JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

29 November 2005 *

In Case T-62/02,

Union Pigments AS, formerly Waardals AS, established in Bergen (Norway), represented by J. Magne Langseth and T. Olavson Laake, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Decision 2003/437/EC 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 2002 L 153, p. 1) and, in the alternative, for reduction of the amount of the fine imposed on the applicant,

* Language of the case: English.

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

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2004,

gives the following

Judgment

Facts

1 Union Pigments AS (formerly Waardals AS, hereinafter 'the applicant' or 'Union Pigments'), a company incorporated under Norwegian law, produces zinc phosphate and modified zinc phosphates. In 2000, its worldwide turnover was EUR 7.09 million.

2 Although they may have slightly differing chemical formulae, zinc orthophosphates form a homogeneous chemical product, generically referred to as 'zinc phosphate'. Zinc phosphate, which is derived from zinc oxide and phosphoric acid, is widely used as an anti-corrosion mineral pigment in the paint industry. It is marketed either as standard zinc phosphate or as modified (or activated) zinc phosphate.

3 In 2001, virtually all of the world zinc production was controlled by the following five European producers: Dr Hans Heubach GmbH & Co. KG ('Heubach'), James M. Brown Limited ('James Brown'), Société Nouvelle des Couleurs Zinciques SA ('SNCZ'), Trident (formerly Britannia Alloys & Chemicals Ltd, 'Britannia') and Union Pigments AS ('Union Pigments'). Between 1994 and 1998, the annual value of standard zinc phosphate on the world market was approximately EUR 22 million and on the European Economic Area (EEA) market approximately EUR 15 to 16 million. In the EEA, Heubach, SNCZ, Trident (formerly Britannia) and Union Pigments had rather similar shares in the standard zinc phosphate market, of approximately 20%. James Brown had a significantly lower market share. Customers for zinc phosphate are the main paint manufacturers. The paint market is dominated by a few multinational chemical groups.

4 On 13 and 14 May 1998, the Commission carried out simultaneous and unannounced investigations under Article 14(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Article [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), at the premises of Heubach, SNCZ and Trident. From 13 to 15 May 1998, acting at the request of the Commission under Article 8(3) of Protocol 23 to the EEA Agreement, the Surveillance Authority of the European Free Trade Association (EFTA) carried out simultaneous and unannounced investigations at the premises of Union Pigments under Article 14(2) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

5 In the administrative procedure, Union Pigments and Trident informed the Commission of their intention to cooperate fully with it in accordance with 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 Leniency Notice') and each made a statement concerning the cartel ('the Union Pigments statement' and 'the Trident statement').

6 On 2 August 2000, the Commission adopted a statement of objections addressed to the addressees of the decision being challenged in these proceedings (see paragraph 7 below), including the applicant.

7 On 11 December 2001, the Commission adopted Decision 2003/437/EC 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 decision which is the subject of the present judgment is the one notified to the undertakings concerned and which is annexed to the application (hereinafter 'the contested decision'). That decision differs in certain respects from the one published in the *Official Journal of the European Union.*

8 In the contested decision, the Commission states that a cartel, consisting of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Union Pigments, had existed between 24 March 1994 and 13 May 1998. The cartel was limited to standard zinc phosphate. The members of the cartel first adopted a market sharing agreement with sales quotas for the producers. Subsequently they agreed on 'bottom' or 'recommended' prices at each meeting, which were generally followed by the cartel members. There was also a certain amount of customer allocation.

9 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 continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

...

(a) in the case of ... Heubach ..., James ... Brown ..., [SNCZ], Trident ... and [Union Pigments]: from 24 March 1994 until 13 May 1998;

(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

...'

10 In calculating the fines, the Commission applied 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 the Leniency Notice.

11 Thus, the Commission first set a 'basic amount' of fine by reference to the gravity and duration of the infringement (see recitals 261 to 313 to the contested decision).

12 As regards gravity, the Commission found that the infringement should be classified as 'very serious', having regard to the nature of the behaviour at issue, its actual impact on the zinc phosphate market and the fact that it had covered the whole of the common market and, following its creation, the whole EEA (recital 300 to the contested decision). Notwithstanding the very serious nature of the infringement, the Commission explained that it would take into consideration the limited size of the product market (recital 303 to the contested decision).

13 The Commission applied 'differential treatment' to the undertakings concerned in order to take account of their effective economic capacity to cause significant damage to competition, and set the fine at a level ensuring that it had sufficient deterrent effect. For that purpose, it divided the undertakings concerned into two categories, according to their 'relative importance in the market concerned'. It thus relied on the EEA-wide product turnover in the last year of the infringement of each of those undertakings and took account of the fact that the applicant, Britannia (Trident as from 15 March 1997), Heubach and SNCZ were 'the major producers of zinc phosphate in the EEA, with rather similar market shares above or around 20%' (recitals 307 and 308 to the contested decision). The applicant, together with Britannia, Heubach, SNCZ and Trident, was placed in the first category ('starting point' of EUR 3 million). James Brown, whose market share was 'significantly lower', was placed in the second category ('starting point' of EUR 750 000) (recitals 308 and 309 to the contested decision).

14 As regards duration, the Commission found that the infringement attributable to the applicant was of 'medium 'duration, having lasted from 24 March 1994 to 13 May 1998 (recital 310 to the contested decision). It therefore increased the applicant's starting point by 40%, thus arriving at a 'basic amount' of EUR 4.2 million (recitals 310 and 313 to the contested decision).

15 The Commission then found that there were no grounds for concluding that there were any aggravating or attenuating circumstances (recitals 314 to 336 to the contested decision). It also rejected arguments concerning the 'poor economic context' in which the infringement took place and the specific characteristics of the undertakings concerned (recitals 337 to 343 to the contested decision). The Commission therefore set the amount of the fine at EUR 4.2 million 'prior to any application of the ... Leniency Notice' as regards the applicant (recital 344 to the contest decision).

16 The Commission also referred to the limit which, under Article 15(2) of Regulation No 17, the fine to be imposed on each of the undertakings concerned may not exceed. Thus, the amount of the applicant's fine prior to application of the Leniency Notice was reduced to EUR 700 000 and that of SNCZ to EUR 1.7 million. The amounts of the fine prior to application of the Leniency Notice were not affected by that limit (recital 345 to the contested decision).

17 Finally, the Commission granted the applicant a reduction of 50% under the Leniency Notice for having provided the Commission with a detailed account of the cartel's activities (recitals 354 to 356 to the contested decision). The final amount of the fine imposed on the applicant was thus EUR 350 000 (recital 370 to the contested decision).

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance on 1 March 2002, the applicant brought the present action.

19 By an application for interim relief lodged at the Registry on the same date, the applicant applied for suspension of enforcement of Articles 3(f) and 4 of the contested decision in so far as they impose a fine on the applicant.

20 Since the parties came to an agreement as to the outcome of the application for interim relief, the President of the Court of First Instance, by order of 1 July 2002 in Case T-62/02 R *Waardals* v *Commission* (not published in the European Court Reports), ordered that the case be removed from the register and reserved the costs.

21 By letter of 18 November 2003, the Commission informed the court that Union Pigments had started bankruptcy proceedings and that it assumed that the applicant would withdraw its application. In response to a question from the Court, the liquidator of Union Pigments indicated, by letter of 12 December 2003, that the latter company had been put into liquidation in June 2003 and that he had authorised Union Pigments's lawyers to continue the proceedings.

22 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measure of organisation of procedure, asked the Commission to produce certain documents and reply to a number of questions in writing. The Commission complied.

23 The parties presented oral argument and answered questions put to them by the Court at the hearing on 2 July 2004.

24 The applicant claims that the Court of First Instance should:

— annul or amend Article 1 of the contested decision regarding the duration of the infringement attributed to it;

— annul Article 3(f) of the contested decision or reduce the fine imposed on the applicant;

— grant its request for measures of organisation of procedure and measures of preparatory inquiry, including the summoning and hearing of witnesses, and grant it access to the report of the hearing of 17 January 2001 drawn up by the Commission;

— order the Commission to pay the costs.

25 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Law

26 The applicant puts forward two pleas in law in support of its application. The first alleges erroneous assessment of the facts and of evidence in applying Article 15(2) of Regulation No 17 and the second alleges miscalculation of the amount of the fine and breach of general principles.

1. *The first plea: erroneous assessment of the facts and of evidence in applying Article 15(2) Regulation No 17*

27 The applicant claims that the Commission's calculation of the fine is based on an incorrect assessment of the facts and of the evidence. The Commission did not take sufficient account of the applicant's observations concerning the circumstances of the case and its participation in the cartel. It criticises the Commission for limiting the case both as regards timing and as regards the facts. That approach meant that the Commission was unable to take account of factors which might justify, for example, an increase of the amount of the fine to be imposed on some of the undertakings concerned, because of the gravity of the infringement and other circumstances, and thus involved the disadvantage of treating all those undertakings in the same way and reducing the applicant's opportunity to benefit from a more favourable decision.

28 This plea comprises two parts, in which the applicant claims that:

— the Commission committed an error of assessment regarding the duration of its participation in the infringement and its withdrawal from the cartel;

— the Commission made errors of assessment of the facts and of the evidence concerning the applicant and its role in the cartel.

The first part: the duration of the applicant's participation in the infringement and its withdrawal from the cartel

Arguments of the parties

29 The applicant maintains that the Commission made an error of assessment regarding the duration of its participation in the infringement and its withdrawal from it. According to settled case-law, it is incumbent on the Commission to prove not only the existence of the cartel but also its duration (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79, and Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3589, paragraph 55). The applicant states that the Commission found that it had participated in the infringement from 24 March 1994 until 13 May 1998, namely a period of four years and one month (Article 1(a) of the contested decision). Although having found that the applicant had withdrawn temporarily from the cartel (recital 125 to the contest decision), the Commission nevertheless gave an incorrect impression of that withdrawal by questioning 'if it occurred at all' (recital 130 to the contested decision).

30 The applicant states that it officially announced its withdrawal from the cartel by fax of 24 April 1995 in reply to a reminder sent by the European Chemical Industry Council (hereinafter 'CEFIC') concerning statistics for the month of May, and that its withdrawal lasted until August 1995. It claims that the withdrawal lasted five to six months, namely from March 1995, in which month it did not disclose any figures concerning the market, until mid-August 1995. In the alternative, it claims that it took the decision to withdraw from the cartel 'immediately after the meeting [of 27 March 1995]', as is clear from the conclusions of the note of 30 March 1995.

31 According to the applicant, the Commission wrongly considered that its withdrawal from the cartel had no impact. It states that, without its data, the statistics prepared by CEFIC could not be correct and were therefore of less value to the cartel. It adds that it obtained an order from its customer Teknos Winter (hereinafter 'Teknos') to which it delivered a container, after having withdrawn from the club in April 1995, and it did so outside the sharing agreement established by the other members of the cartel. In response to the argument put forward by the Commission in the contested decision that its withdrawal was not indicative of totally autonomous commercial behaviour, since the fact of knowing that the cartel was still operating must have had a bearing on its commercial decisions, the applicant contends that the fact that it was not subject to the restrictions imposed by the cartel enabled it to act against the cartel. The fact of obtaining an order from Teknos could only be regarded as evidence of 'totally autonomous commercial behaviour'. As to the Commission's argument that there were grounds for presuming that, subject to proof to the contrary, an undertaking which remains active on the market takes account of information exchanged with its competitors in order to determine its conduct on that market, the applicant replies that the Commission cannot have meant that it should have withdrawn from the market. The applicant also claims that it had no reason to give credence to information received or to act accordingly because, first, recommended prices were not observed in the Nordic countries and the prices charged were below cost, 'which presumably was not significantly lower than the applicant's' and, second, the exchanges of information actually ceased with effect from March 1995.

32 In its reply, the applicant adds that it did not confine itself to behaving like an undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 142). In fact, its conduct was directly in conflict with the anti-competitive effects sought by the other participants (*SCA Holding* v *Commission*, paragraph 143). The principle of legal certainty requires the Commission to prove that the applicant took part in practices restrictive of competition during that period (Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 62). However, the Commission has not produced any such proof in this case. Consequently, it must be concluded that the applicant did

not participate in the cartel during that period. As regards the Commission's assertion that the continuity of the infringement might have been interrupted if the withdrawal had had the effect of rendering the information exchanged entirely useless, the applicant replies that that is precisely what happened in this case, as the information exchanged between the other participants was no longer of any use in the absence of statistics emanating from it.

33 The applicant adds that the Commission gives a false impression of what happened when it describes its withdrawal from the cartel as 'temporary'. The applicant claims that, when it did withdraw, it had no intention of doing so for only a short period. The fact that it obtained an order from Teknos is evidence of that fact.

34 The applicant claims that the contested decision appears to presuppose that it took part in the cartel meeting in London on 12 June 1995. However, when the Commission raises the question whether or not it participated in that meeting, without arriving at any conclusion, its decision is based on an incorrect assessment of the facts and evidence. The applicant states that it informed the Commission, in its statement and in its reply to the statement of objections, of a meeting it had with a representative of Heubach at Heathrow (London) on 12 June 1995. The purpose and agenda of that meeting, however, had nothing to do with the cartel. The applicant admits that a cartel meeting could have taken place at Heathrow on that day, but insists that it was not present. It considers that it would be wrong to speculate about the numerous reasons which might have prompted Heubach to suggest that place and that date for a meeting. It points out that it indicated in its statement that Heubach took advantage of that meeting to inform it that it should rejoin the club, but that it declined the invitation to take part in the meeting thereof, a fact which, moreover, led the other participants to regard it as being 'outside'.

35 For its part, the Commission contests the applicant's claim that it effectively withdrew from the cartel and that the Commission wrongly failed to take that fact into consideration (recitals 230 to 234 to the contested decision). It contends, in particular, that the alleged withdrawal of three months and six days must be seen in the light of the fact that the infringement in question consisted of participation in an agreement and/or a concerted practice (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 164 and 173).

Findings of the Court

36 It is clear from the case-law that it is incumbent on the Commission to prove not only the existence of an agreement but also its duration (*Acerinox* v *Commission*, cited in paragraph 29 above, paragraph 55, and *Dunlop Slazenger* v *Commission*, cited in paragraph 29 above, paragraph 79). In this case, it is common ground that the applicant did participate in the cartel from 24 March 1994 to March or April 1995, and from 1 August 1995 to 13 May 1998. The applicant claims that it withdrew from the cartel from March 1995 until 1 August 1995.

37 The Court notes that there are indeed indications that the applicant withdrew from the cartel for a period. Thus, in response to a request from CEFIC for its statistics for March 1995, the applicant stated, by fax of 24 April 1995, that it 'was pulling out of the Zinc Phosphate Producers Association [Subgroup]' and that, for that reason, it would no longer be forwarding statistics. That reply is consistent with the internal note written on 30 March 1995 by the sales director to the other members of the applicant's management (hereinafter 'the note of 30 March 1995') containing a recommendation for withdrawal from the cartel. Moreover, it is common ground that the applicant did not communicate its statistics to the other undertakings concerned between 24 April and 1 August 1995.

38 However, the Court considers that the Commission was still entitled to conclude that the applicant participated in the cartel, without any real interruption, between 24 March 1994 and 13 May 1998.

39 According to the case-law, the conduct of a person engaging in fair competition is characterised by the independent manner in which he determines the policy that he intends to adopt in the common market (*Suiker Unie and Others* v *Commission*, cited in paragraph 35 above, paragraph 173). Even if it were conceded that the applicant refrained from participating in the activities of the cartel from the end of March 1995 until 1 August 1995, it did not resume a genuinely autonomous policy in the market during that brief period. The benefit it obtained from access to the statistics from other members did not cease to exist on the day the applicant withdrew from the cartel. It presumably took account of information already exchanged with its competitors, including at the meeting of 27 March 1995, in determining its conduct on that market during its alleged withdrawal (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 121, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 162). It must also be pointed out that the applicant admits that in August 1995 it rejoined the cartel because it urgently needed information concerning the market (paragraph 67 of the Union Pigments statement).

40 Moreover, it should also be noted that, when it rejoined the cartel, the applicant provided the other members with statistics retroactively covering the whole period of its purported withdrawal. Consequently, the decision to cease forwarding statistics had only limited effect. In addition, the applicant has not denied that its market share in 1995 coincided with that agreed at the cartel meetings.

41 The applicant claims that it delivered a container to Teknos after withdrawing from the cartel and did so outside the sharing agreement. However, the Commission was entitled to conclude that the applicant had obtained that order by acting on the basis of information received on the strength of the cartel agreements (see, to that effect,

the case-law cited in paragraph 39 above). According to the Teknos allocation agreement, no producer other than the one whose 'turn' it was could invoice a price lower than that fixed for Teknos. It is common ground that the applicant delivered the order concerned to Teknos in April 1995 (recital 230 to the contested decision). The Commission could legitimately conclude that that order had been obtained by the applicant because it knew the price fixed at the preceding meeting, namely that of 27 March 1995. The applicant's conduct in that regard is a classic example of a cartel participant exploiting the cartel for its own benefit, a factor which does not serve to reduce its responsibility as a participant (see, that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230).

42 Furthermore, it must be observed that the applicant did not withdraw from the cartel in order to report it to the Commission or even to resume fair and independent competitive conduct in the relevant market. On the contrary, it is clear from the note of 30 March 1995 that the applicant endeavoured to use its purported withdrawal in order the better to exploit the cartel for its own benefit. According to that note, it considered that the other participants had engaged in internal cooperation within the cartel and had shared customers and markets at its expense. Despite a request to that effect made by the applicant at the cartel meeting of 27 March 1995, the other participants were not prepared to consider increasing its market share. That fact is given in the note as a reason for withdrawing from the cartel. It also shows that the applicant expressly envisaged the possibility of rejoining the cartel subsequently. As the applicant did not withdraw decisively from the cartel and again participated in it only a few months after its purported withdrawal from it, the Court considers that it used its withdrawal to try to obtain better conditions within the cartel, which is another example of a participant exploiting a cartel for its own benefit (see, to that effect, the case-law cited in paragraph 41 above).

43 The fact that the applicant failed to attend only the meeting of 12 June 1995 cannot have the effect of mitigating its participation in the cartel, the latter having lasted more than four years. Furthermore, the applicant was in contact with the other undertakings concerned during the period in question, as shown by the fact that it had a meeting with Heubach at Heathrow airport on 12 June 1995, that is to say on the same day and at the same place as a meeting of the cartel.

44 It follows that the first part of the first plea must be rejected as unfounded.

The second part: errors of assessment of the facts and of evidence concerning the applicant and its role in the cartel

45 The second part of the first plea comprises five complaints, in which the applicant maintains that the Commission committed errors of assessment concerning:

— changes in the applicant's situation since the start of the investigations;

— its impact on the relevant market;

— its participation in the cartel before 1994 and the fact that it was not an instigator of the infringement;

— the fact that it was not a full member of the cartel;

— the fact that it immediately brought the infringement to an end.

The first complaint, concerning changes in the applicant's situation since the start of the investigations

— Arguments of the parties

46 The applicant asserts that the Commission did not appropriately take account of the deterioration of its financial situation, even though it mentioned that development in its communications with the Commission before the contested decision was adopted. More recent developments should also be taken into consideration.

47 First, the applicant states that the Commission wrongly found, in the contested decision, that it 'currently employs around 30 people' (recital 38). It claims it told the Commission that it had only 25 employees.

48 Second, the applicant refers to its critical financial situation. Its turnover fell from 68.7 million Norwegian kroner (NOK) in 1997 to NOK 57.2 million (about EUR 6.92 million) in 2001. Its activities were not very profitable, as shown by the losses of EUR 317 589 and EUR 310 659 which it suffered in 2000 and 2001 respectively. The applicant adds that in 1997 it recorded a net pre-tax result of NOK 1 148 837 but that, in 2000 and 2001, that result was NOK - 3 413 554 and NOK - 3 496 000 respectively. Moreover, its equity capital had considerably diminished, mainly because of significant losses recorded in 2000 and 2001. In 2001, its equity amounted to only NOK 466 095 (about EUR 58 300). It represents 15% of the fine imposed by the Commission.

49 The applicant states that it was not in a position to obtain a bank guarantee to ensure payment of the fine and that it therefore applied to the Court of First Instance for an interim order deferring payment. It adds that, recently, it has been unable to meet all its debts.

50 The Commission considers that the first complaint is not relevant to consideration of the legality of the contested decision.

— Findings of the Court

51 The Court considers that this complaint is not really directed at an incorrect assessment of the facts and evidence. It is true that the Commission found in the contested decision that the applicant 'employ[ed] around 30 people' (recital 28),

whereas the applicant had informed it that it had only 25. However, that cannot affect the legality of the contested decision. Moreover, it must be pointed out that the applicant relies above all on its critical financial situation and does not seek to show errors of fact in that regard in the contested decision. In particular, its arguments concerning changes in its economic situation after the adoption of the contested decision are not relevant to an appraisal of any errors of fact which might be contained in the decision itself.

52 In reality, the arguments put forward in connection with the first complaint in the second part of the plea are relevant only to facts which might be taken into account under the second part of the second plea, relating to the impossibility of paying the fine (see paragraphs 172 to 181 below).

The second complaint, concerning the applicant's influence on the relevant market

— Arguments of the parties

53 The applicant criticises the Commission for not having duly taken account of the fact that it had very little influence on the market and that its room for manoeuvre was limited because of its relations with distributors and customers. First, as regards its distribution network, it states that, for many years, it sold all its zinc phosphate production intended for continental Europe to BASF under a co-production agreement. It manufactured zinc phosphate which it packaged in sacks or packets bearing the BASF trademark, which was then sold as a BASF product. In view of its dependence on BASF and the great difference of size and power as between that company and itself, the applicant had virtually no influence on the price of its supplies to BASF. Despite the expiry of the agreement with BASF in 1997, the latter

remained an important customer. Moreover, the applicant points out that Wengain Ltd (hereinafter 'Wengain'), its exclusive distributor in the British market for several products, including zinc phosphate, had imported and sold other products from various undertakings, so that it was able to offer a whole range of products to the paint industry. Wengain purchased the products from the applicant at a price based on free delivery and re-sold them in the United Kingdom at prices determined by it. As regards large customers and deliveries exceeding 10 tonnes, the applicant was entitled to participate in the negotiations and to deliver goods directly. Because of its distribution network, the applicant had only limited room for manoeuvre regarding quantities and had little opportunity of bringing influence to bear on sales and prices. The position was different only regarding the applicant's direct customers.

54 Second, the applicant alleges that the Commission did not take sufficient account of the fact that it was dependent on its competitors, who were also customers. The applicant supplied zinc chromate to Heubach and to SNCZ. The latter is the applicant's most important customer for that product. Some of the applicant's clients and competitors sought to obtain higher prices for zinc phosphate in order to make the price of modified zinc phosphate more competitive. Not wishing to damage its relations with its competitors, who were also its customers, the applicant states that it was under strong pressure from them to join the cartel. It states that, contrary to the Commission's contention, it does not claim to have been forced to participate in the infringement but was under pressure from its competitors and could not envisage any other solution at the time.

55 The Commission contests the applicant's assertion that it had only a very limited opportunity to influence prices charged to customers and that it did not duly take account, in the contested decision, of the fact that it depended on its competitors, who were also its customers.

56 In response to the applicant's assertion that it had no, or little, influence on the quantities sold in the United Kingdom and Germany, the Commission states that, even if that were the case, it would be irrelevant since the market shares were calculated on an EEA-wide basis.

57 The Commission also points out that the figures set out in Annexes 23 to 25 to the application, concerning phosphate sales, do not correspond exactly to those notified to it by letter of 17 March 1999. It draws attention to the fact that the applicant has not explained those divergences.

— Findings of the Court

58 First, with regard to the argument that the Commission committed an error of assessment of the applicant's influence on its 'distributors', it must be pointed out that the applicant has produced no evidence in the present proceedings to show that the Commission committed any such error.

59 Contrary to its assertion that it sold all its zinc phosphate intended for continental Europe under its co-production agreement with BASF, it is clear from the annexes to the application that the applicant supplied zinc phosphate to other undertakings in continental Europe. Moreover, the co-production agreement between the applicant and BASF came to an end in April 1997. Finally, the applicant began to establish contacts with former customers of BASF (paragraph 77 of the Union Pigments statement). Even if BASF had a considerable influence on the applicant before April 1997, that influence could not have been so great during the last year of the agreement.

60 As regards Wengain, the applicant's distributor in the United Kingdom, it must be borne in mind that the applicant participated in the cartel in order to put an end to the price war, which was intense in the United Kingdom. It itself conceded, first, that it was able to organise a counter-attack in the United Kingdom during that price war (paragraph 45 of the Union Pigments statement) and, second, that one of the advantages of the cartel had been the end of the price war in the United Kingdom in which it had participated (paragraph 49 of the Union Pigments statement and the internal note of 30 March 1995). Those facts show that the applicant was able to influence Wengain's conduct on the United Kingdom market regarding prices.

61 In any event, it is common ground that the applicant's market share was very close to that allocated to it in the cartel. It follows that it had sufficient influence on its distributors to implement the quota agreement. Moreover, the applicant admitted in its statement that, year after year, the cartel had yielded better 'coherence' in prices, except in the Nordic countries (paragraph 73 of the Union Pigments statement). It follows that the Commission was entitled to conclude that the applicant had sufficient influence on its distributors to ensure implementation of the price agreement.

62 It follows that the first argument put forward in support of the second complaint must be rejected.

63 As regards, second, the applicant's alleged dependence on its customers and competitors (see paragraph 54 above), even if it is accepted that the applicant had been subject to pressure, it cannot rely on that fact because it could have reported such pressure to the competent authorities and made a complaint to the Commission under Article 3 of Regulation No 17 rather than participate in the activities in question (see, to that effect, Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647, paragraph 50, and the case-law cited therein). Moreover, after allegedly withdrawing from the cartel in 1995, the applicant, according to its own

statements, rejoined it not because of pressure but in order to obtain information about the market (paragraph 67 of the Union Pigments statement). Furthermore, the applicant's assertion that it was obliged to participate in the infringement is not consistent with its alleged withdrawal.

64 It follows that this complaint must be rejected.

The third complaint: the applicant was not an instigator of the infringement

— Arguments of the parties

65 The applicant claims that the Commission made factual errors regarding its contacts with the cartel members before March 1994. It observes that, according to the Commission, the cartel in the sector in question was set up in March 1994 (recital 81 to the contested decision). However, the cartel came into being before that date and before the applicant was invited to join it. The applicant maintains that the 'other competitors' had already come to an understanding about a way of sharing markets and that its three main competitors, SNCZ, Britannia and Heubach, then held the same market share, namely 24%. The applicant states that it suspected the existence of a 'cartel within the cartel', an 'inner circle', which operated before it was invited to the meeting of 24 March 1994. The existence of such an 'inner circle' is corroborated by the Commission's findings that Trident declared that there were regular contacts between Pasminco Europe-ISC Alloys (Trident's predecessor) and its competitors from 1989 to 1994 and a sales executive was regularly in contact with competitors, in particular by means of a direct telephone line (recital 76 to the contested decision). According to the applicant, it never had any contact with the executive in question concerning the state of the market and price levels. The fact that the other undertakings concerned had set up the cartel before it was invited to join them explains, at least in part, why it was not within the inner circle comprising the founder members.

66 The applicant adds that the fact that the cartel existed before the meeting of 24 March 1994 is confirmed by the Commission's finding that a meeting took place in October 1993, the purpose of which was 'to end the price war and bring some order in the market' (recital 315 to the contested decision). The applicant maintains that it did not take part in that meeting. Although it explained, both in its reply to the statement of objections and orally, that it had not attended that meeting, the Commission did not state its views on the matter and merely noted, in the contested decision, that it contested its participation in the meeting in question (recital 86 to the contested decision). The fact that the Commission did not apparently seek to check the facts concerning that meeting adversely affected the applicant. In reply to the Commission's argument that, in its statements of 2 September 1998, it had itself mentioned the meeting of 24 March 1994 as being a 'first meeting of the club', the applicant states that it was manifestly referring to the 'first meeting in which [it] was present'.

67 Next, the applicant states that, in the contested decision, the Commission concluded that it had been unable to identify a specific ringleader and that the cartel constituted 'a joint initiative of most of the competitors in the zinc phosphate sector' (recital 319 to the contested decision). It criticises the Commission for failing to take account of the fact that the other participants in the cartel had taken the initiative to set it up and had already held a first meeting before it was invited to join. Given that it had not taken part in the 1993 meeting, an event which gave rise to the cartel, it is unfair to treat the applicant in the same way as the other participants regarding the creation of the cartel. If it is correct that the first meeting of the five producers took place later than 24 March 1994, the Commission has harmed the applicant by failing to take account of the fact that multilateral meetings of the other four producers took place before 1994. According to the applicant, Heubach behaved as the de facto leader of the cartel, at least vis-à-vis the applicant. It adds that it was not necessary for the cartel to have been imposed by one of its participants for the Commission to be able to find a ringleader.

68 As regards the Commission's refusal to treat it differently because the other participants had set up the cartel before it was invited to participate, the applicant maintains that what happened before and after the period concerned cannot be regarded as entirely irrelevant. The choice made by the Commission to take account of certain factors influenced its assessment of the gravity of the applicant's participation, to its detriment. Even if the Commission were to limit its investigations and the contested decision to a given period, which would have little effect on the size of the fine for the others, the applicant should not have to suffer by not receiving the differentiated treatment which it would otherwise very probably have been afforded.

69 The Commission replies that it never stated that the applicant was an instigator of the cartel or that it had participated in the October 1993 meeting. It merely found the existence of an infringement as from 1994. Although it is possible that a cartel may have existed before that date, it is clear that it is not covered by the contested decision and it is therefore pointless to continue discussing the issue. The Commission adds that, in its statements of 2 September 1998, the applicant makes reference to the meeting of 24 March 1994 as being a 'first meeting of the "club"'. It refers to the examination of that question in the section dealing with possible attenuating circumstances.

70 In any event, the applicant would gain no advantage from a finding that the other addressees of the contested decision were 'ringleaders' or that they had also colluded on other markets or for a longer period.

— Findings of the Court

71 In the first place, although the file contains certain indications that the zinc phosphate producers engaged in anti-competitive contacts before 24 March 1994 (see, for example, recitals 76 to 80, 82 to 86 and 225 to the contested decision), the Court considers that the Commission could reasonably conclude that the infringement commenced only at the meeting held on that date. It must be noted, in that connection, that the applicant denied participating in a meeting in October 1993 (recital 86 to the contested decision), so that the Commission was entitled to conclude that the first meeting attended by all the undertakings concerned was that of 24 March 1994. Moreover, the latter meeting was the first of the cartel's regular meetings. Furthermore, the first meetings of the cartel of 24 March and 3 May 1994 fit in with a letter from CEFIC of 26 May 1994 announcing the creation of the zinc phosphate statistics group (recitals 66, 109 and 112 to the contested decision).

72 In any event, even if it were accepted that the infringement had started at an earlier date, that would change nothing for the applicant, as it participated in the infringement only from 24 March 1994. The applicant's argument that the cartel had started in October 1993 is therefore wholly irrelevant to the claim for annulment of the contested decision.

73 The applicant claims that the Commission should have found that the other participants, and Heubach in particular, had taken the initiative to set up the cartel and that the Commission disregarded the applicant's distinct role. Whilst it is true that according to the Guidelines, the 'role of leader in, or instigator of, the infringement' may be an aggravating circumstance justifying increase of the basic

amount (Section 2, third indent), in this case the Commission concluded that 'the cartel was a joint initiative of most of the competitors in the zinc phosphate sector, and that no specific ringleader could therefore be identified' (recital 319 to the contested decision). Accordingly, contrary to the impression which the applicant appears to wish to give, the Commission did not increase the fines on that ground. It follows that the applicant was not harmed by the Commission's abovementioned conclusion. Moreover, the correctness of that conclusion cannot be challenged since it does not appear from the documents before the Court that any one undertaking took the initiative to set up the cartel (see, for example, recitals 314 to 318 to the contested decision).

74 It follows that the third complaint is unfounded.

The fourth complaint: the applicant was not a full member of the cartel

— Arguments of the parties

75 The applicant claims that the Commission erred in failing to take account of the fact that it was not a full member of the cartel and that it was not regarded as such by the other members. It refers to several facts in support. First, it did not participate in the first meeting, held in October 1993. Secondly, and generally, it cooperated with the cartel only with great reluctance. Thus, it refers to the fact, acknowledged by the Commission, that CEFIC had to send it a reminder on 15 June 1994 for it to provide information (recital 109 to the contested decision). Third, the Commission's findings concerning the notes relating to a meeting of 27 March 1995 in London show that the applicant did not enjoy equal treatment as a member. The applicant observes that one of its employees noted in his diary, on 27 March 1995, that it had envisaged asking to be treated at that meeting as a 'full member with allocation of clients'

(recital 122 to the contested decision). After that meeting, its sales director mentioned, in the note of 30 March 1995, that the other participants 'were not willing to discuss larger market share for [the applicant]' (recital 122 to the contested decision). The Commission also stated that the applicant thought that 'the others were cheating on [it]' (recital 124 to the contested decision).

76 Fourth, the applicant states that it did not participate in the Teknos sharing agreement. It maintains that, as the Commission observes (recital 99 to the contested decision), the reason for which, on one occasion only, the other three undertakings had decided unilaterally that it should deliver a container to Teknos was to ensure that the latter company did not suspect the existence of an arrangement. However, that order was made at the expense of other business in Finland. The note of 30 March 1995 is, according to the applicant, proof that it did not participate in the Teknos sharing agreement. The applicant criticises the Commission for drawing no inference from the fact that it received an order from Teknos after it had withdrawn from the club in April 1995 (recital 131 to the contested decision). The only correct approach would have been to conclude that the applicant had not participated in that agreement, which constitutes further proof that it was not a full member of the cartel. As regards the Commission's assertion that the applicant 'itself recognises' that it benefited from having Teknos allocated to it for a period of six months, the applicant repeats that that customer was allocated to it only once and not for a period of six months.

77 The applicant rejects the Commission's assertion that the evidence shows that it did not play a passive role in the cartel. It considers that that evidence, although perhaps reflecting a somewhat naive attitude regarding the activities of the club, is indicative of neither an active nor a passive role. The fact of collecting documents, such as those obtained by the Commission at the applicant's premises, is not inconsistent with a passive role. In fact, its role would have been more active if it had removed or destroyed such documents. The applicant adds that the fact that it took turns reserving meeting rooms from time to time merely underscores the passive nature of

its participation. As regards the Commission's attempts to give the impression that it failed to disclose the existence of the meeting of 9 January 1995, the applicant claims that it had never considered that meeting, the purpose of which was to broker better relations with one of the other companies, as a 'club meeting'. Nor should it be relevant for the assessment of its conduct.

78 The description given by the Commission of the applicant's representatives at the cartel meetings is misleading and gives the incorrect impression that they were of the same rank as those of the other undertakings concerned. The Commission found that the other undertakings were represented by members of top management, namely managing directors, general managers or presidents, and that the applicant was represented by a 'director and the international sales manager' (recital 71 to the contested decision). Although Mr R. bore the title 'director', that title was not a legal designation and reveals nothing concerning the position, powers or responsibilities of its holder, which were more comparable with those of Mr B., the sales manager. In contrast, the other undertakings had chosen representatives at the highest levels of their respective boards. Mr W. was, when the infringement commenced, the applicant's managing director.

79 The Commission contests the applicant's arguments. It emphasises that the applicant was not compelled to participate in the cartel and states that it is clear from the facts set out in the contested decision, supported by numerous pieces of direct evidence obtained at the applicant's premises, that the latter's role could not be described as 'passive'. On the contrary, the evidence shows that it implemented the agreements concluded by the cartel.

80 The Commission states that the applicant benefited from the allocation of customers. In its defence, it observes that in 1997 Teknos was allocated to the

applicant for a period of six months, a fact which the applicant itself acknowledges. In its rejoinder, the Commission admits that it 'mistakenly referred to another customer allocation', but points out that the fact that it was concluded in the contested decision that Teknos was allocated to the applicant was not contested by the applicant.

— Findings of the Court

81 The Court finds that the Commission was entitled to conclude that the applicant had participated fully in the cartel. As will be shown below, the applicant participated in all the most important aspects of the infringement.

82 First, it is common ground that the applicant regularly took part in the cartel meetings. The Commission correctly found that it had attended 15 of the 16 multilateral meetings identified during the period of the cartel (recitals 102, 107, 112, 116, 120, 132, 133, 137, 151, 157, 168 and 181 to the contested decision). Moreover, the applicant even organised some of those meetings (recitals 120, 136 and 160 to the contested decision). Its assertion that it did not attend the October 1993 meeting is not relevant, as the Commission concluded that the cartel did not start until 24 March 1994.

83 The applicant's argument that it was not represented by persons of the same high level as the representatives of the other undertakings concerned, does not show that it was not a full member of the cartel. Contrary to the impression given by the applicant, the Commission did not state that the other undertakings were represented by members of the most senior management. It simply identified the

usual representatives of the undertakings at cartel meetings. Moreover, the representation of the applicant, even if entrusted merely to the sales director, was of a sufficiently high level to demonstrate the applicant's full participation in those meetings.

84 Second, the applicant does not deny that it participated fully in the agreement on quotas (paragraphs 51 to 53 of the Union Pigments statement). Moreover, the internal note of 30 March 1995 shows that it even requested an increase in its market share (recital 122 to the contested decision). As provided for in the agreement, the applicant sent information concerning its sales turnover to CEFIC and, subsequently, to its successor, the Verband des Mineralfarbenindustrie eV (paragraphs 51 to 53 of the Union Pigments statement; recitals 109, 110, 130, 134, 144, 153 and 184 to the contested decision). In return, the applicant received information on the sales of the other members of the cartel, of a kind likely to influence its conduct within the cartel and on the market (see to that effect Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 207). The fact that CEFIC had to send a reminder to the applicant to provide information (recital 109 to the contested decision) is not sufficient to show that the applicant cooperated only very reluctantly with the cartel.

85 Third, the applicant does not in its statement deny that it participated in the fixing of the indicative prices (see paragraphs 49, 60 and 73 of the Union Pigments statement). It even acknowledged in its note of 30 March 1995 that it had obtained higher prices thanks to the cartel (recital 125 to the contested decision; see also paragraphs 49 and 73 of the Union Pigments statement).

86 Fourth, the Commission rightly concluded that the applicant had participated in the allocation of customers. The applicant merely denies participating in the agreement allocating Teknos but not its participation in the other allocations mentioned in the

contested decision. As regards Teknos, it may well be that that customer was allocated before March 1995 without the applicant's involvement (recitals 122 to 124 to the contested decision). However, the applicant admitted that it did deliver a container to Teknos (paragraph 69 of the Union Pigments statement). Its explanation that that delivery was made only to ensure that Teknos did not suspect the existence of the agreement cannot be accepted. Moreover, according to Trident, the price to be invoiced to Teknos was the subject of an agreement and it had been agreed that no producer other than the one whose 'turn' it was could invoice a price lower than that which had been agreed (recital 96 to the contested decision). According to a note from the applicant concerning a meeting of 4 February 1997, it apparently agreed to fix its prices above those of SNCZ because Teknos had been allocated to the latter for six months (recitals 138 and 139 to the contested decision). That fact also shows the applicant's participation in the agreement allocating Teknos. Furthermore, this company was one of the applicant's main customers (recitals 97 and 270 to the contested decision) and, according to Trident, the applicant was ready to initiate a price war in order to retain it (recital 97 to the contested decision). The Court finds therefore that it has not been established that the applicant did not participate in the allocation of that customer, at least after it became aware of that allocation.

87 In any event, even if the applicant had not participated in the agreement allocating Teknos, the Commission was entitled to decide that it bore responsibility for customer allocation. It must be borne in mind in that connection that an undertaking that has by its own conduct participated in a multiple infringement of the competition rules, within the definition of an agreement or concerted practice having an anti-competitive object under Article 81(1) EC and which was designed to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the course of the same infringement throughout the period of its participation where it is proved that the undertaking in question was aware of, or might reasonably have foreseen, the unlawful conduct of the other participants, and was prepared to accept the risk (*Commission* v *Anic Partecipazioni*, cited in paragraph 39 above, paragraph 203, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 158).

88 Finally, the Commission was entitled not to conclude that there was a 'cartel within the cartel' as claimed by the applicant (recitals 122 to 125 to the contested decision). The applicant did not in fact adduce sufficient evidence of the existence of such an 'inner circle'. In any event, that cannot change the fact that the applicant participated fully in the infringement identified in the contested decision.

89 It follows from all the foregoing that the fourth plea must be rejected as unfounded.

The fifth plea: the applicant immediately brought the infringement to an end

— Arguments of the parties

90 The applicant states that the Commission did not duly take account of the fact that, following the investigations carried out at the premises of the undertakings, it immediately brought the infringement to an end. It decided to cooperate fully with the Commission in those investigations and is still determined to do so. Following those investigations, the applicant cancelled the meeting planned to be held in Amsterdam without saying why and also clearly informed Heubach that it would no longer disclose any statistical data. On 15 July 1998, the applicant sent a fax to the cartel participants informing them of its withdrawal from it. The applicant refused the invitation to join the new association, the Association of European Manufacturers of Zinc Phosphates (hereinafter 'EMZP'), and informed the Commission of the creation of that association. In the applicant's view, its conduct concerning the EMZP shows that it immediately took the measures which the Commission would impose later under the statement of objections. That conduct was such that the applicant should receive different treatment. However, the Commission did not duly take account of those circumstances. The applicant criticises it more particularly for not drawing a clear distinction between it and the

other undertakings concerned with regard to the EMZP. The Commission gave an incorrect impression of the applicant's conduct when it stated that information was supplied to that association by the 'cartel members' (recital 254 to the contested decision), without clearly specifying that the applicant had not taken part therein.

91 The Commission states that it is not required to reduce the amount of the fine on the ground that the applicant brought the infringement to an end as soon as it intervened (*LR AF 1998* v *Commission*, cited in paragraph 87 above, paragraph 324) and that the fact of taking an attenuating circumstance into consideration in this case would have had no impact on the final amount of the fine.

— Findings of the Court

92 Section 3, third indent, of the Guidelines provides for reduction of the basic amount in the event of 'termination of the infringement as soon as the Commission intervenes'. The Commission cannot however be required to consider, as a general rule, that termination of an infringement constitutes an attenuating circumstance. An undertaking's reaction to the opening of an investigation into its activities can be viewed only in the particular context of the case (*LR AF 1998* v *Commission*, cited in paragraph 87 above, paragraph 324).

93 In this case, on 13 and 14 May 1998 the Commission undertook investigations within various undertakings and the EFTA Surveillance Authority undertook investigations at the applicant's premises from 13 to 15 May 1998. In Article 1 of the contested decision, the Commission concludes that the cartel lasted from 24 March 1994 to 13 May 1998. It follows that the fact that the undertakings terminated the infringement as soon as the Commission intervened was taken into account.

94 In any event, the applicant has not proved that it did cease participating in the cartel as soon as the Commission intervened. It did not inform the other participants of its withdrawal until 15 July 1998 (see paragraph 90 above).

95 As regards the applicant's argument that it cooperated fully with the Commission following the investigations, it must be noted that it did not contact the Commission until 17 July 1998 (recital 57 to the contested decision). Moreover, it was granted the maximum reduction under Section D of the Leniency Notice, namely 50%.

96 As regards the EMZP, it need merely be stated that that organisation was set up on 31 July 1998 and is therefore not involved in the infringement at issue (recital 42 to the contested decision). Accordingly, the applicant's failure to join that association is irrelevant in this case.

97 It follows that the fifth complaint, and consequently the first plea in its entirety, must be rejected as unfounded.

2. *The second plea: miscalculation of the amount of the fine and breach of general principles*

98 The applicant maintains that, in so far as the Commission based the contested decision on an incorrect assessment of the facts and of the evidence, that decision is also vitiated as regards the basic amount of the fine and, therefore, infringes Article 15(2) of Regulation No 17, the principles followed in the Commission's decision-

making practice, the Guidelines and the Leniency Notice. This plea comprises six parts, concerning the following aspects of the contested decision:

— the gravity of the infringement and differential treatment;

— the duration of the infringement;

— misapplication of the concept of aggravating circumstances and failure to take account of attenuating circumstances;

— misapplication of the Leniency Notice;

— breach of the principles of equal treatment and proportionality;

— the inappropriateness of exerting greater deterrence and the impossibility of paying the fine.

The first part of the plea: the gravity of the infringement and differential treatment

Arguments of the parties

99 According to the applicant, the Commission had no right to describe the infringement committed by it as 'very serious' (recital 300 to the contested decision). It maintains that that infringement should have been regarded as 'less serious' and that it would have deservedly been accorded different treatment if the

Commission had duly taken account of the circumstances of the case, in particular the fact that it was not among the instigators of the cartel or of the inner circle, that it was not a full member of the cartel, that it withdrew from the cartel for a period of five to six months, that its withdrawal had a negative impact on the cartel and that its role was merely passive, whilst the driving force of the cartel was provided by other participants. Moreover, the real effect of the infringement imputed to it was insignificant, given that a large part of its production was acquired by BASF or was sold through the intermediary of its distributors. In fact, the prices charged by it were frequently below the 'recommended level'.

100 Next, the applicant claims that the Commission did not take account of the relative weights of the undertakings concerned in its application of differential treatment. In view of the relatively great difference of size as between those undertakings, reflected by their turnover and numbers of employees, and the effective ability of the applicant to do harm, the basic amount for the latter should have been considerably lower than that for the other undertakings. Moreover, the Commission should have taken account of the existence of cooperation among the other participants, in particular Heubach, SNCZ and Trident, vis-à-vis a small undertaking like the applicant. It emphasises that its influence was different from that exercised by the other undertakings concerned and fell far short of the market share used by the Commission as a basis for calculating the amount of the fine (in that connection, see paragraph 53 above).

101 In the light of the foregoing, the applicant claims that the Commission set an excessive basic amount in its case.

102 According to the Commission, the applicant is confusing the question of the gravity of the infringement with that of its own participation in it. As regards the allegations

concerning differential treatment, it points out that it divided the undertakings into two categories, the applicant being placed in the first category with three other undertakings. The applicant's market share, evaluated by it at about 30%, being by far the highest, there was in the Commission's view no reason for granting it special treatment. In its rejoinder, the Commission adds that the applicant has provided no relevant evidence to show that it was not one of the main producers of zinc phosphate in the EEA and that it had been wrongly placed in the same category as those producers.

Findings of the Court

103 In Section 1 A of the Guidelines, the Commission committed itself explicitly to taking account, in assessing the gravity of infringements, not of only their nature and of the size of the relevant geographic market but also of their actual impact on the market, where this can be measured. In the present case, all those criteria are mentioned in recital 300 to the contested decision.

104 It is apparent from the contested decision, as well as from the Guidelines, the principles of which were applied in that decision, that whilst the gravity of the infringement is initially assessed on the basis of the particular characteristics of the infringement, such as its nature and impact on the market, that assessment is subsequently adjusted according to the individual circumstances of the undertaking, so that the Commission takes into consideration, besides the size and capacities of the undertakings, both aggravating and attenuating circumstances, as the case may be (see Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1530, and the case-law cited).

105 The arguments put forward by the applicant in connection with this first part of the plea concern its own participation in the infringement rather than the particular characteristics of the infringement. The Court considers that the arguments to the effect that the applicant was not one of the instigators of the cartel or a member of the 'inner circle', that it was not a full member of the cartel and that its role was merely passive must be assessed when the question of aggravating and attenuating circumstances is examined (see paragraphs 118 to 133 below). As regards the applicant's withdrawal from the cartel, that matter relates to the duration of the infringement, which will be considered in paragraphs 111 to 114 below.

106 As regards the applicant's argument that the actual impact of its infringement was insignificant, it need merely be stated that the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it participated (*Commission* v *Anic Partecipazioni*, cited in paragraph 39 above, paragraph 152, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 160).

107 As regards the complaint that the Commission did not take account of the relative weights of the undertakings concerned in applying differential treatment or the applicant's capacity to do harm, it is appropriate to consider it in the context of the complaint alleging breach of the principles of equal treatment and proportionality.

108 Finally, the Court has already rejected the other arguments put forward by the applicant in connection with the second part of the first plea, namely the fact that there was an inner circle (see paragraph 88) and that it had limited influence on the market (see paragraphs 58 to 62 above).

The second part: the duration of the infringement

Arguments of the parties

109 The applicant claims that the Commission was wrong, first, in concluding that it had committed an infringement of the same duration as the other participants, namely four years and one month, and, second, in consequently increasing by 40% the starting level of the fine set in respect of the gravity of the infringement. The Commission did not take account of the fact that the applicant withdrew from the cartel for a period of five to six months. Consequently, it breached the principle of equal treatment, departed from its own decision-making practice and misapplied the Guidelines. According to the applicant, the increase of the starting level to take account of the duration of the infringement should have been much less than 40%.

110 The Commission refers to the arguments it put forward in response to the first part of the first plea.

Findings of the Court

111 As held in paragraphs 36 to 44 above, the Commission was entitled to conclude that the applicant had participated in the infringement without interruption from 24 March 1994 to 13 May 1998. Accordingly, the second part of the second plea cannot be upheld.

112 In any event, even if the applicant's arguments were well founded, the final amount of the fine would not change. The Commission would still be entitled to conclude that the applicant committed an infringement of average duration, extending from 24 March 1994 until March 1995, and then from August 1995 until 13 May 1998. An increase in respect of duration of up to 35% would be appropriate. However, having regard to the calculations involved in applying the Leniency Notice and the maximum limit of 10% of the turnover in the preceding business year achieved by the undertaking concerned, an increase of about 35% instead of 40% would not change the final amount of the applicant's fine.

113 Finally, with regard to the argument put forward by the applicant at the hearing to the effect that the Commission should not have increased the fines by 10% per year, it need merely be stated that this was not raised in the originating application and constitutes a new plea which is inadmissible pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance.

114 For those various reasons, the second part of the second plea must be rejected.

The third part of the plea: misapplication of the concept of aggravating circumstances and failure to take account of attenuating circumstances

Arguments of the parties

115 First, the applicant claims that there was no justification for the Commission to find aggravating circumstances in this case by including it among the participants which

took the 'joint initiative' to create the cartel. It adds that the Commission did not take sufficient account of the fact that the other undertakings brought the cartel into being and constituted an 'inner circle', whereas it joined the cartel only later and had never been a full member. By not granting the applicant more favourable treatment for those reasons, the Commission infringed the Guidelines.

116 Second, the applicant claims that, by considering that there were no attenuating circumstances in this case, the Commission committed an error and failed to comply with its decision-making practice and with the Guidelines. Referring to its arguments set out above, it states that the Commission failed to take account of the fact that it had been invited to join a cartel which existed already, that it had never been part of the 'inner circle' and that it had never been allocated any customer except in one case, in order to protect the other members of the cartel. The Commission likewise failed to take account of the fact that, in practice, the applicant had implemented the agreements at issue only to a very limited extent, as demonstrated by its withdrawal from the cartel, the lower prices which it charged in the Nordic market and the fact, established by the Commission (recital 118 to the contested decision), that at meetings it was often in conflict with other participants, in particular Britannia as regards sales in the United Kingdom and the price war. Moreover, the applicant considers that the Commission did not take account of the fact that it had, to some extent, been constrained to join the cartel because, first, certain participants in it were also important customers and, second, it was in the process of losing its most important customer and distributor on the continent, namely BASF.

117 The Commission considers, first, that it need only be pointed out that the contested decision did not find that there were aggravating circumstances in relation to the applicant. Second, it considers that the applicant's arguments concerning the alleged attenuating circumstances must be rejected.

Findings of the Court

118 As is clear from the case-law, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (see, to that effect, *Suiker Unie and Others* v *Commission*, cited in paragraph 35 above, paragraph 623, and *Commission* v *Anic Partecipazioni*, cited in paragraph 39 above, paragraph 150) in order to determine whether there are any aggravating or attenuating circumstances relating to them.

119 That conclusion follows logically from the principle that penalties must fit the offence, so that an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law (see, as regards fines, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

120 Sections 2 and 3 of the Guidelines provide for adjustment of the basic amount of the fine by reference to certain aggravating and attenuating circumstances, which are peculiar to each undertaking concerned.

121 In the first place, as regards the applicant's argument that the Commission found an aggravating circumstance in relation to it by including it among the participants that had taken the joint initiative to set up the cartel, it need merely be pointed out that it has no foundation in fact. The Commission did not in fact find any aggravating

circumstance in respect of the applicant (recitals 314 to 319 to the contested decision). In any event, even if the Commission had concluded that an aggravating circumstance existed regarding the other undertakings concerned, in view of the fact that they were the ringleaders or instigators of the infringement, that would not have changed in any way the amount of the fine imposed on the applicant.

122 For the same reasons, the applicant's argument that the Commission should have found an aggravating circumstance by reason of the fact that the other undertakings had established an inner circle cannot be upheld (see, in that connection, paragraph 88 above).

123 Next, the claim for reduction of the fine in respect of attenuating circumstances must also be rejected.

124 First, the applicant relies on the fact that it was invited to join a cartel that existed already, that it was not part of the inner circle and that it had never been allocated a customer. As indicated in paragraph 71 above, the Commission was entitled not to conclude that the cartel existed before 24 March 1994. Moreover, there is nothing in the file to show the existence of the inner circle referred to by the applicant (in that connection, see paragraph 88 above). Finally, the Commission was entitled to conclude that the applicant had participated in the agreement to allocate customers, including Teknos (see paragraph 86 above).

125 Moreover, the Court considers that, as a matter of principle, a participant in an infringement cannot allege an attenuating circumstance deriving from the conduct of the other participants in the infringement. In this case, the fact that the other cartel members became involved in the cartel earlier, or more deeply, might well constitute an aggravating circumstance in relation to them but not an attenuating circumstance in favour of the applicant.

126 As regards the applicant's argument that its role in the cartel was merely passive, it is true that 'an exclusively passive or "follow-my-leader" role' in the infringement can, where it is established, amount to an attenuating circumstance. A passive role implies that the undertaking will adopt a 'low profile', that is to say, not actively participate in the making of any anti-competitive agreements. It is clear from the case-law that amongst the circumstances that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the 'ordinary' members of the cartel, and likewise its belated entry to the market where the infringement occurred, regardless of the duration of its participation in the infringement, or again the existence of express statements to that effect emanating from representatives of other undertakings which participated in the infringement (see *Cheil Jedang* v *Commission*, cited in paragraph 84 above, paragraphs 167 and 168, and the case-law there 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 331). However, as already stated at paragraphs 82 to 87 above, the applicant has not proved the existence of such a 'low profile' in this case.

127 Second, the applicant considers that it should have benefited from a reduction of the amount of the fine because it in fact implemented the agreements in question only to a very limited extent. It seems thereby to be criticising the Commission for failing to treat as an attenuating circumstance the non-implementation in practice of the offending agreements, in accordance with Section 3, second indent, of the Guidelines.

128 In that connection, it is necessary to check whether the circumstances referred to by the applicant are such as to establish that, during the period in which it was a party to the offending agreements, it actually declined to apply them by adopting competitive conduct on the market (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 106 above, paragraph 268, and the case-law there cited).

129 As the applicant participated fully in the cartel (see paragraphs 81 to 87 above), the Court finds that it did not behave competitively in the market in the sense of the case-law cited in paragraph 128 above. It must be emphasised in that connection that the applicant admitted that it had ended its alleged withdrawal in August 1995 in order to benefit from the infringement (paragraph 67 of the Union Pigments statement). Thus, it clearly rejected the option of adopting competitive conduct in the market and preferred to take advantage of the cartel.

130 As regards the applicant's argument that it sold products below the recommended price, the Court would point out that the fact that an undertaking proven to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with those competitors is not necessarily a matter which must be taken into account as an attenuating circumstance. An undertaking which, despite colluding with its competitors, follows a policy that departs from that agreed on, may simply be trying to exploit the cartel for its own benefit (see, to that effect, *Cascades* v *Commission*, cited in paragraph 41 above, paragraph 230).

131 As to the applicant's argument that it was in competition with Britannia despite the cartel, it must be observed that it is common ground that those undertakings tried to divert customers from each other in 1994 and that, on 9 January 1995, James Brown organised a meeting with Britannia and the applicant in an attempt to improve the situation (recital 117 to the contested decision). It appears that the parties were unable to reach an agreement to resolve the difficulties of the situation then obtaining. It is true that that conflict shows some level of competition between the undertakings in question. However, the Commission did not claim, in the contested decision, that the cartel had precluded all competition in the market. Moreover, the applicant has produced no evidence to show that its conflict with Britannia continued throughout the duration of the infringement.

132 In any event, it is clear that the applicant participated in the meeting of 9 January 1995 because it considered itself to have been affected by competition and it therefore sought to conclude a new agreement.

133 Third, the applicant maintains that the Commission should have taken account of the fact that it was forced to join the cartel. As the Court has already held, that argument must be rejected (see paragraph 63 above).

134 It follows that the third part of the second plea must be rejected as unfounded.

The fourth part of the plea: misapplication of the Leniency Notice

Arguments of the parties

135 The applicant considers that the 50% reduction granted to it by the Commission under the Leniency Notice is insufficient. It observes that the new Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3. hereinafter 'the new Leniency Notice') differs from the Leniency Notice in that the latter requires an undertaking to produce 'decisive' evidence and does not grant complete immunity for undertakings which acted as instigators or played a determining role in the illegal activity. The applicant states that, although the contested decision gives the impression that the cartel was the result of a joint initiative, the Commission now recognises that it never claimed that the applicant had been an instigator of or had played a determining role in the cartel. Moreover,

the applicant claims to have sent the Commission information enabling it to ascertain that the other participants had decided, after the investigations, to set up the EMZP. The applicant points out that, in Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), Løgstør, one of the undertakings that had been granted a reduction, had informed the Commission that the members of the cartel had decided to continue its operation after the investigations. The applicant adds that it gave oral explanations and lists of meetings to the Commission. Finally, the applicant denies having indicated that the investigation carried out at the premises of the cartel members had not provided sufficient grounds for initiating the procedure.

136 The Commission contends that the distinction alleged by the applicant between the Leniency Notice and the new Leniency Notice is irrelevant, as it never claimed that the applicant had been an instigator or had played a determining role in the cartel. As regards the applicant's argument that the Commission did not in this case apply the Leniency Notice correctly, the Commission considers it to be without foundation.

Findings of the Court

137 First, it is important to note that, as found in recitals 351 to 353 to the contested decision, none of the undertakings concerned fulfilled the conditions for the application of Section B or Section C of the Leniency Notice. The conduct of those undertakings was therefore assessed by reference to Section D of the notice, entitled 'Significant reduction in a fine'.

138 Section D(1) provides, '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated'.

139 In this case, the Commission granted the applicant a reduction of 50% of its fine, namely the maximum reduction which the Commission could grant on the basis of Section D of the Leniency Notice (recitals 354 to 356 to the contested decision). The applicant maintains that the Commission should have granted it an even greater reduction. However, it does not contest the application of Section D(1) in this case. Moreover, it does not deny that the Commission compiled decisive and direct evidence of the infringement during the investigations carried out at its premises and that it does not therefore fulfil the conditions for the application of Sections B and C. As the Commission granted the applicant the maximum reduction of 50%, provided for under Section D(1) of the Leniency Notice, the Court considers that the applicant's argument in that connection is entirely without foundation.

140 As regards the new Leniency Notice, it was not published in the *Official Journal* until 19 February 2002 and, by virtue of point 28 thereof, does not replace the Leniency Notice until 14 February 2002. In those circumstances, the new Leniency Notice is not relevant to this case (see, to that effect, *Tokai Carbon and Others* v *Commission*, cited in paragraph 126 above, paragraph 273). Furthermore, the argument relied on by the applicant in that connection (see paragraph 135 above) is irrelevant in so far as the Commission has never claimed that it was an instigator or that it played a determining role in the cartel.

141 It follows from the foregoing that the fourth part of the second plea must be rejected.

The fifth part of the plea: breach of the principles of equal treatment and proportionality

Arguments of the parties

142 The applicant claims that it was punished relatively more severely than the 'members of the inner circle', even though they played a more active role in the creation and conduct of the cartel and participated in it uninterruptedly. Consequently, the Commission infringed the principles of equal treatment and proportionality and did not comply with the Guidelines.

143 The applicant states that it received a reduction because the fine exceeded 10% of its total turnover. However, the basic amount for the applicant (EUR 4.2 million) exceeded 60% of its total turnover in 2001. In contrast, the fine imposed on Britannia, Heubach and James Brown did not exceed 10% of their respective worldwide turnovers. The final amount of the fine imposed on the applicant, after application of the Leniency Notice, exceeded 5% of that turnover, and was as severe as that imposed on Heubach. Although, after application of the Leniency Notice, the applicant received a reduction of 50% and Heubach a reduction of 10%, which indicates that the latter should be penalised more severely by a factor of 80%, the final amount of the fine shows that the penalty imposed on Heubach was only 8% more severe than that imposed on the applicant. Consequently, the Commission infringed the principles of equal treatment and proportionality.

144 Moreover, the Commission took as the starting point for calculating the amount of the fine the same amount of EUR 3 million for practically all the undertakings,

regardless of their size. The applicant observes that, although the undertakings concerned had more or less similar market shares, their respective sizes were, and continue to be, significantly different, as evidenced by their turnovers, which are an important factor in determining their 'real' impact on the market. By choosing the same starting point for all the participants, the Commission imposed a much heavier penalty on those undertakings which, like the applicant, have a lower turnover. The Commission infringed the principle of proportionality in so far as the fines are not proportional to the power of each undertaking, determined by its market share, its size and its turnover.

145 The applicant points out that the Guidelines provide for the classification of infringements in three categories and therefore for differential treatment of the undertakings concerned according to the nature of the infringement imputed to them. As the Court indicated in its judgment in *Acerinox* v *Commission*, cited in paragraph 29 above, paragraph 78, it is also 'necessary to take account of the effective economic capacity of the offenders to cause significant damage to other operators, in particular consumers, and to set the amount of the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph [of the Guidelines])'. The Court also held that, within each of the categories indicated above, it may be appropriate to 'to apply weightings to the amounts decided on so as to take account of the specific weight and therefore the real impact on competition of the unlawful conduct of each undertaking, especially where there is considerable disparity in the sizes of the undertakings that have committed an infringement of the same nature and to make consequential adjustments to the basic amount depending on the specific characteristics of each undertaking (Section 1 A, sixth paragraph [of the Guidelines])'. The Court concluded, in the same case, that the market shares held by an undertaking are relevant in order to determine what influence it may exert on the market but they cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity (*Acerinox* v *Commission*, cited in paragraph 29 above, paragraph 88, and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139). The applicant asserts that, in this case, the Commission did not consider whether there was a considerable disparity between the undertakings that participated in the infringement and it failed to take

appropriate account of the size and economic strength of the undertakings concerned and, therefore, of their influence on the market. By virtue of the principle of equal treatment for the same type of infringement, the Commission should have imposed fines of different amounts on the undertakings concerned.

146 The applicant considers that if the Commission had correctly used its 'wide margin of appreciation' it would necessarily have taken account of the factors justifying a lower fine in its case. It states that it is clear, for example, from the judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, to which the Commission refers in its defence, that the Commission must, in assessing the gravity of an infringement, have regard to, among other things, the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market (paragraph 120). The applicant reaffirms that it really had no power to impose the prices agreed within the cartel. Moreover, its financial situation was weak, compared with that of the other undertakings concerned. Thus, any influence it might have been able to exercise in the market was considerably less than that corresponding to the market share used as a basis for calculation of the fine by the Commission.

147 The Commission rejects the applicant's argument. It observes in particular that the applicant makes no mention of the fact that the fine imposed on it is far lower than the highest fine imposed. Its fine is ten times lower than that imposed on Heubach, even though the two undertakings had similar market shares and should, in principle, have derived a similar benefit from the cartel.

Findings of the Court

148 The applicant claims, essentially, that the Commission did not take sufficient account of its size and its responsibility when setting the amount of the fines and that, therefore, it breached the principles of equal treatment and proportionality. It

is also necessary to examine, in this context, the applicant's argument that the Commission did not take account of the relative weights of the undertakings in applying differential treatment or of the actual capacity of the applicant to do harm (see paragraph 107 above).

149 First, it must be borne in mind, on the one hand, that the only express reference to turnover contained in Article 15(2) Regulation No 17 concerns the upper limit which a fine may not exceed and, on the other, that that limit is to be understood as referring to the total turnover (*Musique diffusion française and Others* v *Commission*, cited in paragraph 146 above, paragraph 119). In compliance with that limit, the Commission may therefore, in principle, choose which turnover to take in terms of territory and products in order to determine the fine (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 5023), without being obliged to adhere precisely to the worldwide total turnover or turnover in the relevant product market. Last, although the Guidelines do not provide that fines are to be calculated according to a specific turnover, they do not preclude such a figure from being taken into account, provided that the choice made by the Commission is not vitiated by a manifest error of assessment (*Tokai Carbon and Others* v *Commission*, cited in paragraph 126 above, paragraph 195).

150 In this case, it must be borne in mind that it is apparent from the contested decision that the Commission considered it necessary to treat the undertakings differently in order to take account of 'the effective economic capacity of the offenders to cause significant damage to competition' (recital 304 to the contested decision). It added that it was necessary to 'to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition'. In assessing those factors, the Commission chose to rely on the turnover from standard zinc phosphate sales in the EEA during the last year of the infringement. It observed that

the applicant was one of the main zinc phosphate producers in the EEA, in which it held a market share of about 20%, and therefore placed it in the first category (recital 308 to the contested decision). The starting point of the fine was set, for all the undertakings in the first category, at EUR 3 million. The starting point for James Brown, which had a market share of about 5%, was set at EUR 750 000.

151 Although the Commission compared the relative importance of the undertakings concerned on the basis of their turnover in zinc phosphate sales in the EEA, it also referred to the undertakings' shares of the relevant market for the purpose of placing them in two different categories. The Commission determined the market shares of the undertakings concerned by relying, first, on their turnovers in the relevant market, as shown in the table in recital 50 to the contested decision, and, second, on information contained in the file. The correctness of that approach is not contested by the applicant.

152 In an analysis of the 'effective economic capacity of the offenders to cause significant damage to competition', which involves an assessment of the real importance of those undertakings in the market affected, that is to say their influence on the market, the total turnover is an imprecise guide. It is of course possible for a powerful undertaking with a multitude of different activities to have only an incidental presence in a specific product market. Similarly, an undertaking with a strong position in a geographical market outside the Community may have only a weak position in the Community or EEA market. In such cases, the mere fact that the undertaking in question has a high total turnover does not necessarily mean that it has a decisive influence in the market affected. That is why the Court of Justice emphasised in its judgment in *Baustahlgewebe* v *Commission*, cited in paragraph 145 above, paragraph 139, that, although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert in the market (see *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 106 above, paragraph 193). In this case, the

Commission took account of both the market shares and the turnovers of the undertakings concerned in the market affected, which made it possible to determine the relative importance of each undertaking in the relevant market.

153 It follows that the Commission did not commit any manifest error of assessment in its analysis of the 'effective economic capacity of [the] offenders' within the meaning of Section 1A, fourth paragraph, of the Guidelines.

154 Moreover, it is clear from a comparison of the turnovers achieved in the market by the undertakings in the first category, as set out in the table in recital 50 to the contested decision, that it was correct for those undertakings to be grouped together and for them to be allocated the same starting point. Thus, in 1998, the applicant achieved a turnover in the relevant market in the EEA of EUR 3.2 million. Heubach, Trident and SNCZ achieved turnovers of EUR 3.7, 3.69 and 3.9 million respectively. Britannia, which had ceased all economic activity in 1998, had a turnover in the relevant market in the EEA in 1996 of EUR 2.78 million.

155 The fact nevertheless remains that division into categories must be compatible with the principle of equal treatment whereby comparable situations must not be treated differently and different situations must not be treated in the same way, unless such difference in treatment is objectively justified (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913 (hereinafter '*FETTSCSA*'), paragraph 406. Following the same approach, the Guidelines provide, in Section 1A, sixth paragraph, that a 'considerable' disparity between the sizes of the undertakings committing infringements of the same type is, in particular, capable of justifying differentiation in assessing the gravity of the infringement. Moreover, according to the case-law, the amount of the fines must, at least, be proportionate in relation to

the factors that entered into the assessment of the seriousness of the infringement (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 106).

156 Consequently, where the Commission divides the undertakings concerned into groups for the purpose of setting the amount of the fines, the thresholds for each of the groups thus identified must be coherent and objectively justified (*FETTCSA*, paragraph 416, and *LR AF 1998* v *Commission*, cited in paragraph 87 above, paragraph 298).

157 Admittedly, in this case, the applicant, although having a total turnover of only EUR 7 million in 2000, was placed in the same group as Britannia, Heubach, Trident and SNCZ, whose turnovers were respectively EUR 55.7, 71, 76 and 17 million. However, no breach of the principle of proportionality or of the principle of equal treatment can be inferred from that fact. As explained in paragraphs 150 and 151 above, those different undertakings were grouped together because they had turnovers in the relevant market and market shares which were very similar. It was coherent and objectively justified to group the undertakings together on that basis. Moreover, the Court considers that the difference of size as between the applicant and the other undertakings concerned was not so great as to make it necessary to place it in a different group (see, to that effect, Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraphs 69 to 77).

158 It must be pointed out, for the sake of completeness, that, in the circumstances of the present case, sufficient account was taken of the applicant's total turnover when the upper limit of 10% provided for by Article 15(2) of Regulation No 17 was applied. As indicated in paragraphs 16 and 17 above, the amount of the applicant's fine was reduced to EUR 700 000 in order to comply with that upper limit, before being further reduced to EUR 350 000 for cooperation. The purpose of the upper limit of 10% is to prevent fines from being disproportionate in relation to the size of the undertaking (*Musique diffusion française and Others* v *Commission*, cited in

paragraph 146 above, paragraph 119). The application of that maximum limit in this case ensured that the fine imposed on the applicant was proportionate to its size. In view of the very serious nature of the infringement and the fact that it lasted for more than four years, the amount of the fine could have been much higher if the applicant had not been a small undertaking and if it had not benefited from the upper limit of 10%.

159 The applicant states that, compared with those imposed on the other undertakings concerned, its fine is not proportionate to its size. However, the Commission is not required to calculate the amount of a fine by reference to amounts based on the turnovers of the undertakings concerned. Moreover, it is not required to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market (*Dansk Rørindustri* v *Commission*, cited in paragraph 32 above, paragraph 202).

160 As regards the applicant's argument that, after application of the Leniency Notice, it benefited from a reduction of 50% and Heubach from a reduction of 10%, thereby indicating that the latter should be penalised more severely, by a factor of 80%, it is sufficient to point out that the Commission is not required to determine the amount of fines on the basis of the reductions it has granted under the Leniency Notice.

161 The applicant's argument that the basic amount exceeded 60% of its total turnover is not relevant. The maximum limit imposed by Article 15(2) of Regulation No 17, whereby the fine finally imposed on an undertaking must be reduced if it exceeds 10% of its turnover, regardless of the intermediate calculation operations designed to take account of the gravity and duration of the infringement, does not prevent the Commission from referring, during its calculation, to an intermediate amount

exceeding 10% of the turnover of the undertaking concerned, provided that the fine eventually imposed on the undertaking does not exceed that maximum limit (*Dansk Rørindustri* v *Commission*, cited in paragraph 32 above, paragraph 205).

162 Moreover, the applicant claims that the Commission breached the principles of equal treatment and proportionality and that it did not take account of the Guidelines in calculating the fines, in that the applicant was penalised more severely than the 'members of the inner circle'. However, as indicated in paragraph 88 above, the existence of the alleged 'inner circle' has not been proved.

163 Moreover, it must be pointed out that the applicant has not demonstrated that its conduct was 'less serious' than that of the other undertakings concerned.

164 Finally, as far as the principle of equal treatment is concerned, it must be noted, in the light of the foregoing, that the application of the Guidelines in this case made it possible to ensure that both aspects of that principle were complied with. First, all the undertakings shared joint and comparable responsibility in that they all participated in a very serious infringement. Thus, initially, that responsibility was assessed by reference to factors peculiar to the infringement such as its nature and its impact on the market. The Commission then adjusted that assessment by reference to the circumstances peculiar to each of the undertakings concerned, including its size and capacities, the duration of its participation and its cooperation.

165 It follows that the fifth part of the second plea must be rejected.

The sixth part of the plea: the inappropriateness of exerting greater deterrence and the impossibility of paying the fine

Arguments of the parties

166 The applicant claims that the Commission breached essential procedural requirements and the principles of proportionality and equal treatment by not taking account of the fact that there was no reason to exert greater deterrence and that it had no means of paying the fine.

167 In the first place, the applicant maintains that the Commission breached the principle of proportionality and the principle of equal treatment by not considering whether less severe deterrent measures might be appropriate. The Commission should, as it did in other cases, have taken into consideration not only the applicant's market share but also its overall size to ensure that the punishment was proportional and had a deterrent effect (Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18). The applicant states that it withdrew from the cartel in 1995, that it brought the infringement to an end as soon as the Commission intervened and that it was the first to cooperate with the Commission in the investigations. After that very costly experience, the applicant formed the firm intention to comply with the competition rules and it would therefore be pointless for more severe deterrent measures to be imposed. The applicant considers that the Commission could, in its case, validly contemplate imposing only a symbolic fine. It maintains that, consequently, the fine

should be reduced. It fears that it has been the victim of the Commission's eagerness to send a message, as reflected in the Commission's press release (IP/01/1797), that small and medium-sized undertakings should entertain no illusion that their size will win them any kind of preferential treatment regarding fines.

168 Second, the applicant claims that the Commission should have taken account of its real ability to pay, in accordance with Section 5(b) of the Guidelines and the case-law (*LR AF 1998* v *Commission*, cited in paragraph 87 above, paragraph 308). It claims to be in a very precarious financial situation. If it had to pay the fine, its chances of recovering and regaining a competitive position in the market would be entirely compromised.

169 The Commission, it says, admitted in its defence that, in response to requests from it, the applicant had sent it 'financial statements that showed a weak financial position'. However, the Commission, first, criticised the applicant for not expressing its 'concern as to the possibility to pay the fine' and, second, stated that it could not evaluate the applicant's real capacity to pay in the absence of comments from the applicant on that subject. The applicant replies that, when the Commission requested such documents, it did not ask it to comment on its capacity to pay. Moreover, the weakness of the applicant's financial situation and its attempt to reduce its costs in general because of that situation were well known to the Commission. For example, on 31 January 2001, the applicant sent the Commission translations of its provisional accounts for 2000, which showed a final negative pre-tax result of EUR 417 100. By letter of 31 January 2001, the Commission thanked the applicant for the annual accounts and assured it that they would 'be taken into consideration in the final assessment'.

170 In response to the Commission's argument that a reduction of the applicant's fine because of its difficult financial situation would have the effect of giving it an unjustified competitive advantage, the applicant states that no such case arises here. The market has changed. It also states that its owners and management have

changed and that the new owners and executives, who are no longer hampered by family ties, are in a position to take bold decisions regarding marketing and restructuring of the undertaking which would have been regarded as impossible by the previous owners and management.

171 The Commission contests the merits of the applicant's arguments. It observes that the applicant made no reference to its inability to pay in a 'specific social context' within the meaning of the Guidelines and that it did not even provide information concerning the degree of profitability of the undertaking. Moreover, the applicant never expressed concern as to its ability to pay a fine.

Findings of the Court

172 As regards, first, the deterrent effect of the fine, it must be borne in mind that the purpose of the Commission's power to impose fines is to enable it to carry out the task of supervision entrusted to it by Community law (*Musique diffusion française and Others* v *Commission*, cited in paragraph 146 above, paragraph 105, and *Archer Daniels Midland and Archer Daniels Midlands Ingredients* v *Commission*, cited in paragraph 106 above, paragraph 105). That task includes the duty to punish individual infringements and the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that the Commission must ensure that the fines have a deterrent effect (*Archer Daniels Midland and Archer Daniels Midlands Ingredients* v *Commission*, cited in paragraph 106 above, paragraphs 105 and 106). The deterrent effect of a fine imposed for infringement of the Community competition rules cannot be assessed by reference

solely to the particular situation of the undertaking sanctioned (*Archer Daniels Midland and Archer Daniels Midlands Ingredients* v *Commission*, cited in paragraph 106 above, paragraph 110; see also Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 170 to 174).

173 In this case, the fine of EUR 350 000 imposed on the applicant represents only 4.9% of its turnover. Such a fine cannot be regarded as disproportionate in relation to the applicant's size or to the nature of the infringement. Moreover, the applicant has not established any breach of the principle of equal treatment in that regard (see paragraphs 149 to 165 above).

174 Moreover, as regards the applicant's assertion that the Commission should have imposed a 'symbolic' fine on it, it should be noted that, according to Section 5(d) of the Guidelines, the Commission must 'reserve the right, in certain cases, to impose a 'symbolic' fine of [EUR] 1 000, which would not involve any calculation based on the duration of the infringement or any aggravating or attenuating circumstances'. The applicant has not shown why a symbolic fine would have been justified in this case. In view of the fact that it participated in a very serious infringement for more than four years, the Court considers that it would be very difficult to establish any such justification. Nor can the applicant's cooperation in the procedure justify such a fine. As indicated in paragraph 139 above, the applicant has already received the maximum reduction of 50% in accordance with Section D(1) of the Leniency Notice. Moreover, the fact that the applicant intended to comply with the competition rules before the adoption of the contested decision does not constitute a sufficient reason for the Commission to confine itself to imposing a symbolic fine. It must be borne in mind, in that connection, that it is clear from the case-law that the deterrence of third parties, and not only of the undertaking concerned, is an important aim of Article 15(2) of Regulation No 17 (see the case-law cited in paragraph 172 above).

175 As regards the applicant's assertion that the Commission did not take sufficient account of its financial situation, it is relevant to point out that, according to settled case-law, the Commission is not required when determining the fine to take account of an undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market (see *LR AF 1998* v *Commission*, cited in paragraph 87 above, paragraph 308; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487; and *FETTCSA*, paragraph 351, and the case-law cited).

176 That case-law is not called in question by Section 5(b) of the Guidelines, which states that an undertaking's real ability to pay must be taken into consideration. That ability applies only in a 'specific social context' consisting of the consequences which payment of the fine would have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned (*Tokai Carbon and Others* v *Commission*, cited in paragraph 126 above, paragraph 371). Although the applicant informed the Commission of its financial situation during the pre-litigation procedure, it did not invoke Section 5(b) of the Guidelines and it produced no information such as to enable the Commission to assess the abovementioned 'specific social context'.

177 Furthermore, the fact that a measure adopted by a Community authority brings about the insolvency or liquidation of a given undertaking is not as such prohibited by Community law (see, to that effect, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14, and Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, paragraph 38). Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by

the undertaking would also lose their value (*Tokai Carbon and Others* v *Commission*, cited in paragraph 126 above, paragraph 372).

178 For the sake of completeness, it must be pointed out that the applicant has not established any link of cause and effect between the contested decision and imposition of the fine, on the one hand, and its insolvency on the other. It is clear from the documents before the Court that the applicant was declared insolvent on 2 June 2003, that is to say almost 18 months after the date of the contested decision and one year after the agreement it concluded with the Commission under which it would pay only EUR 50 000 every six months with effect from 1 July 2002 (see the order in *Waardals* v *Commission*, cited in paragraph 20 above). Despite questions put by the Court on this issue at the hearing, the applicant provided no clarification regarding either the nature of its insolvency or the other debts which had played a role in its insolvency. It follows that it has not been established that the fine imposed in this case provoked the applicant's insolvency.

179 Finally, the applicant has not established that the Commission gave a commitment to reduce the fine having regard to its financial situation. The Commission stated in its letter of 31 January 2001 that it would take the applicant's annual accounts for 2000 into consideration in determining its individual liability. That certainly does not represent a commitment of the kind alleged by the applicant, but rather an intention on the Commission's part to use the annual accounts in order to set the upper limit of 10% provided for by Article 15(2) of Regulation No 17.

180 In view of the foregoing, the applicant's last plea must be rejected.

181 It follows that the application must be dismissed in its entirety.

The requests for measures of organisation of procedure and measures of preparatory inquiry

182 The applicant has asked the Court, by way of measures of organisation of procedure and of preparatory inquiry, to call and hear witnesses and to grant it access to the hearing report of 17 January 2001 drawn up by the Commission.

183 The Commission opposes that request.

184 The Court considers that, as there are no differences of opinion as to the course of the events in this case, that request should not be granted.

185 It follows that the action must be dismissed in its entirety.

Costs

186 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the application for interim measures, as claimed by the Commission in its pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, including those of the application for interim measures.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 29 November 2005.

E. Coulon P. Lindh

Registrar President

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