOT
## delivered on 1 March 2007 [1]

1. This case relates to the appeal brought by Britannia Alloys & Chemicals Ltd ('Britannia' or the 'appellant') against the judgment of the Court of First Instance of the European Communities delivered on 29 November 2005 in *Britannia Alloys & Chemicals* v *Commission* (the 'judgment under appeal'). [2]

2. In the judgment under appeal the Court of First Instance dismissed the action for annulment brought by the appellant against Commission Decision 2003/437/EC, [3] which imposed penalties on Britannia, under Article 81(1) EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, 'the EEA Agreement'), for having participated in a continuing agreement and/or concerted practice in the zinc phosphate sector. In support of that action, the appellant alleged infringement of Article 15(2) of Council Regulation No 17 [4] and infringement of the principles of proportionality, equal treatment and legal certainty. Britannia complained that, for the purpose of determining the upper limit on the fine imposed on the company, the Commission of the European Communities had taken account of its turnover for a business year other than the one preceding the adoption of the contested decision.

3. In the present appeal the appellant maintains, in essence, that the Court of First Instance committed various errors in law by holding that the Commission could apply such a method of calculation. It asks the Court to rule whether, in so doing, the Court of First Instance infringed Article 15(2) of Regulation No 17 and the principles of equal treatment and legal certainty in the judgment under appeal.

1 — Original language: French.

2 — Case T-33/02 [2005] ECR II-4973.

3 — Decision of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1) (the 'contested decision').

4 — Regulation of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), as amended by Council Regulation (EC) No 1216/1999 of 10 June 1999 (OJ 1999 L 148, p. 5). It should be noted that this regulation has been replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

4. In this Opinion I shall argue that the Court of First Instance did not err in law in deciding that the Commission was entitled, for the purpose of calculating the maximum amount of the fine applicable to the appellant, to take a business year other than the one preceding the adoption of the contested decision.

5. On the other hand, I shall conclude that the Court of First Instance failed in its obligation to state reasons pursuant to Articles 36 and 53 of the Statute of the Court of Justice by not responding to an argument raised by the appellant in the action for annulment before it. Consequently, I shall propose that the Court of Justice set aside the judgment under appeal insofar as this point is concerned. As the action has reached a stage at which it can be decided, I shall invite the Court to dispose of the case and to give final judgment on the plea for annulment raised at first instance. I shall maintain that this plea is unfounded and, in the light of the facts already found by the Court of First Instance in the judgment under appeal, I shall propose that the Court dismiss the appeal brought by Britannia.

## I — Legal background

6. Article 81 EC prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

7. If that provision is infringed, the Commission may, pursuant to Article 15(2) of Regulation No 17, 'impose on undertakings or associations of undertakings fines of from [EUR 1 000] to [EUR 1 million], or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement'.

8. In order to ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, in 1998 the Commission published guidelines defining the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17. [5]

5 — 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').

9. Section 1 of the Guidelines provides that, for calculating the amount of fines, the basic amount will be determined according to the criteria referred to in that provision, namely the gravity and duration of the infringement.

10. 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 (Section 1 A, first paragraph, of the Guidelines). In this connection, infringements will be put into one of three categories: 'minor infringements', for which the likely fines are between EUR 1 000 and EUR 1 million; 'serious infringements', for which the fine may range from EUR 1 million to EUR 20 million; and 'very serious infringements', for which the fine exceeds EUR 20 million (Section 1 A, second paragraph, first to third indents). Within each of these categories, and in particular as far as 'serious' and 'very serious' infringements are concerned, the scale of fines makes it possible to apply differential treatment to undertakings according to the nature of the infringement committed (Section 1 A, third paragraph). It is also 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).

11. Account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (Section 1 A, fifth paragraph).

12. The Commission may, in some cases, apply weightings to the amounts determined within each of the three categories described above in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type, thus adjusting the basic amount according to the specific character of each undertaking (Section 1 A, sixth paragraph).

13. As regards the duration of the infringement, the Guidelines make a distinction between 'infringements of short duration' (in general, less than one year), for which the amount determined for gravity should not be increased, 'infringements of medium duration' (in general, one to five years), for which the amount may be increased by up to 50%, and 'infringements of long duration' (in

general, more than five years), for which the amount in question may be increased by up to 10% per year (Section 1 B, first paragraph, first to third indents).

14. The Guidelines go on to list, by way of example, aggravating and attenuating circumstances that may be taken into account to increase or reduce the basic amount, and then refer to the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases. [6]

15. As a general comment, Section 5(a), first paragraph, of the Guidelines states that the final amount of the fine calculated according to this method (basic amount increased or reduced on a percentage basis for aggravating or attenuating circumstances) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17. According to Section 5(a), second paragraph, of the Guidelines, the accounting year on the basis of which the worldwide turnover is determined must, as far as possible, be the one preceding the year in which the decision is taken or, if figures are not available for that accounting year, the one immediately preceding it.

6 — OJ 1996 C 207, p. 4, the 'Leniency Notice'.

16. Furthermore, Section 5(b) of the Guidelines provides that, depending on the circumstances, account should be taken, once the calculations described above have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and the fines should be adjusted accordingly.

17. Hence, using the method described in the Guidelines, fines are set on the basis of the two criteria mentioned in Article 15(2) of Regulation No 17, namely the gravity and duration of the infringement, while complying with the upper limit in relation to the turnover of each undertaking, determined in accordance with the same provision.

## II — Facts

18. The facts, as set out in the judgment under appeal, may be summarised as follows.

19. Britannia, a company incorporated under English law, is a subsidiary of M.I.M. Holdings Ltd ('MIM'), an Australian company. Britannia produced and sold zinc products, including zinc phosphate. In March 1997 Trident Alloys Ltd ('Trident'), an independent company formed by Britannia's management, acquired Britannia's zinc business for GBP 14 359 072. Britannia is still in existence as a subsidiary of MIM, but is a non-trading company and therefore has no turnover.

20. In 2001 the greater part of the world market in zinc phosphate was controlled by the following five European producers: Dr Hans Heubach GmbH & Co. KG ('Heubach'), James M. Brown Ltd ('James Brown'), Société nouvelle des couleurs zinciques SA ('SNCZ'), Trident (formerly Britannia) and Union Pigments AS (formerly Waardals AS) ('Union Pigments').

21. On 13 and 14 May 1998 the Commission carried out simultaneous and unannounced investigations under Article 14(2) of Regulation No 17 at the premises of Heubach, SNCZ and Trident.

22. On 11 December 2001 the Commission adopted the contested decision, in which it imposed on the appellant a fine of EUR 3.37 million for infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement.

23. In the contested decision the Commission indicates that a cartel of Britannia (Trident from 15 March 1997 onwards), Heubach, James Brown, SNCZ and Union Pigments existed from 24 March 1994 until 13 May 1998. The cartel was confined to the market in standard zinc phosphate. The Commission alleges first that the cartel members established a market sharing agreement with sales quotas for each producer, secondly that they fixed bottom or 'recommended' prices at each meeting and generally adhered to them, and thirdly that there was to some extent an allocation of customers.

24. The operative part of the contested decision reads as follows:

'*Article 1*

Britannia ..., ... Heubach ..., James ... Brown, [SNCZ], Trident ... and [Union Pigments] have infringed the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

...

(b) in the case of Britannia ...: from 24 March 1994 until 15 March 1997;

(c) in the case of Trident [...]: from 15 March 1997 until 13 May 1998.

...

*Article 3*

For the infringement referred to in Article 1, the following fines are imposed:

(a) Britannia ...: EUR 3.37 million,

(b) ... Heubach ...: EUR 3.78 million,

(c) James ... Brown ...: EUR 940 000,

(d) [SNCZ]: EUR 1.53 million,

(e) Trident ...: EUR 1.98 million,

(f) [Union Pigments]: EUR 350 000.

...'

25. In determining the basic amount of the fines, the Commission had regard to all relevant circumstances, and particularly the gravity and duration of the infringement, in accordance with the methodology set out in the Guidelines.

26. In the contested decision the Commission described the infringement as 'very serious'. It maintained that the zinc phosphate producers had deliberately conceived, directed and encouraged a cartel designed to restrict competition in the market in question, to the detriment of their customers and the broader public. According to the decision, the infringement also affected the entire

territory of the European Economic Area. In conclusion, and taking account of the relative importance of the appellant in the market concerned, the Commission considered that an amount of EUR 3 million was an appropriate basis for setting the amount of the fine.

27. As regards the duration of the infringement, the Commission considered that it lasted for two years and eleven months (from 24 March 1994 to 15 March 1997), which constituted an infringement of medium duration. Hence it considered it justified to apply an increase of 25% to the basic amount, bringing the amount of the fine to EUR 3.75 million. [7]

28. The Commission then pointed out that, under Article 15(2) of Regulation No 17, the fine imposed on each of the undertakings may not in any case exceed 10% of its worldwide turnover. For the purpose of calculating the upper limit applicable to the fine imposed on the appellant, the Commission 'took into account its global turnover for the business year ending 30 June 1996, which is the last available figure reflecting an entire year of normal economic activity'. [8] As this turnover amounted to EUR 55 713 550, [9] the upper limit of the fine was set at around EUR 5.5 million. Since the amount of the fine set by the Commission before application of the Leniency Notice was less than this upper limit, the Commission did not reduce it on that ground.

29. Finally, the Commission granted Britannia a reduction of 10% in the light of the Leniency Notice. [10]

30. Consequently, the final amount of the fine imposed on the appellant was EUR 3.37 millions. [11]

## III — The action before the Court of First Instance and the judgment under appeal

31. By application lodged at the Registry of the Court of First Instance on 21 February 2002, Britannia brought an action for the partial annulment of the contested decision and, in the alternative, for a reduction in the fine imposed by that decision.

7 — Recitals 311 and 313 of the contested decision.

8 — Recital 345 of the contested decision and the related footnote 197.

9 — Recital 50 of the contested decision.

10 — Recital 366 of the contested decision.

11 — Recital 370 of the contested decision.

32. Paragraph 16 of the judgment under appeal reads as follows:

'The applicant puts forward a single plea. It comprises three parts, in which the applicant claims that, by using its turnover for the business year ending on 30 June 1996 when calculating the upper limit of 10% of turnover, the Commission infringed:

— Article 15(2) of Regulation No 17 and the principle of proportionality;

— the principle of equal treatment;

— the principle of legal certainty.'

33. In the judgment under appeal, the Court of First Instance dismissed that action.

**IV — The proceedings before the Court of Justice and the forms of order sought by the parties**

34. By the appeal lodged on 7 February 2006, Britannia claims that the Court should:

— set aside the judgment insofar as it dismisses the application brought by the appellant in respect of the contested decision;

— annul Article 3 of the contested decision insofar as it pertains to Britannia;

— in the alternative, modify Article 3 of the contested decision as it pertains to the appellant, so as to annul or substantially reduce the fine imposed on the appellant;

— in the alternative, refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice as to the law;

— order the Commission to bear the costs.

35. The Commission claims that the Court should:

— dismiss the pleas in law and submissions identified as inadmissible in the response;

— in the alternative, dismiss the action as unfounded;

— order the appellant to bear the costs.

## V — Legal analysis

36. By my understanding, the appellant raises four pleas, alleging first infringement of Article 15(2) of Regulation No 17, secondly infringement of the principle of equal treatment, thirdly infringement of the principle of legal certainty and fourthly a failure to state reasons in the judgment under appeal.

37. I shall examine each of these pleas in turn.

### A — *The first plea, alleging infringement of Article 15(2) of Regulation No 17*

38. Before expressing an opinion on the justification of this plea, I wish to make two preliminary observations.

39. The first relates to the limits of the review performed by the Court of Justice in an appeal.

40. It is apparent from Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal is limited to points of law.

41. According to settled case-law, the Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is apparent from the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. [12]

12 — See in particular Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 47 to 49.

42. However, it is common ground that when the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. [13]

43. In the context, in particular, of the implementation of Article 81 EC and Article 15 of Regulation No 17, it is established case-law that the Court of Justice must verify whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced. However, it is not for the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law. [14]

44. The second observation relates to the margin of discretion available to the Commission when imposing a fine under Article 15 of Regulation No 17.

45. It has been consistently held that the Commission enjoys a wide discretion as regards the method used for calculating fines. It can, in this respect, take account of numerous factors within the limits laid down in Article 15(2) of Regulation No 17. [15]

46. The exercise of that discretion is nevertheless constrained by rules of conduct that the Commission has imposed on itself by adopting the Guidelines. Although the latter do not constitute rules of law which the administration is always bound to observe, the Court nevertheless considers that the Commission cannot depart from those rules without being found to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. [16]

47. It is against the background of these considerations that it is necessary to verify whether the Court of First Instance correctly assessed the exercise of that discretion by the Commission.

13 — See in particular Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 23; Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 41; and Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51.

14 — See in particular Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 244 and 245 and the case-law cited.

15 — Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 46 and the case-law cited.

16 — Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 207 and 208 and the case-law cited.

48. In this plea, I reiterate, the appellant maintains that the Court of First Instance infringed Article 15(2) of Regulation No 17 by holding that, for the purposes of determining the upper limit of the fine, the Commission was entitled to use the turnover achieved in a business year other than that preceding the adoption of the contested decision.

49. From a reading of the appeal, it is evident that Britannia relies on several arguments in support of this plea.

50. Before examining whether they are well founded, it should be recalled that under Article 15(2) of Regulation No 17 the Commission may impose on an undertaking, on account of an infringement of Article 81(1) EC, a fine of between EUR 1 000 and EUR 1 million, or a sum in excess of that figure but not exceeding 10% of the turnover achieved by the undertaking in question in the preceding business year.

51. *First*, the appellant complains that the Court of First Instance departed from the wording of Article 15(2) of Regulation No 17 and from the case-law of the Court by ruling that, in exceptional circumstances, the Commission could use a business year other than the one preceding the adoption of the contested decision. According to the appellant, the concept of 'preceding business year' contained in the aforesaid provision refers, under settled case-law, to the most recent complete financial year as at the date on which the Commission decision was adopted. [17] In the opinion of Britannia, the Court of First Instance therefore erred in law by not taking into account its turnover for the business year that ended on 30 June 2001.

52. Like the Commission, I consider this argument to be unfounded.

53. The Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it forms part. [18]

54. It seems to me that in the judgment under appeal the Court of First Instance correctly based its ruling on the objectives pursued by the Community legislature in the suppression of infringements of the compe-

17 — The appellant cites the judgment in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 5009.

18 — See to that effect Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 203 and the case-law cited.

tition rules and on the case-law established by the Community judicature for the interpretation of Article 15(2) of Regulation No 17.

55. It should be noted first that in paragraph 37 of the judgment under appeal the Court of First Instance referred to the judgments in *Cimenteries CBR and Others* v *Commission* and in *Sarrió* v *Commission* [19] to state that the concept of 'preceding business year' mentioned in Article 15(2) of Regulation No 17 refers, in principle, to the last full business year of each of the undertakings concerned as at the date of adoption of the contested decision.

56. The Court of First Instance then based its assessment, in paragraphs 35 and 36 of the judgment under appeal, on the objective of Article 15(2) of Regulation No 17. It points out that the purpose of that provision is 'to give the Commission the power to impose fines on undertakings to enable it to carry out the task of supervision conferred on it by Community law'. [20] The penalties laid down in that provision are, it should be recalled, a key means whereby the Commission can see to it that, in accordance with Article 3(1)(g) EC, a 'system ensuring that competition in the internal market is not distorted' is established within the Community. These fines, imposed for practices that call for rigorous suppression, have a dual purpose. First, they must make it possible to punish undertakings for the infringement committed, and secondly they must deter others that would be tempted to commit such an infringement in order to guide future conduct towards greater economic efficiency. [21]

57. The Commission, which is responsible for defending the public economic interest, must ensure that its actions have a deterrent effect when it sets the amount of fines. For that purpose it may decide to increase generally the fines imposed on the undertakings. In each individual case it may also adjust the amount of the fine in order to take account of the desired impact on the undertaking in question.

58. In order to ensure a sufficiently deterrent effect, the fine must be neither negligible nor excessive, particularly in relation to the ability of the undertaking in question to pay. It is therefore essential, in my view, for the Commission to be able to base the calculation on a turnover that reflects the real financial situation of the undertaking.

19 — Case C-291/98 P [2000] ECR I-9991, paragraph 85.

20 — The Court of First Instance refers to Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 105.

21 — The Court recognised very early, in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, that the object of the penalties provided for in Article 15 of Regulation No 17 'is to suppress illegal activities and to prevent any recurrence' (paragraph 173).

59. In the light of these objectives, in my opinion the Court of First Instance correctly considered, in paragraph 38 of the judgment under appeal, that the calculation of the legal upper limit of the fine is based on the assumption not only that the Commission knows the turnover for the last business year preceding the adoption of the contested decision but also that that figure represents a complete year of normal economic activity over a period of 12 months.

60. I believe that this reading of Article 15(2) of Regulation No 17 is not wrong. In my opinion, it avoids excessive regulatory rigidity, which would be detrimental to the effectiveness of the penalty and the practical effect of Article 81 EC. As we shall see, the financial situation of each undertaking may present peculiarities and, in some cases, require the Commission to exercise increased vigilance. In my view, the method of calculating the legal upper limit of the penalty must take account of those peculiarities, particularly in order to maintain the deterrent effect of the fine.

61. It appears to me that in the judgment under appeal the Court of First Instance envisages three types of situation.

62. The first is the situation in which, during the business year preceding the adoption of a Commission decision, an undertaking has achieved a turnover reflecting an entire year of normal economic activity. In this instance, as the Court of First Instance indicates in paragraph 49 of the judgment under appeal, the Commission is obliged to use this turnover to fix the maximum limit of the fine, despite a significant decrease in the undertaking's overall resources by comparison with earlier years owing to a difficult economic context, an accident or a strike.

63. The second is the situation in which basing the calculation only on the business year preceding the adoption of a Commission decision does not permit the Commission correctly to assess the undertaking's resources. As the Court of First Instance indicates in paragraph 39 of the judgment under appeal, this may be the case where an undertaking has not drawn up or disclosed its annual accounts before the adoption of the decision. This may also be the case if, as a result of a change in its accounting practices, an undertaking produces accounts covering a period of less than 12 months. In these circumstances, in accordance with the second paragraph of Section 5(a) of the Guidelines, the Commission is entitled to rely on the turnover achieved in the immediately preceding business year covering a period of 12 months.

64. The third and last is the situation in which an undertaking has no turnover in the business year preceding the adoption of a Commission decision. Such a situation may, for example, result from the reorganisation of an undertaking which, although continuing to exist in legal terms, has disposed of all its commercial activities. However, if an

undertaking has not carried on any economic activity during the business year preceding the adoption of the decision, the turnover for that period does not enable the Commission to determine the importance of the undertaking, contrary to the requirements of the case-law. [22] This situation may also be the result of fraudulent conduct on the part of an undertaking which, in order to avoid a fine for illegal conduct, decides to divert its turnover.

65. The inevitable conclusion is that in such a situation reliance only on the data for the business year preceding the adoption of the decision does not enable the Commission to assess the undertaking's resources correctly and to ensure that the fine has a sufficiently deterrent effect.

66. I therefore fully share the assessment of the Court of First Instance, set out in paragraph 48 of the judgment under appeal, that, in determining the upper limit provided for in Article 15(2) of Regulation No 17, the Commission must 'have at its disposal a turnover representing a full 12-month period of normal economic activity'. This assessment is fully consistent with the case-law established by the Court of Justice [23] and with the objectives of suppressing and deterring infringement of the competition rules.

67. Consequently, I consider that the Court of First Instance did not err in law in holding that the Commission was entitled to rely, under Article 15(2) of Regulation No 17, on the last complete business year preceding the adoption of the contested decision, that is to say the business year that ended on 30 June 1996.

68. *Secondly*, Britannia asserts, in essence, that the Court of First Instance did not apply the 'alternative monetary threshold' laid down in the first part of Article 15(2) of Regulation No 17.

69. The appellant maintains that, in the absence of turnover, the Commission was only able to impose on it a fine of between EUR 1 000 and EUR 1 million as an alternative measure. According to the appellant, that interpretation is consistent with the objective of Article 15(2) of Regulation No 17, which aims to avoid fines that are disproportionate in relation to the importance of the undertaking. [24] Furthermore,

22 — Paragraph 42 of the judgment under appeal.

23 — See the case-law cited in footnote 17 to this Opinion.

24 — Britannia relies on the judgment in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, in which the Court stated that 'the ceiling aims inter alia to protect undertakings against excessive fines which could destroy them commercially. It is therefore logical that the ceiling refers not to the period of the infringements penalised, which may precede the date of the fine by several years, but to a period closer to that date' (paragraph 389).

according to the appellant, whereas the limit of 10% is set by reference to a turnover, the first part of Article 15(2) of Regulation No 17 neither expressly lays down nor assumes that there is turnover.

70. Britannia also objects that the Court of First Instance took into account the objective of deterrence mentioned in Article 15(2) of Regulation No 17 in connection with the assessment of the upper limit of the fine set by the Commission. According to the appellant, the calculation of the basic amount of the fine (fixed by reference to the criteria of gravity and duration of the infringement) and the setting of the upper limit thereof pursue two distinct objectives. It maintains that it is clear from the judgment in *Dansk Rørindustri and Others* v *Commission* that the upper limit set in Article 15(2) of Regulation No 17 aims to 'ensure that the fines are not excessive or disproportionate' and thus 'has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement'. [25] In the opinion of the appellant, the Court of First Instance therefore erred in law in deciding, in paragraph 44 of the judgment under appeal, that the Commission was entitled to consider that a fine of EUR 1 million was not sufficient in the present case.

71. It must be noted first that Britannia's argument regarding the assessment of the Court of First Instance as to the deterrent effect of a fine of EUR 1 million is not, in my opinion, admissible.

72. In keeping with the Commission, I believe that the examination of that argument falls within the compass of an assessment of the facts, which, as I have noted in points 40 and 41 of this Opinion, the Court cannot examine in an appeal.

73. Secondly, I consider that the arguments relating to the application of an alternative monetary threshold are unfounded.

74. I consider that the setting of the upper limit of the penalty does not come down to a simple choice between a maximum fine of EUR 1 million and an upper limit based on the undertaking's turnover. It is common ground that, as regards the method used for calculating fines, the Commission must comply with the ceiling on turnover laid down in Article 15(2) of Regulation No 17. Nevertheless, within the limits laid down in that provision, the Commission enjoys a wide discretion and it can take account of 'numerous factors', as the Court has pointed out. [26] Contrary to the appellant's contention, I believe that the objective of deterrence is pursued both in calculating the basic amount of the fine and in determining the upper limit thereof. Indeed, that objective is

25 — Paragraphs 281 and 282.

26 — *SGL Carbon* v *Commission*, paragraphs 46 and 47.

inherent in the very adoption of Regulation No 17 [27] and takes precedence over the wording of Article 15(2) of that regulation. In these circumstances, and provided that the fine is below the maximum ceiling laid down in Article 15(2) of Regulation No 17, I consider that the Commission may, in the exercise of its discretion, take account of the objective of deterrence in making the calculation in question.

75. Hence, in my opinion the Court of First Instance was right to consider that the Commission was entitled to take account of the objective of deterrence envisaged in Article 15(2) of Regulation No 17 in assessing the upper limit of the fine applicable to the appellant.

76. In the light of these considerations, I believe that the appellant's second argument must be declared to be in part inadmissible and in part unfounded.

77. I therefore propose that the Court dismiss the first plea as being partly inadmissible and partly unfounded.

B — *The second plea, alleging infringement of the principle of equal treatment*

78. A reading of the appeal shows that the appellant relies on three arguments in support of this plea.

79. Before I examine whether they are well founded, it should be noted that the principle of equal treatment is a general principle of law which the Commission is required to uphold in proceedings initiated under Article 81 EC.

80. In accordance with settled case-law, to which the Court of First Instance correctly referred in paragraph 60 of the judgment under appeal, this principle prevents comparable situations from being treated differently or different situations from being treated in the same way, unless such difference in treatment is objectively justified. [28]

81. *First*, the appellant maintains that the Court of First Instance infringed the principle of equal treatment in considering that the Commission was entitled to treat it differently from SNCZ and Union Pigments, which had also participated in the cartel.

27 — See in particular the 10th recital of Regulation No 17, which states that 'compliance with Articles [81 EC] and [82 EC] and the fulfilment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments'.

28 — See in particular *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 69 and the case-law cited.

82. I do not consider that this argument is well founded.

83. It is clear from the judgment under appeal that, unlike the appellant, these undertakings were still commercially active in the zinc phosphate market when the Commission adopted the contested decision. Their turnover in the business year preceding the adoption of that decision therefore enabled the Commission to assess their financial resources and hence to determine their economic importance, which was not the case with Britannia.

84. These facts are sufficient to find that the appellant's situation genuinely differed from that of SNCZ and Union Pigments.

85. In these circumstances, I consider that the Court of First Instance rightly ruled that the Commission could treat the appellant differently from those undertakings.

86. Furthermore, I would point out that the Community judicature has recognised that, as regards the calculation of fines imposed under Article 15(2) of Regulation No 17, some differentiation between the undertakings concerned by a Commission decision is inherent in the application of the method chosen in the Guidelines. [29] The Guidelines allow the Commission to set the penalty individually on the basis of the actions and characteristics of the undertakings in order to ensure the effectiveness of the Community rules on competition.

87. Hence I am of the opinion that this argument can be dismissed as unfounded.

88. *Secondly*, the appellant claims that the Court of First Instance infringed the principle of equal treatment by ruling that the Commission was entitled to treat it differently by comparison with undertakings such as Anic SpA, DSM and UCAR International Inc., which were the subject of earlier Commission decisions. [30] According to the appellant, the Court of First Instance was wrong to rule, in paragraph 61 of the judgment under appeal, that its situation was not comparable to that of those undertakings.

29 — See in this regard Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 285.

30 — See respectively Commission Decisions 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 of the EC Treaty] (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, the 'Polypropylene decision'); 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/31.865 — PVC) (OJ 1994 L 239, p. 14, the 'PVC decision'); and 2002/271/EC 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.490 — Graphite Electrodes) (OJ 2002 L 100, p. 1, the 'Graphite Electrodes decision').

89. The appellant adds that when calculating the maximum amount of the fine the Commission has always used the preceding business year, regardless of whether the activities covered by the cartel had been transferred or whether the turnover achieved in that year was lower than before the transfer of its activities. For example, according to the appellant, in the Graphite Electrodes decision the Commission had set the maximum amount of the applicable fine on the basis of the turnover achieved by UCAR International Inc. during its preceding business year, that is to say EUR 841 million, even though this was considerably less than it had achieved during the last year of the infringement, namely EUR 1 022 million.

90. The Commission maintains that this argument is inadmissible, as it relates to a purely factual assessment, which cannot be re-examined by the Court on appeal. [31]

91. I do not agree with that analysis. Although it is true that the Court of First Instance has exclusive jurisdiction to find and assess the facts, it is established case-law that the Court of Justice has jurisdiction to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. [32]

92. In raising this argument, Britannia asks the Court to review the legal conclusions that the Court of First Instance drew from the facts found in the decisions the appellant has cited, as to the comparability of the situations of the undertakings and respect for the principle of equal treatment.

93. Insofar as the appellant does not claim distortion of the facts found by the Court of First Instance, it is for the Court to assess whether the Court of First Instance correctly ruled that the situation of Britannia was not comparable to that of Anic SpA and DSM and that, as a consequence, Britannia could not insist on being treated in the same manner on the basis of the principle of equal treatment.

94. In contrast to the Commission, I therefore propose that the Court rule this argument to be admissible.

95. As I have indicated, the appellant considers that the Court of First Instance erred

31 — Paragraph 48 of the response.

32 — See the case-law cited in footnote 13 to this Opinion.

in law by ruling, in paragraph 61 of the judgment under appeal, that its situation was not comparable to that of the said undertakings.

96. From a simple reading of paragraph 61 it is clear that that argument is unfounded. Paragraph 61 reads as follows:

'The applicant's first argument, namely that the Commission departed from its earlier practice, is unfounded. Its situation is not comparable to that of the undertakings [involved in the Polypropylene and PVC decisions] because it achieved no turnover in the business year preceding the contested decision. Accordingly, it cannot insist on being treated in the same way as the undertakings in those earlier cases.'

97. The statement of reasons of the Court of First Instance makes it possible to understand the reasons for dismissing the appellant's argument. [33] As the Court of First Instance pointed out, the appellant had no turnover in the business year preceding adoption of the contested decision. This is a determining factor which, in my view, allowed the Court of First Instance to consider that the appellant was indeed in a different situation from that of Anic SpA and DSM. In those circumstances, I believe that the Court of First Instance rightly ruled that the Commission could treat Britannia differently from those undertakings.

98. At all events, it appears to me that any principles that might be extracted from the Polypropylene, PVC and Graphite Electrodes decisions cannot be relied upon in the present action, for two reasons.

99. First, according to settled case-law, which the Court reiterated in *JCB Service* v *Commission*, 'the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and ... decisions in other cases can give only an indication for the purpose of determining whether there is discrimination'. [34] As the Court states, the principles extracted from that practice can 'only give an indication, since the facts of the cases, such as markets, products, the under-

33 — It should be pointed out that, according to settled case-law, 'the obligation to state reasons does not require the Court of First Instance to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review' (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* [2004] ECR I-123, paragraph 372 and the case-law cited).

34 — Paragraph 205. See also Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 87 and the case-law cited.

takings and periods concerned, [are] not the same'.[35] Furthermore, it has to be pointed out that the Polypropylene and PVC decisions on which the appellant relies were adopted before the Guidelines had even been published.

100. Secondly, the Court has repeatedly ruled that the fact that the Commission punished certain types of infringement in the past with fines of a particular level cannot prevent it from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the effectiveness of Community competition policy.[36] In these circumstances, I consider that an undertaking involved in administrative proceedings initiated under Article 81 EC cannot acquire a legal expectation that the Commission will treat it in the same manner as an undertaking in a comparable situation.

101. In these circumstances, I propose that the Court dismiss this argument as unfounded.

102. *Thirdly*, the appellant objects to the fact that, in paragraph 63 of the judgment under appeal, the Court of First Instance ruled that there would have been unjustified discrimination in its favour, as compared with Trident, if the Commission had not used the turnover achieved in an earlier business year.

103. This argument is manifestly ineffective.

104. Indeed, the judgment under appeal rejects the second limb alleging infringement of the principle of equal treatment exclusively on the ground that the applicant is in a situation different from that of the undertakings in the cartel, namely Union Pigments and SNCZ, and from that of the undertakings which gave rise to a previous Commission proceeding, that is to say Anic SpA and DSM.

105. Consequently, I believe that the finding of the Court of First Instance set out in paragraph 63 of the judgment under appeal has no bearing on this point.

106. In my view, as this ground for the judgment was given purely for the sake of completeness, the appellant's complaints

35 — Paragraph 201 of *JCB Service* v *Commission*.

36 — Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 81 and the case-law cited.

against this finding cannot lead to the judgment being set aside and are therefore irrelevant. [37]

107. In these circumstances, I propose that the Court dismiss this second plea in its entirety as unfounded.

*C — The third plea, alleging infringement of the principle of legal certainty*

108. The appellant maintains that the Court of First Instance infringed the principle of legal certainty in finding that the Commission had not committed errors of law by using a business year other than the one preceding the contested decision to set the upper limit of 10% of turnover.

109. Britannia points out that this principle is enshrined in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (the 'ECHR'). The appellant observes that that principle is also recognised in Article 11 of the Universal Declaration of Human Rights and Article 49(1) of the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 in Nice. [38]

110. Britannia states that the system of fines established by Regulation No 17 is of a 'criminal law character' [39] to which Article 7(1) of the ECHR applies, and in this regard it asserts that it is a general principle of law that provisions relating to offences and penalties may not be interpreted extensively to the detriment of the defendant. [40]

111. In addition, the appellant points out that the Court of First Instance has ruled that 'the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed'. [41] It has also held that 'the Commission is not empowered to amend Regulation No 17 or to depart

37 — See in particular Case C-184/01 P *Hirschfeldt* v *EEA* [2002] ECR I-10173, paragraph 48; Case C-122/01 P *T. Port* v *Commission* [2003] ECR I-4261, paragraph 17; and, for recent case-law, the order of 12 December 2006 in Case C-129/06 P *Autosalone Ispra* v *Commission*, not published in the ECR, paragraph 17 and the case-law cited.

38 — OJ 2000 C 364, p. 1. The Charter is contained in Part II of the Treaty establishing a Constitution for Europe, which has not yet entered into force (OJ 2004 C 310, p. 41).

39 — The appellant refers to page 885 in the Opinion of Judge Vesterdorf, appointed as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867.

40 — The appellant refers to Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25, and to a judgment of the European Court of Human Rights (*E.K. v. Turkey*, judgment of 7 February 2002, § 51 and 55).

41 — *LR AF 1998* v *Commission*, paragraph 221.

from it, even by rules of a general nature which it imposes on itself'. [42]

112. Moreover, according to the appellant, the Court has held that the principle of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences. [43]

113. The appellant therefore maintains that the Commission could not exceed the limits set in Article 15(2) of Regulation No 17. In its view, it was not foreseeable, in the light of the clear wording of that provision, that the Commission would take as a basis a business year other than the preceding business year. It asserts that, on the contrary, the principle of legal certainty required the Commission to impose on the appellant a fine of between EUR 1 000 and EUR 1 million, as laid down in the first part of that provision.

114. According to Britannia, the Court of First Instance has created a situation in which it is impossible for undertakings to determine the relevant reference year for calculating the applicable upper limit and hence a clear and precise maximum amount of the fine that could be imposed on them. [44]

115. The appellant points out that the assessment of whether the undertaking has a 'normal economic activity' is subjective and that there is great uncertainty as to the situations deemed to be 'exceptional circumstances'. It maintains that the Commission was not authorised to make an arbitrary choice of the reference year on the basis of such criteria.

116. The Commission considers that this plea must be dismissed insofar as it merely reformulates the arguments put forward by Britannia in the first plea.

117. In any event, the Commission observes that the interpretation of Article 15(2) of Regulation No 17 was perfectly foreseeable, since the upper limit laid down in that provision applies to the turnover in the preceding business year and the appellant had no such turnover. The Commission points out that the principle of the foreseeability of fines means that undertakings must be able to assess the consequences of their actions before committing them. It notes

42 — Ibid., paragraph 222.

43 — The appellant cites Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24.

44 — The appellant cites Case C-236/02 *Slob* [2004] ECR I-1861, which states that '[legal certainty] requires in particular that a rule such as the one before the Court, which may lead to the imposition of charges on the economic operators concerned, must be clear and precise, so that they know unequivocally what their rights and obligations are and can take steps accordingly' (paragraph 37).

that, in the present case, Britannia's turnover on the day on which it decided to commit the infringement was not very different from that used to calculate the maximum amount of the fine (EUR 55.7 million for the year ending on 30 June 1996). According to the Commission, the appellant could thus assess, at the time of the infringement, the amount of the fine that it would have to pay if the cartel were discovered and punished. Moreover, the Commission notes that the specific situation of Britannia, namely continued legal existence but with nil turnover, raised a particular problem of which Britannia could not have been unaware. However, the appellant refrained from raising this point in its response to the statement of objections addressed to it.

118. I consider that this plea is unfounded.

119. Indeed, it does appear to me that the arguments put forward by Britannia are a reformulation of those already used to support the first plea alleging an infringement of Article 15(2) of Regulation No 17. As I have considered them to be unfounded, I believe that the arguments raised by the appellant in support of this third plea are also unfounded.

120. Nevertheless, in case the Court does not share this opinion, I shall examine these arguments for the sake of completeness.

121. Britannia maintains, in essence, that the calculation method used by the Commission for applying Article 15(2) of Regulation No 17 could not have been foreseen at the time when the infringement was committed.

122. Before examining whether this argument is well founded, I wish to recall the requirements stemming from the principle of legal certainty.

123. This principle is a corollary of the principle of legality and is a fundamental principle of Community law. As the Court of First Instance noted in paragraph 69 of the judgment under appeal, this principle 'requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable'. [45] The Court has consistently held that 'the principle of legal

45 — The Court of First Instance cites Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 113.

certainty must be observed all the more strictly in the case of a measure liable to have financial consequences'. [46]

124. As the appellant has indicated, the same principle is enshrined in Article 7(1) of the ECHR and Article 49(1) of the Charter of Fundamental Rights of the European Union, which, as I have pointed out, does not have legally binding force. [47]

125. Article 7(1) of the ECHR, which reproduces the wording of Article 11(2) of the Universal Declaration of Human Rights, reads as follows:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

126. I would point out that the Community judicature does not have jurisdiction to assess the legality of the calculation method used by the Commission in the light of Article 7(1) of the ECHR, inasmuch as the provisions of that convention are not, as such, part of Community law. [48]

127. However, the Court has repeatedly held that fundamental rights form an integral part of the general principles of law, the observance of which it must ensure. [49] For that purpose, the Court draws inspiration not only from the constitutional traditions common to the Member States but also from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. [50] The Court has considered that the ECHR has special significance in that respect. [51]

128. In the light of the case-law laid down by the European Court of Human Rights and by the Community judicature, a legal rule imposing a penalty — a rule which has a criminal law character or an administrative

46 — See in particular Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-0000, paragraph 79 and the case-law cited.

47 — In Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1 the Court of First Instance nevertheless stated that this charter 'does show the importance of the rights it sets out in the Community legal order' (paragraph 122).

48 — See in particular Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 59.

49 — See in this regard Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraphs 23 and 24. Note that under Article 6(2) EU 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

50 — Opinion 2/94 of 28 March 1996 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14.

51 — *Kremzow*, paragraph 14.

instrument imposing an administrative penalty — must have a number of characteristics.

129. First, any rule of law, in particular one imposing penalties or permitting penalties to be imposed, must rest on a clear and unambiguous legal basis. [52]

130. In addition, that rule must be clear and precise. [53]

131. The Community judicature holds that persons concerned by the regulations in question must be in a position to know without ambiguity the rights and obligations deriving from the regulations so that they may take steps accordingly. [54] According to the Court, this requirement applies not only to rules establishing the facts of an infringement but also those defining the consequences of an infringement of rules of law. [55]

The law must therefore clearly define infringements and the punishment of them.

132. For the European Court of Human Rights, the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the information provided by existing and published case-law. [56]

133. Finally, the law must be accessible and foreseeable. [57]

134. The European Court of Human Rights considers that the person concerned must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [58]

135. A law may still satisfy the requirement of foreseeability even if the person concerned

52 — See in particular *Koninklijke Coöperatie Cosun*, paragraph 80 and the case-law cited.

53 — See Eur. Court H.R., *Coëme and Others v. Belgium*, judgment of 22 June 2000, *Reports of Judgments and Decisions*, 2000-VII, § 145.

54 — See, to that effect, Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17; Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and *X*, paragraph 25.

55 — See, to that effect, the *X* judgment, paragraphs 22 and 25.

56 — See in particular Eur. Court H.R., *G. v. France*, judgment of 27 September 1995, Series A No 325-B, § 25.

57 — See Eur. Court H.R., *Baskaya and Okçuoglu v. Turkey*, judgment of 8 July 1999, *Reports of Judgments and Decisions* 1999-IV, p. 308, § 36.

58 — See Eur. Court H.R., *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A No 226-A, § 75, and *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions*, 1996-V, § 35. The Court referred to the latter case in *Dansk Rørindustri and Others* v *Commission*, paragraph 219.

has to take advice to assess such consequences. [59] Nor is a law which confers a discretion on the administrative authority inconsistent with this requirement. In that case, the requirement of foreseeability implies that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. [60]

136. Moreover, Article 7(1) of the ECHR does not require that the terms of the provision in question be so precise that the consequences that may ensue from infringement of that provision are foreseeable with absolute certainty. [61] According to the European Court of Human Rights, it is necessary to avoid excessive regulatory rigidity in order to enable the administration to adapt to changing circumstances. This also makes it possible to individualise the applicable punishment. Although the principle of legality requires a rigorous and objective classification of the measure, the principle that penalties must be specific to the individual concerned demands, in fact, that the choice of penalty be adapted to the particular circumstances of each person.

137. These characteristics, namely the clarity of rules of law and the foreseeability and individualisation of penalties, are necessary safeguards to ensure the effectiveness of the policy pursued by the Community legislature.

138. Having recalled these aspects, it is necessary to see whether the calculation method used by the Commission in the present case was reasonably foreseeable.

139. In this regard, the Court of First Instance held, in paragraph 73 of the judgment under appeal, that the appellant was perfectly able to foresee that a fine would be imposed on it insofar as it had committed a clear infringement of the Community competition rules. It also held that it was foreseeable that that fine would be determined by reference not only to the gravity and duration of the infringement but also to the specific circumstances of the undertaking.

140. I fully share this analysis, for the following reasons.

141. First, although Article 15(2) of Regulation No 17 leaves the Commission a wide margin of discretion, it appears to me that it nevertheless limits the exercise of that discretion by establishing objective criteria

59 — The *Cantoni v. France*, judgment, § 35.

60 — See in particular Eur. Court H.R., *Kruslin v. France*, judgment of 24 April 1990, Series A No 176-A, § 27, 29 and 30, and *Margareta and Roger Andersson v. Sweden*, § 75.

61 — See Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 79.

to which the Commission must adhere. As any fine that may be imposed is based on the wording of that provision, it is subject to a quantifiable and absolute ceiling, calculated by reference to each undertaking, for each infringement, so that the maximum amount of the fine that can be imposed on a given undertaking can, in my view, be determined in advance.

142. Secondly, the exercise of the Commission's discretion is limited by the rules of conduct which it has imposed upon itself in the Guidelines. Although the Guidelines are not rules of law which the administration is always bound to observe, the Community judicature has held that they nevertheless set out rules of practice from which the Commission may not depart without being found to be in breach of general principles of law, such as equal treatment, the protection of legitimate expectations or legal certainty. [62]

143. As the Court ruled in *Dansk Rørindustri and Others* v *Commission*, the Guidelines ensure legal certainty on the part of the undertakings concerned and enable them to know the calculation methods used by the Commission in implementing Article 15(2) of Regulation No 17. [63] The Commission has been criticised for many years for the opaque manner in which it calculated fines and the publication of the Guidelines made it possible to improve the transparency of its decisions. [64]

144. Thirdly, under Article 229 EC and Article 17 of Regulation No 17, the Court of Justice and the Court of First Instance have unlimited jurisdiction to hear actions against decisions whereby the Commission has fixed a fine. They may thus not only annul the decisions but also cancel, reduce or increase the fine imposed. The Commission's administrative practice is thus subject to complete review by the Community judicature. The review performed by it has made it possible, by means of consistent and published case-law, to clarify the criteria and calculation method that the Commission must apply when fixing the amount of fines. The Community judicature has thus stated,

62 — See *Dansk Rørindustri and Others* v *Commission*, paragraphs 209 to 212, and *JCB Service* v *Commission*, paragraphs 207 and 208.

63 — Paragraph 213.

64 — It is interesting to note that for the first 30 years in which the Commission applied Regulation No 17 there was no clear directive guiding its actions. The result of this was a lack of transparency in the methods used by the Commission in administrative proceedings, with the corollary that a large number of actions for the annulment of Commission decisions were brought by undertakings. In Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, the Court of First Instance then indicated that it was 'desirable for undertakings — in order to be able to define their position in full knowledge of the facts — to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them [by a decision for infringement of the competition rules], without being obliged, in order to do so, to bring court proceedings against [that decision]' (paragraph 142).

in established case-law to which the appellant indeed refers, that the concept of 'preceding business year', means in principle the last full year of each of the undertakings concerned at the date of adoption of the contested decision.

145. Contrary to Britannia's claims, I therefore do not consider that the Commission has unlimited discretion permitting it to choose 'arbitrarily' the business year on which to base the calculation of the upper limit of the fine. [65]

146. In the light of the points I have just set out, it appears to me that the appellant was able to foresee, to a reasonable degree, the calculation method used by the Commission, where necessary by seeking legal advice.

147. In any case, I wish to add that, in my opinion, the objectives of suppression and deterrence pursued by the Community legislature justify avoiding the possibility that undertakings may know in advance precisely the amount of the fine likely to be imposed on them, for two reasons.

65 — I give the term employed by the appellant in paragraph 6.5 of the appeal.

148. First, I consider it important that undertakings should not be able to evaluate the benefits they may derive from participation in an infringement by taking into account the amount of such a fine.

149. Secondly, I believe that situations must be avoided in which undertakings are tempted to divert their capital on the ground that, in the absence of turnover, a smaller fine or no fine at all will be imposed on them.

150. In the present case, as the Court of First Instance correctly stated in paragraph 73 of the judgment under appeal, the principle of legal certainty could give the appellant no guarantee that its cessation of commercial activities would result in its escaping a fine.

151. In the light of these factors, I consider that Britannia's inability to know in advance and with 'absolute certainty' the reference year relevant for calculating the applicable ceiling, and hence the maximum fine that could be imposed on it, does not constitute an infringement of the principle of legal certainty.

152. I therefore propose that the Court dismiss the third plea as unfounded.

D — *The fourth plea, alleging the lack of a statement of reasons for the judgment under appeal*

153. The appellant maintains that the judgment under appeal failed to respond to its argument alleging unequal treatment by comparison with Karageorgis, one of the undertakings that was the subject of Commission Decision 1999/271/EC. [66] According to the appellant, it expressly raised this argument before the Court of First Instance and the latter referred to it in paragraph 55 of the judgment under appeal.

154. Britannia states that, in the Greek Ferries decision, Karageorgis had withdrawn from the market before the Commission adopted its decision. As the turnover of that undertaking for the preceding business year was not available, the Commission relied on the first part of Article 15(2) of Regulation No 17 and fined the undertaking EUR 1 million. According to the appellant, its situation in the present case is very similar to that of Karageorgis. Consequently, it considers that it should not be placed in a less advantageous situation than Karageorgis and should, in all events, be treated the same.

155. The plea raised by Britannia relates to the formal requirement to state reasons. It asks the Court to punish a lack of a statement of reasons in the judgment under appeal. This plea is admissible in as much as, in accordance with settled case-law, the question whether the Court of First Instance ruled on the pleas of the parties and correctly stated the reasons for its judgment is a question of law which is amenable, as such, to judicial review on appeal. [67]

156. I remind the Court first that, under Article 36 of the Statute of the Court of Justice, which is applicable to the Court of First Instance pursuant to Article 53 of the Statute, '[j]udgments shall state the reasons on which they are based'.

157. According to the Court of Justice, the statement of reasons for a judgment must disclose in a clear and unequivocal fashion the reasoning followed by the Court of First

66 — Decision of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24, the 'Greek Ferries decision').

67 — See in particular Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53 and the case-law cited.

Instance in such a way as to make the persons concerned aware of the reasons for the decision and to enable the Court to exercise its powers of review. [68] In the case of an action under Article 230 EC, the requirement to state reasons obviously means that the Court of First Instance must examine the appellant's pleas for annulment and state the reasons leading it to dismiss the plea or annul the contested measure. In particular, in the framework of Article 81 EC and Article 15 of Regulation No 17, the Court considers that it is for the Court to verify whether the Court of First Instance responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced. [69]

158. Nevertheless, in the judgment in *Connolly* v *Commission* [70] the Court placed limits on this obligation to respond to the pleas raised. It considered that the grounds of a judgment must be assessed in light of the circumstances of the case [71] and that the Court of First Instance is 'not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence'. [72]

159. Having recalled these matters, it is necessary to examine whether the Court of First Instance failed to respond to the argument in question raised by the appellant and, if so, whether it was obliged to respond to that argument.

160. At first instance the appellant claimed that the Commission had infringed the principle of equal treatment by treating it differently from, first, the undertakings in the Polypropylene and PVC decisions and, secondly, Karageorgis in the Greek Ferries decision. Britannia also alleged that the Commission had treated it differently by comparison with SNCZ and Union Pigments, which had also participated in the cartel.

161. The Court of First Instance identified the arguments raised by the appellant in paragraphs 54 to 56 of the judgment under appeal. Paragraph 54 of that judgment summarises those deriving from the Polypropylene and PVC decisions, and paragraph 55 sets out the appellant's reasoning based on analysis of the Greek Ferries decision. Paragraph 56 summarises Britannia's arguments relating to the Commission's treatment of SNCZ and Union Pigments.

68 — See to that effect Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraphs 32 to 34; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 70; order in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 58; order in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 52; and order in Case C-159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I-4147, paragraph 70.

69 — See the case-law cited in footnote 14 to this Opinion.

70 — Case C-274/99 P [2001] ECR I-1611.

71 — Ibid., paragraph 120.

72 — Ibid., paragraph 121. See also Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81.

162. The Court of First Instance dismissed these arguments for the following reasons:

'61 The applicant's first argument, namely that the Commission departed from its earlier practice, is unfounded. Its situation is not comparable to that of the undertakings involved in the cases cited in paragraph 54 [of the judgment under appeal] because it achieved no turnover in the business year preceding the contested decision. Accordingly, it cannot insist on being treated in the same way as the undertakings in those earlier cases.

62 The applicant's second argument, alleging discrimination as between itself, on the one hand, and, on the other, SNCZ and Union Pigments, must also be rejected. ... As a nil turnover gives a false impression of the applicant's standing, the Commission was entitled to refer to an earlier year and, accordingly, to treat the applicant differently from SNCZ and Union Pigments.

...

64 The second part of the sole plea in law must therefore be rejected.'

163. A simple reading suffices for a finding that the Court of First Instance failed to respond to the appellant's argument claiming infringement of the principle of equal treatment in comparison with the situation of Karageorgis. This argument was nevertheless expressly raised by Britannia in points 3.3.3 to 3.3.6 of its action at first instance and identified, as such, by the Court of First Instance in paragraph 55 of the judgment under appeal.

164. It is true that the Court has held that the Court of First Instance is not obliged to respond to arguments that are 'not sufficiently clear and precise'. [73]

165. Nonetheless, in the present case it appears to me that the argument in question met these criteria and thus permitted the Court of First Instance to adopt a position.

166. In the originating application lodged at first instance, Britannia clearly set out the reasons why it considered its situation to be comparable to that of Karageorgis in the Greek Ferries decision. [74] Moreover, in support of its reasoning, it identified precisely

73 — See point 158 of this Opinion.

74 — Paragraph 3.3.6 of the application.

the paragraphs in the grounds of that decision in which the Commission set out the method of calculating the upper limit of the fine applicable to Karageorgis. [75]

167. Consequently, I consider that the Court of First Instance failed to state reasons as it was required to do under Articles 36 and 53 of the Statute of the Court of Justice by omitting to respond to the argument raised by the appellant.

168. On that ground, I therefore propose that the Court declare this plea to be well founded and set aside the judgment under appeal.

## VI — Disposal of the case

169. Article 61(1) of the Statute of the Court of Justice provides that, if the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. In that case, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

170. I consider that in the present case the state of the proceedings permits judgment to be given on the point on which I have proposed that the judgment be set aside. [76] I therefore propose that the Court deal with the matter and give final judgment on the plea relied upon by Britannia at first instance.

## VII — The action at first instance

171. Britannia applies for annulment of the contested decision and relies on several pleas, one of which alleges infringement of the principle of equal treatment.

172. In the context of that plea, the appellant maintains that the Commission failed to observe that principle by treating the undertaking differently by comparison with Karageorgis, referred to in the Greek Ferries decision.

173. Britannia maintains that its situation was, in fact, comparable to that of the abovementioned undertaking inasmuch as both had withdrawn from the market several years before the adoption of the Commission decision. However, in the Greek Ferries decision, after noting that it had no informa-

75 — Paragraph 3.3.4 of the application.

76 — See points 153 to 168 of this Opinion.

tion regarding Karageorgis' turnover in the business year preceding the adoption of the decision, the Commission decided, in accordance with Article 19(2) of Council Regulation (EEC) No 4056/86, [77] to impose a fine of ECU 1 million on the undertaking. [78]

174. The appellant claims that, by calculating the upper limit of the fine applicable to the appellant on the basis of a business year other than the one preceding the adoption of the contested decision, the Commission thus departed from its previous practice, infringing the principle of equal treatment in the present case.

175. I consider this plea to be unfounded.

176. In my opinion, the principles that may be extracted from the Greek Ferries decision cannot be relied upon in the present case for the reasons I have already set out in points 99 and 100 of this Opinion.

177. Although the situation of Karageorgis is similar to that of Britannia, [79] it is settled case-law that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters. Indeed, the Court has consistently held that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination since the facts of the cases, such as markets, products, the undertakings and periods concerned, are not the same. This is true of the case mentioned by the appellant.

178. Moreover, the Court has also held that the Commission is not bound by the level of fines imposed in the past for different types of infringement and can raise that level within the limits set in Regulation No 17 if that is necessary to ensure the effectiveness of Community competition policy. [80] In that regard, the Court has stated that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or as to a method of

77 — Regulation of 22 December 1986 laying down detailed rules for the application of Articles [81] and [82] of the Treaty to maritime transport (OJ 1986 L 378, p. 4), last amended by Regulation No 1/2003. The wording of Article 19(2) of the regulation is identical to that of Article 15(2) of Regulation No 17.

78 — Paragraph 167 of the grounds of the Greek Ferries decision, reproduced by the appellant in paragraph 3.3.4 of its appeal.

79 — It is apparent from the Greek Ferries decision of 9 December 1998 that Karageorgis had ceased its operations in January 1993, in other words almost six years before the adoption of the contested decision, and had closed all of its branches in Greece. The Commission had no information on the turnover achieved by that undertaking in 1997 (paragraph 167 of the grounds of the decision).

80 — *Aristrain* v *Commission*, paragraph 81 and the case-law cited.

calculating the fines.[81] According to the Court, the undertakings in question must therefore 'take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past'.[82]

179. In these circumstances, I consider that an undertaking, such as Britannia, involved in an administrative procedure under Article 81 EC could not acquire a legitimate expectation that the Commission would treat it in the same way as Karageorgis in a previous decision.

180. In view of these factors, I believe that the Commission has not infringed the principle of equal treatment.

181. I therefore propose that the Court reject this plea for annulment.

81 — *Dansk Rørindustri and Others* v *Commission*, paragraph 228.
82 — Ibid., paragraph 229.

## VIII — Costs

182. Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for an order for costs against the appellant and the latter has been unsuccessful on most of its pleas, the appellant must, in my opinion, be ordered to pay the costs incurred in these appeal proceedings.

183. Moreover, Article 122 of the Rules of Procedure provides that where the appeal is well founded and the Court itself gives final judgment in the case, the Court shall make a decision as to costs. In the present case, examination of the plea put forward by the appellant at first instance alleging infringement of the principle of equal treatment in relation to the treatment of Karageorgis (the subject of the Greek Ferries decision) has revealed no ground for annulling the contested decision. Consequently, I see no reason to alter the operative part of the judgment under appeal.

184. In these circumstances, the appellant must be ordered to bear the costs both of the present proceedings and of those brought before the Court of First Instance.

## IX — Conclusion

185. In the light of the foregoing considerations, I therefore propose that the Court:

(1) sets aside the judgment of the Court of First Instance of the European Communities of 29 November 2005 in Case T-33/02 *Britannia Alloys & Chemicals* v *Commission* in that it failed to examine the argument alleging infringement of the principle of equal treatment between Britannia Alloys & Chemicals Ltd and Karageorgis, the subject of Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.466 — Greek Ferries);

(2) dismisses the remainder of the appeal;

(3) dismisses the action brought before the Court of First Instance of the European Communities for annulment of Commission Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate);

(4) orders Britannia Alloys & Chemicals Ltd to pay the costs both of these proceedings and of those brought before the Court of First Instance of the European Communities.