# JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 September 2006 *

In Case T-59/02,

**Archer Daniels Midland Co.,** established in Decatur, Illinois (United States), represented by C.O. Lenz, lawyer, L. Martin Alegi, M. Garcia, and E. Batchelor, Solicitors,

applicant,

v

**Commission of the European Communities,** represented by P. Oliver, acting as Agent,

defendant,

APPLICATION for annulment of Article 1 of 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 COMP/E-1/36.604 — Citric acid) (OJ

* Language of the case: English.

2002 L 239, p. 18) in so far as it finds that the applicant infringed Article 81 EC and Article 53 of the EEA Agreement by agreeing to restrict capacity in the market in question and to designate a producer who was to lead price increases in each national segment of the said market, and for the annulment of Article 3 of the same decision in so far as it pertains to the applicant and, in the alternative, for the reduction of the fine imposed on it,

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

composed of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2004,

gives the following

## Judgment

### Facts

1 The applicant, Archer Daniels Midland Co. ('ADM'), is the parent company of a group of companies which operate in the cereal and oil seed processing industry. It entered the citric acid market in 1991.

2 Citric acid is the most widely used acidulant and preservative in the world. It exists in different types and is used in a variety of applications, mainly in food and beverages, household detergents and cleaners, pharmaceuticals and cosmetics, and in various industrial processes.

3 In 1995 total worldwide sales of citric acid were approximately EUR 894.72 million, those in the European Economic Area (EEA) being approximately EUR 323.69 million. In 1996 approximately 60% of the worldwide citric acid market was in the hands of the five addressees of the Decision, namely, in addition to ADM, Jungbunzlauer AG ('JBL'), F. Hoffmann-La Roche AG ('HLR'), Haarmann & Reimer Corp. ('H&R'), belonging to the Bayer AG Group ('Bayer'), and Cerestar Bioproducts BV ('Cerestar'), together referred to as 'the parties concerned'.

4 In August 1995 the United States Department of Justice informed the Commission of an investigation into the citric acid market. Between October 1996 and June 1998 all the parties concerned, including ADM, pleaded guilty to taking part in a cartel. As a result of plea agreements with the Department of Justice, fines were imposed on the companies by the United States authorities. In addition, several individuals charged were fined. Investigations were also carried out in Canada and some of the same companies, including ADM, were fined there.

5 On 6 August 1997 the Commission sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) to the four largest producers of citric acid in the Community. In addition, in January 1998 the Commission sent requests for information to the main purchasers of citric acid in the Community and in June and July 1998 it sent further requests for information to the main producers of citric acid in the Community.

6 Following receipt of the first request for information which had been sent to it in July 1998, Cerestar contacted the Commission and, in the course of a meeting on 29 October 1998, expressed a wish to cooperate with the Commission under 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'). At the meeting Cerestar gave an oral account of the cartel activity in which it had been involved. On 25 March 1999 it sent the Commission a written statement confirming what it had said at the meeting.

7 By letter of 28 July 1998 the Commission sent JBL a further request for information, to which the latter replied by letter of 28 September 1998.

8 At a meeting on 11 December 1998 ADM expressed its willingness to cooperate with the Commission and gave an oral account of the anti-competitive activity in which it had been involved. On 15 January 1999 it sent the Commission a written statement confirming that account.

9 On 3 March 1999 the Commission sent additional requests for information to HLR, JBL and Cerestar.

10 On 28 April, 21 May and 28 July 1999 respectively, Bayer, on behalf of H&R, JBL and HLR made statements on the basis of the Leniency Notice.

11 On 29 March 2000 the Commission, on the basis of the information supplied to it, sent a statement of objections to ADM and the other parties concerned for infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement ('the EEA Agreement'). ADM and the other parties concerned submitted written observations

in response to the Commission's objections. None of the parties requested an oral hearing, nor did they substantially contest the facts as set out in the statement of objections.

12 On 27 July 2001 the Commission sent additional requests for information to ADM and the other parties concerned.

13 On 5 December 2001 the Commission adopted Decision C(2001) 3923 final relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) ('the Decision'). The Decision was notified to ADM by letter of 17 December 2001.

14 The Decision includes the following provisions:

*'Article 1*

[ADM], [Cerestar], [H&R], [HLR] and [JBL] have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the sector of citric acid.

The duration of the infringement was as follows:

— in the case of [ADM], [H&R], [HLR] and [JBL]: from March 1991 to May 1995;

— in the case of [Cerestar]: from May 1992 to May 1995.

...

*Article 3*

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

(a) [ADM]: EUR 39.69 million

(b) [Cerestar]: EUR 170 000

(c) [HLR]: EUR 63.5 million

(d) [H&R]: EUR 14.22 million

(e) [JBL]: EUR 17.64 million.'

15 At recitals 80 to 84 of the Decision, the Commission stated that the cartel involved the allocation of specific sales quotas to each member and their adherence to those quotas, the fixing of target and/or floor prices, the elimination of price discounts and the exchange of specific information on customers.

16 For calculating the fines, the Commission used in the Decision the method described 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.

17 First, the Commission determined the basic amount of the fine by reference to the gravity and duration of the infringement.

18 In that context, as regards the gravity of the infringement, the Commission found, first, that, taking into account the nature of the infringement, its actual impact on the EEA citric acid market and the scope of the relevant geographic market, the parties concerned had committed a very serious infringement (recital 230 of the Decision).

19 Next, the Commission considered that it was necessary to take account of the actual economic capacity of the offenders to cause significant damage to competition, and to set the fine at a level which ensured that it had sufficient deterrent effect. Consequently, taking as its basis the worldwide turnover of the parties concerned from the sale of citric acid in the last year of the infringement, namely 1995, the Commission divided them into three categories as follows: in the first category, H&R with a worldwide market share of 22%, in the second, ADM and JBL with worldwide market shares of [*confidential*] [1] and HLR with a market share of 9%, and in the third category Cerestar, with a worldwide market share of 2.5%. On this basis the starting amounts fixed by the Commission were EUR 35 million for the company in the first category, EUR 21 million for those in the second and EUR 3.5 million for that in the third category (recital 239 of the Decision).

1 — Confidential data omitted.

20 In addition, the starting amount was adjusted to ensure that the fine had a sufficient deterrent effect. The Commission thus found that, taking account of the size and overall resources of the parties concerned, as expressed by their total worldwide turnover, the starting point for the fines on ADM and HLR should be multiplied by 2 and that for the fine on H&R by 2.5 (recitals 50 and 246 of the Decision).

21 As regards the duration of the infringement committed by each undertaking, the resulting starting amount was increased by 10% per year, giving an increase of 40% for ADM, H&R, HLR and JBL, and 30% for Cerestar (recitals 249 and 250 of the Decision).

22 Accordingly, the Commission set the basic amounts of the fines at EUR 58.8 million for ADM, while those for Cerestar, HLR, H&R and JBL were set at EUR 4.55 million, EUR 58.8 million, EUR 122.5 million and EUR 29.4 million respectively (recital 254 of the Decision).

23 Second, the basic amounts for ADM and HLR were increased by 35% to take account of aggravating factors on the ground that they had acted as ringleaders of the cartel (recital 273 of the Decision).

24 Third, the Commission examined and rejected the arguments of certain undertakings with regard to attenuating circumstances (recitals 274 to 291 of the Decision).

25 Fourth, pursuant to Article 15(2) of Regulation No 17, the Commission adjusted the resulting amounts for Cerestar and H&R so that they did not exceed the 10% limit of their worldwide turnover (recital 293 of the Decision).

26 Fifth, under Section B of the Leniency Notice, the Commission allowed Cerestar a 'very substantial reduction' (namely 90%) in the fine which would have been imposed if it had not cooperated. By virtue of Section D of the Notice, the Commission allowed ADM a 'significant reduction' (namely 50%), while JBL, H&R and HLR were granted reductions of 40%, 30% and 20% respectively (recital 326).

**Procedure and forms of order sought by the parties**

27 ADM brought the present action by application lodged at the Registry of the Court of First Instance on 28 February 2002.

28 By separate document received by the Court Registry on 28 February 2002, ADM requested that certain information in the pleadings and in certain annexes be treated as confidential.

29 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, put written questions to the parties to which they replied within the prescribed period.

30 The parties presented oral argument and replied to the Court's questions at the hearing on 9 June 2004.

31 ADM claims that the Court should:

— annul Article 1 of the Decision to the extent that it finds that it violated Article 81 EC and Article 53 of the EEA Agreement by agreeing to restrict capacity in the market in question and to designate a producer who was to lead price increases in each national market of the market in question;

— annul Article 3 of the Decision in so far as it pertains to ADM;

— in the alternative, reduce the fine;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order ADM to pay the costs.

## Law

### I — *Whether the Guidelines apply*

#### A — *Arguments of the parties*

33 First, ADM submits that the method of calculating fines laid down by the Guidelines differs fundamentally from the Commission's previous fining practice which, as it acknowledged in the Decision (recital 253), entailed determining the fine according to a base rate representing a certain percentage of sales in the relevant Community market. Conversely, the Guidelines introduce a fixed rate fine, for example EUR 20 million for a very serious infringement, regardless of the volume of sales of the product concerned.

34 ADM observes that during the period to which this case relates (1991 to 1995), the Commission consistently applied this practice and imposed fines of generally between 2.5% and 9% of the value of sales of the relevant product in the Community market. By contrast, implementation of the new policy deriving from the Guidelines results in fines of 10 to 34 times higher than those imposed on the basis of the former practice.

35 ADM acknowledges that the Commission has discretion to increase fines where competition law policy requires higher dissuasive fines. However, in imposing a fine of 10 to 34 times that which would have been fixed under its former approach, the Commission manifestly overstepped any such discretion. Contrary to the Commission's contention, that conclusion is borne out by the judgment of the Court of First Instance in Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR

II-1633, paragraph 237. In that judgment, the Court of First Instance made the Commission's ability to increase the level of fines within the limits indicated in Regulation No 17 subject to the condition that doing so is necessary to ensure the implementation of Community competition policy. The Commission has not provided any explanation nor put forward any evidence in either the Decision or its pleadings such as to show that the implementation of that policy required the imposition of fines 10 to 34 times higher than those resulting from the former standard practice. ADM also observes that in *Lögstör Rör* v *Commission* and all the other cases dealing with the pre-insulated pipes cartel, apart from the case concerning ABB (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881), the Commission imposed fines of a level comparable to the level prevailing when its earlier practice was followed. ADM asserts that the undertakings participating in that cartel were fined only between 3% and 14% of the affected sales and even ABB's fine represented only 44% of its affected sales.

36 ADM submits that undertakings must be able to carry on business in conditions which are not unpredictable. In accordance with the Guidelines (first paragraph), the Commission must follow a coherent and non-discriminatory policy when setting the amount of the fines. Lack of legal certainty in the assessment of fines is antithetical to the notion of effectively implementing the deterrent constituted by a fine. For a fine to act as an effective deterrent, it is essential that the undertakings concerned have prior knowledge of applicable penalties. An effective general amnesty or leniency policy requires that the penalties in cases of non-cooperation are clearly defined in advance. Likewise, it is unconscionable to maintain a state of constant uncertainty as to the level of fines which may be imposed for competition law violations, especially given the long period of time taken to complete investigations of such infringements. Consequently, legal certainty requires that the approach adopted by the Commission in calculating fines under Article 15(2) of Regulation No 17 may be predicted with a sufficient degree of certainty.

37 ADM adds that it is apparent from the United States Sentencing Guidelines (Section 1B1.11(b)(1); 'the US Guidelines') and from the decision of a federal Court of Appeals (*United States* v *Kimler* 167 F. 3d 889 (5th Cir. 1999) that retroactive application of new guidelines in the matter of fines is prohibited by the *ex post facto* clause of the United States Constitution when it results in the imposition of a punishment more severe than the punishment provided for when the infringement occurred.

38 Consequently, in ADM's submission, where the new policy laid down in the Guidelines is applied retroactively to an infringement which, as is the case in this instance, took place prior to their publication and has the effect of imposing on ADM a much higher fine than those imposed when former practice prevailed without that increase being necessary to ensure compliance with competition law policy, such application offends against the principle of legal certainty and is unlawful.

39 Second, ADM submits that the application of the Guidelines violates the principle of equal treatment since it differentiates between undertakings which have infringed competition law by reference not to the date of the infringement but to the date on which the Commission's decision was adopted, which was fixed by the Commission in an arbitrary manner. By way of example, the undertakings referred to in Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article [82] of the EC Treaty (IV/34.621, 35.059/F-3 — Irish Sugar plc) (OJ 1997 L 258, p. 1) and in Commission Decision 94/210/EC of 29 March 1994 relating to a proceeding pursuant to Articles [81] and [82] of the EC Treaty (IV/33.941 — HOV-SVZ/MCN) (OJ 1994 L 104, p. 34) were fined on the basis of only 6.8% and 5% of their relevant market sales respectively, although the infringements concerned were contemporaneous with the citric acid cartel.

40 The Commission contends that the pleas should be rejected.

B — *Findings of the Court*

41 The Court observes, first of all, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* v *Commission* [2005] ECR I-5425, paragraph 202; Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 218 to 221; and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 39).

42 Next, the Court considers that the adoption of guidelines capable of modifying the general competition policy of the Commission as regards fines may, in principle, fall within the scope of the principle of non-retroactivity.

43 First, the Guidelines are capable of producing legal effects. Those effects stem not from any attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission. By adopting and publishing the Guidelines, the Commission imposes a limit on its own discretion; it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraphs 209 to 212).

44 Second, as an instrument of competition policy, the Guidelines fall within the scope of the principle of non-retroactivity, just like a new interpretation by the courts of a rule establishing an offence, in conformity with the case-law of the European Court of Human Rights on Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, in particular, Eur. Court H.R., *S.W. v. United Kingdom* and *C.R. v. United Kingdom*, judgments of 22 November 1995, Series A Nos 335-B and 335-C, §§ 34 to 36 and §§ 32 to 34; *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions*, 1996-V, §§ 29 to 32, and *Coëme and Others v. Belgium*, judgment of 22 June 2000, Reports, 2000-VII, § 145) which holds that that provision precludes the retroactive application of a new interpretation of a rule establishing an offence. According to that case-law, that is the case in particular where there is an interpretation by the courts which produces a result which was not reasonably foreseeable at the time when the offence was committed, having regard notably to the interpretation of the rule applied in the case-law at the material time. It should however be stated that it follows from that same case-law that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. Thus, a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. More specifically, in accordance with *Cantoni v. France* (§ 35), this is true particularly in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails (*Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraphs 215 to 223).

45 In view of the foregoing, it is therefore necessary to ascertain whether the modification, which consisted in the adoption of the Guidelines, was reasonably foreseeable at the time when the infringements at issue were committed.

46 In that regard, it should be noted that the main innovation in the Guidelines consisted in taking as a starting point for the calculation a basic amount, determined on the basis of brackets laid down for that purpose by the Guidelines; those brackets

reflect the various degrees of gravity of infringements but, as such, bear no relation to the relevant turnover. The essential feature of that method is thus that fines are determined on a tariff basis, albeit one that is relative and flexible (*Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraph 225).

47 Next, it should be recalled that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraph 227; Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109; Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 81; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309; Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89; and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraph 56).

48 It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines (*Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraph 228).

49 Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines (*Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraphs 229 and 230).

50 Thus, ADM is wrong to contend in essence that, in the context of the cartel, the increase in the level of the fines by the Commission is manifestly disproportionate to the objective of ensuring the implementation of competition policy.

51 Similarly, the fact alleged by ADM — even if it were established — that the application of the new policy results in fines of 10 to 34 times higher than those imposed on the basis of the former practice is not capable of leading to a breach of the principle of non-retroactivity. Having regard in particular to the case-law cited in paragraph 44 of this judgment, it must have been reasonably foreseeable for ADM that the Commission could at any time review the general level of fines when implementing another competition policy. Thus, ADM should reasonably have been able to foresee such an increase — even if it were established — at the time when the infringements at issue were committed.

52 Finally, in so far as ADM claims that, to ensure that fines have a deterrent effect, it is essential that undertakings have prior knowledge of the level of fines which they must expect if they commit an infringement of the Community competition rules, it is sufficient to note that the deterrent effect of fines in no way presupposes that undertakings have prior knowledge of the exact level of the fine which they must expect for a particular type of anti-competitive conduct.

53 As regards the infringement of the principle of equal treatment alleged by ADM, it should be noted that it has already been held that application of the method set out in the Guidelines in calculating the fine imposed on ADM does not constitute discriminatory treatment of ADM by comparison with undertakings which infringed the Community competition rules at the same time but, for reasons pertaining to the time when the infringement was discovered or to the conduct of the administrative procedure initiated against them, were sanctioned before the Guidelines were

adopted and published (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraphs 69 to 73; Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraphs 118 and 119).

54 Consequently, the complaint alleging infringement of the principle of equal treatment must be rejected.

II — *Effect of fines already imposed in other countries*

A — *Arguments of the parties*

55 ADM contends that, by refusing to deduct from the fine imposed by the Decision an amount corresponding to the fines already imposed on ADM in the United States and Canada, the Commission infringed the principle that a second penalty may not be imposed for the same offence. As the judgment in Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281 shows, the Commission has a duty to set off a penalty imposed by the authorities of a third country against any other penalty if the facts alleged against the applicant by the Commission are the same as those alleged by those authorities. According to the applicant, that is precisely the case here because, by contrast with the case which gave rise to the judgment in Case 7/72 *Boehringer* v *Commission*, the cartel sanctioned by the United States and Canadian authorities was the same, in object, geographical extent and duration, as that sanctioned by the Commission, which, moreover, acted on the basis of evidence obtained by the United States authorities.

56 In this connection, ADM contests the assertion made in the Decision that the fines imposed by the United States and Canadian authorities took account of the anti-competitive effects of the cartel only in the area of their jurisdictions (recital 333 of the Decision). On the contrary, according to the applicants, it is clear from the judgment delivered against ADM in the United States on 15 October 1996 that the cartel sanctioned therein was worldwide in scope and affected trade 'in the United States and elsewhere'. Moreover, the fine was particularly large because of the geographical extent of the offence. In the case brought in Canada, specific account was taken also of the worldwide scope of the cartel.

57 In any event, even if the Commission's assertion were correct, the fact that other authorities took into account only the local effects of an offence is irrelevant for the purpose of applying the principle that a second penalty may not be imposed for the same offence. According to the judgment in *Boehringer* v *Commission*, paragraph 55 above, the sole determining factor in this respect is whether or not the acts complained of are identical. That is confirmed by the Commission's own decision-making practice: in a 1983 decision it set off against the fines which it imposed on undertakings participating in a cartel fines imposed by the German authorities, although it was ruling only on the aspects of the cartel outside Germany (see Decision 83/546/EEC of 17 October 1983 relating to a proceeding pursuant to Article [81] of the Treaty establishing the European Economic Community (IV/30.064 — Cast iron and steel rolls) (OJ 1983 L 317, p. 1)).

58 ADM contends that, when determining the amount of the fine, the Commission failed to take account of the fact that it had already been ordered, in non-member countries, to pay fines and damages in such an amount to deter it from committing any further breaches of competition law. ADM has therefore been punished enough.

59 Furthermore, according to ADM, the Commission is mistaken in finding that the damages paid by ADM in the United States and the Canadian actions were purely

compensatory. The damages paid in settlement took account of the treble damages claims of the purchasers in question. They were therefore more than a purely compensatory amount and included a penal element. Consequently the Commission ought to have taken account of the penal amounts in accordance with the principle that a second penalty may not be imposed for the same infringement.

60 The Commission contends that the plea should be rejected.

B — *Findings of the Court*

61 It should be noted that the principle of *ne bis in idem* prohibits the same person from being sanctioned more than once for the same unlawful conduct in order to protect one and the same legal interest. The application of that principle is subject to three cumulative conditions: the identity of the facts, the unity of offender and the unity of legal interest protected (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338).

62 The Community judicature has therefore held that an undertaking may be made the defendant to two parallel sets of proceedings concerning the same infringement and, thus, incur concurrent sanctions, one imposed by the competent authority of the Member State in question, the other a Community sanction, to the extent that the two sets of proceedings pursue different ends and that the legal rules infringed are not the same (Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 11; Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 191; and Case T-149/89 *Sotralentz* v *Commission* [1995] ECR II-1127, paragraph 29).

63 It follows that the principle of *ne bis in idem* cannot, a fortiori, apply in a case such as this one where the procedures conducted and penalties imposed by the Commission on the one hand and the United States and Canadian authorities on the other clearly pursued different ends. The aim of the first was to preserve undistorted competition within the European Union and the EEA, whereas the aim of the second was to protect the United States and Canadian markets (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01, T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 134, and the case-law cited therein). The condition of the unity of the legal interest protected, which is necessary for the principle of *ne bis in idem* to apply, is not therefore fulfilled.

64 ADM is therefore wrong to rely on the principle of *ne bis in idem* in the present case.

65 That finding is not called in question by *Boehringer* v *Commission*, paragraph 55 above, relied on by ADM. In that case, the Court did not state that the Commission was required to set off a penalty imposed by the authorities of a non-member State where the facts with which the Commission charges an undertaking are the same as those alleged by the first authorities but merely stated that that question should be decided when it arises (*Boehringer* v *Commission*, paragraph 55 above, paragraph 3).

66 In any event, even if the principle of fairness could, in certain specific circumstances, compel the Commission to take account of sanctions imposed by the authorities of non-member States where those States also punish conduct in the Community, ADM has failed to demonstrate that that is the case in this instance and that the United States and Canadian authorities sanctioned the cartel to the extent that it related to the territories of the Community or the EEA.

67 The mere reference in the agreement entered into with the United States authorities to the fact that the cartel related to 'the United States and elsewhere' does not show that when calculating the fine the United States authorities took account of applications of the cartel or its effects other than in respect of the United States and, in particular in the EEA (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 63 above, paragraph 143).

68 Similarly, as regards the high level of the fine on account of the geographical extent of the infringement, that mere assertion is not sufficient to show that the cartel's impact on the EEA was taken into consideration.

69 So far as concerns the agreement entered into with the Canadian authorities, ADM fails to adduce the slightest evidence that when determining the amount of the fine those authorities had regard to the applications of the cartel or its effects other than in respect of Canada and, in particular, to those found in the EEA. The reference by the Canadian authorities to the worldwide scope of the cartel, relied on by ADM, was made only to establish the importance of the cartel on the whole of the Canadian market.

70 As regards the deterrent effects of fines already imposed and damages, including non-compensatory, treble damages, the Court recalls that the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Article 81(1) EC or Article 82 EC is one of the means conferred on the Commission in order to enable it to carry out the task of supervision entrusted to it by Community law. That task encompasses the duty to pursue a general policy 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 (*Musique diffusion française and Others v Commission*, paragraph 47 above, paragraph 105).

71 It follows that the Commission has the power to decide the level of fines in order to reinforce their deterrent effect when infringements of a particular type, although established as being unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them (*Musique diffusion française and Others* v *Commission*, paragraph 47 above, paragraph 108).

72 ADM cannot validly argue that there was in its case no such deterrent effect because it had already been sanctioned on the basis of the same facts by the courts of non-member States. The objective of deterrence pursued by the Commission relates to the conduct of undertakings within the Community or the EEA. Consequently, the deterrent effect of a fine imposed on ADM for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of ADM or by reference to whether it has complied with the competition rules in non-member States outside the EEA (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 63 above, paragraphs 146 and 147).

73 The plea that no account was taken of fines imposed in other States must therefore be rejected.

III — *The gravity of the infringement*

A — *Introduction*

74 ADM claims that the Commission incorrectly assessed the gravity of the infringement when calculating the amount of the fine. The pleas relied on in that respect concern (i) the failure to have regard to, or to have sufficient regard to the relevant product turnover, (ii) the application of a multiplier to the starting amount and (iii) the actual impact of the cartel on the market.

75 Before ruling on the merits of the various pleas put forward in this connection, it is necessary to summarise the method followed by the Commission in this case in assessing and taking account of the gravity of the infringement, as set out in the recitals of the Decision.

76 It is apparent from the Decision that, in assessing the gravity of the infringement, the Commission found, first, that, having regard to the nature of the infringement, its actual impact on the EEA citric acid market and the scope of the relevant geographic market, namely the whole of the EEA, the parties concerned had committed a very serious infringement (recitals 204 to 232 of the Decision).

77 Next, the Commission considered that it was necessary to apply to the parties concerned differential treatment in order to 'take account of the effective economic capacity of the offenders to cause significant damage to competition and ... set the fine at a level which ensures a sufficiently deterrent effect'. In that context, the Commission stated that it would take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition (recitals 233 and 234 of the Decision).

78 For the purposes of assessing those elements, the Commission chose to rely on the worldwide citric acid turnover of the parties concerned during the last year of the infringement, namely 1995. In this respect, the Commission found that given that the citric acid market is global, 'these figures give the most appropriate picture of the participating undertakings' capacity to cause significant damage to other operators in the common market and/or the EEA' (recital 236 of the Decision). The Commission added that, in its view, that approach was supported by the fact that this was a global cartel, the object of which was inter alia to allocate markets on a worldwide level. It found, moreover, that the worldwide turnover of any given party to the cartel also gave an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had that party not participated (recital 236 of the Decision).

79 On that basis, the Commission decided to divide the undertakings into three categories: it placed H&R in the first category, arguing that 'with a worldwide market share of 22%, [it] was the largest player in the market'. It placed ADM, JBL and HLR in the second category, stating that the first two held 'similar market shares of [*confidential*]' and that the latter had a market share of 9%. Lastly, it placed Cerestar in the third category on the ground that it was 'by far the smallest player' with a market share of 2.5% in 1995. Thus, the Commission set a starting amount of EUR 35 million for H&R, EUR 21 million for ADM, JBL and HLR, and EUR 3.5 million for Cerestar (recitals 237 to 239 of the Decision).

80 Finally, in order to ensure that the fine had a sufficiently deterrent effect, the Commission adjusted the starting amount on the basis of the size and the worldwide resources of the parties concerned. Thus, the Commission applied a multiplier of 2 (that is an increase of 100%) to the starting amount for ADM, which was thus raised to EUR 42 million, and a multiplier of 2.5 (that is an increase of 150%) to the starting amount for HLR, which therefore rose to EUR 87.5 million (recitals 240 to 246 of the Decision).

B — *The failure to have regard to the relevant product turnover*

1. Arguments of the parties

81 ADM complains that the Commission failed to have regard to, or had insufficient regard to, relevant product turnover when calculating the basic amount of the fine.

82 First, ADM submits that it is apparent from the case-law of the Court of First Instance that relevant product turnover is an important element in the assessment of fines (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraphs 92 to 95; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 233; Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127; and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176).

83 ADM submits that consideration of EEA sales in the relevant product is an appropriate starting point for assessing both the damage to competition on the relevant product market within the Community and the relative importance of the participants in the cartel in relation to the products concerned. That conclusion is borne out by the case-law of the Court of First Instance (*Europa Carton* v *Commission*, paragraph 47 above, paragraph 126; Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraph 108, upheld on appeal by the Court of Justice in Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641).

84 Furthermore, the judgment in *LR AF 1998* v *Commission*, paragraph 41 above, confirms that attributing disproportionate importance to an undertaking's total size in assessing the fine is unlawful.

85 Similarly, ADM submits that, in comparable cases in recent years (Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1); Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1); Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1); Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh) (OJ 1989 L 260, p. 1); Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding

pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1)) the Commission took as its basis sales of the relevant product in the Community market, as it indeed acknowledged in the Decision (recital 253). In relying in those decisions on that basis of calculation, the Commission set fines of between 2.5% and 9% of the undertakings' relevant product turnover. If the Commission had also applied that basis of calculation in this instance, it would have imposed a fine on ADM of between EUR 1.15 million and EUR 4.14 million. However, in failing to adhere to that basis of calculation, the Commission imposed on ADM fines which were 10 to 34 times higher than those which would have been imposed on that basis.

86 ADM submits that the Commission was also wrong in stating that it took account of the turnover of the parties concerned by dividing them into three categories according to the size of their shares in the worldwide market for citric acid (recital 236). The Commission ought also to have taken account of the limited value of ADM's citric acid sales in the EEA in 1995.

87 (i) As the Commission itself acknowledges, it must determine the gravity of the infringement and hence the level of the fine by reference to the effects on the EEA. The Commission's argument on this point at recital 236 of the Decision, to the effect that the worldwide turnover had to be used in that connection because the object of the cartel had been to 'withhold competitive reserves from the EEA market' is unfounded. The Decision does not allege that the parties agreed to withhold supplies from the EEA market. ADM states that the cartel agreed quotas on a worldwide basis (recitals 97 to 101 of the Decision) and that there were no separate quotas for

Europe. In a cartel affecting EEA consumers, the harm to such consumers is the same whether or not the cartel extends outside the EEA. In this connection, there should be no difference in the assessment of the gravity of the infringement and the fine.

88 (ii) The Commission's practice is inconsistent. In the 'Seamless Steel Tubes' case (Commission Decision 2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 EC (Case IV/E-1/35.860-B, Seamless steel tubes, OJ 2003 L 140, p. 1) and the 'Sodium Gluconate' case (Decision of 2 October 2001 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement, COMP/E-1/36.756 — Sodium gluconate) the Commission purported to take into account only EEA sales.

89 (iii) The perverse results that arise if worldwide sales are taken into account are well illustrated in the present case because ADM's sales in Canada and the United States, which account for almost 50% of its worldwide citric acid sales, were already taken into account by the authorities of those countries when they imposed sanctions on ADM. By taking worldwide sales into account, the Commission imposed a fine which is disproportionate in relation to the ADM sales for which it has already been punished.

90 (iv) ADM maintains that, even if worldwide citric acid sales are an appropriate factor for setting the fine, the Commission did not properly take them into account. The fine on ADM (before applying the Leniency Notice) is 66% of worldwide citric acid sales, which far exceeds any harm to consumers or to competitors occasioned by ADM's participation in the cartel. Such harm, if any, would have amounted to a

fraction of worldwide sales. Rather, the Commission relied exclusively on ADM's total turnover and resources. ADM submits that disproportionate reliance on total turnover leads to an unlawful fine.

91 Consequently, ADM submits that the Commission not only disregarded the principles deriving from case-law but also violated the principle of proportionality.

92 Second, ADM submits that the Guidelines indicate that it is 'necessary to take account of the effective economic capacity of the offenders to cause significant damage to other operators, in particular consumers' and that they also provide, in the case of cartels, for weighting designed to reflect 'the real impact of the offending conduct of each undertaking on competition'.

93 In ADM's submission, the economic impact, whether on competition or on other operators, may be assessed only by reference to the amount of affected product sales. Only by taking these sales into account is it possible to assess the scope of the potential harm to consumers or competition in terms of an anti-competitive surcharge or other illegal benefit.

94 Consequently, in failing to take account of relevant product sales, the Commission applied its own guidelines incorrectly.

95 Finally, ADM submits that, in failing to give proper reasons for its decision not to take into account ADM's EEA sales in the relevant product market, the Commission infringed its obligation to state reasons.

96 The Commission contends that the pleas put forward should be rejected.

2. Findings of the Court

97 ADM alleges infringement, first, of the principle of proportionality and of the Guidelines and, second, of the obligation to state reasons.

(a) Infringement of the principle of proportionality

98 As acknowledged by settled case-law, the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, there is no binding or exhaustive list of the criteria which must be applied (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 443).

99 Furthermore, according to settled case-law, the criteria for assessing the gravity of an infringement may include 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 it was able to exert on the relevant market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the market share of the undertakings concerned on the relevant market, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and the fixing of an appropriate fine cannot therefore be the result of a simple calculation based on total turnover (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 47 above, paragraphs 120 and 121; *Parker Pen* v *Commission*, paragraph 82 above, paragraph 94; *SCA Holding* v *Commission*, paragraph 82 above, paragraph 176; *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraph 187; and *HFB and Others* v *Commission*, paragraph 98 above, paragraph 444).

100 It follows that, although it cannot be denied, as ADM states, that turnover in the relevant product is an appropriate starting point for assessing both the damage to competition on the relevant product market within the Community and the relative importance of the participants in the cartel in relation to the products concerned, the fact remains that that is by no means the only criterion according to which the Commission should assess the gravity of the infringement.

101 Consequently, contrary to what ADM submits, if an assessment of the proportionality of the fine were confined, as it seems to propose, merely to the correlation between the fine imposed and the relevant product turnover, that would confer disproportionate importance on that criterion. It is necessary to assess the proportionality of that fine by reference to all the factors which the Commission must take into account when determining the gravity of the infringement, namely, the actual nature of the infringement, its actual impact on the relevant market and the scope of the geographic market.

102 The merits of the Decision in relation to some of those criteria will be examined on the basis of ADM's four arguments, which seek in essence to establish that the Commission should, in the present case, have used in this connection the turnover of the undertakings concerned at EEA level and not at worldwide level.

103 By its first argument, ADM criticises in substance the fact that, at recital 236 of the Decision, the Commission found that it was necessary to use the worldwide turnover to divide the parties concerned into three categories because the object of the cartel had been to 'withhold competitive reserves from the EEA market'. According to ADM, the Decision does not allege that the parties had agreed to withhold supplies from the EEA market.

104 The Court considers that ADM cites that part of the Decision out of its context. When recital 236 of the Decision is read as a whole, it is clear that, in the Commission's opinion, in the context of a worldwide cartel like that in the present case, only the worldwide turnover makes it possible to assess the effective capacity of the parties concerned to cause damage to the relevant market. Consequently, that first argument is unfounded.

105 By its second argument, ADM seeks to show that, in its recent administrative practice, the Commission itself relied on EEA turnover.

106 The Court notes however that the two decisions which ADM relies on in support of that argument are not relevant in the present case. In the 'Seamless Steel Tubes' case (see paragraph 88 above), the Commission did not divide the parties concerned into categories (see recitals 159 to 162 of the decision in that case). As regards the 'Sodium Gluconate' case (see paragraph 88 above), the Commission relied on worldwide turnover to divide the undertakings into categories, as in the present case. ADM's argument is therefore factually incorrect.

107 By its third argument, ADM raises in essence the fact that its citric acid sales in Canada and the United States, which account for almost 50% of its worldwide citric acid sales, were already taken into account by the authorities of those countries when they imposed sanctions on ADM. In so far as, by that argument, ADM repeats in essence the complaint alleging breach of the principle that a second penalty may not be imposed for the same offence, that argument has already been rejected by the Court as unfounded (see paragraphs 61 to 73 above). In so far as, by that argument, ADM submits that it is not for the Commission to set the fine on the basis of conduct outside the Community area, that argument is factually incorrect. The Commission did not use worldwide turnover as a basis for calculating the fine, but only as a means of determining the effective economic capacity of each undertaking to cause damage to competition and to set the fine at a level which ensured that it had sufficient deterrent effect for each undertaking, which is justified in the light of the worldwide nature of the cartel.

108 By its fourth argument, ADM seeks in essence to establish that taking into account worldwide citric acid sales leads to a disproportionate fine in relation to the damage caused to consumers and to competition.

109 It should be recalled that in the present case, the cartel is made up of undertakings operating at worldwide level and holding 60% of the relevant product market at worldwide level and, in particular, concerns, apart from price-fixing, also market sharing by means of allocating sales quotas. In such a case, the Commission may legitimately rely, as it has done in the present case, on the respective worldwide citric acid turnover of the members of that cartel for the purpose of differentiating between the parties concerned. The objective of that differential treatment is to assess the effective economic capacity of offenders to cause damage to competition by their offending conduct and, therefore, to take account of their specific weight within the cartel. Consequently, the Commission did not exceed its wide margin of assessment in this respect in finding that the respective worldwide market share of the cartel members was an appropriate indication.

110 The pleas alleging infringement of the principle of proportionality must therefore be rejected.

(b) Infringement of the Guidelines

111 As regards infringement of the Guidelines, the Court notes that they do not provide that fines are to be calculated according to the overall turnover of undertakings or their turnover in the relevant market. However, nor do they preclude the Commission from taking such turnover figures into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances demand it (see, to that effect, *LR AF 1998* v *Commission*, paragraph 41 above, paragraph 283, upheld on appeal in *Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraph 258, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraph 187).

112 Consequently, the Guidelines do not provide that the turnover figures of the undertakings concerned — whether the overall turnover or the relevant product turnover — constitute the starting point for calculating the fines and, still less, that they constitute the only relevant criteria for assessing the gravity of the infringement.

113 On the other hand, the Commission may take account of turnover as one among a number of relevant factors. This is particularly so where, in accordance with the third to sixth paragraphs of Section 1A of the Guidelines, the Commission adjusts the amount in order to ensure that the fines have a sufficiently deterrent effect. In that respect, the Commission takes account of the effective economic capacity of the offenders to cause significant damage to other operators and of the need to ensure that the fine has a sufficiently deterrent effect (Section 1A, fourth paragraph) and

applies weightings to the amounts determined on the basis of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type (Section 1A, sixth paragraph).

114 In the present case, the Commission submitted in its pleadings that it relied on turnover in the relevant product market in order to assess the relative importance of each undertaking. As is clear from recital 236 of the Decision, the Commission did indeed have regard to the worldwide turnover for the product in question in order to take account of the relative importance of the undertakings on the relevant market. As was already held at paragraphs 77 and 78 above, the Commission found that, in order to apply differential treatment to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures a sufficiently deterrent effect, it chose to rely on the worldwide citric acid turnover of the parties concerned during the last year of the infringement, namely 1995.

115 In the present case, the cartel is made up of undertakings which hold a very large part of the relevant product market at worldwide level. Moreover, the cartel concerns price-fixing and market sharing by means of allocating sales quotas. In such a case, the Commission may legitimately rely on the worldwide citric acid turnover of the members of that cartel for the purpose of differentiating between the undertakings concerned. Since the objective of that differential treatment is to assess the effective economic capacity of offenders to cause damage to competition by their offending conduct and, therefore, to take account of their specific weight within the cartel, the Commission did not exceed its wide margin of assessment in finding that the worldwide market share of the respective members of the cartel was an appropriate indication.

116 Consequently, the plea alleging infringement of the Guidelines must be rejected.

(c) Infringement of the obligation to state reasons

117 It is settled case-law that the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. In that regard, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87).

118 In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be established, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors including, in particular, the specific circumstances of the case and its context; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 98 above, paragraph 54).

119 In the present case, the Commission calculated the amount of the fine to be imposed on an undertaking on the basis of its turnover for the relevant product; however it did not take account of the relevant product turnover in the EEA, but at worldwide level (see paragraph 114 above). Contrary to what ADM asserts, the Commission was not required to take account of the turnover for the relevant product in the EEA

(see paragraph 111 above). Consequently, it cannot be criticised for failing to state why it did not use that factor in calculating the fine imposed.

120 Accordingly, the plea alleging infringement of the obligation to state reasons must also be rejected.

C — *Application of a multiplier to the starting amount*

1. Arguments of the parties

121 ADM submits that increasing the starting amount by a multiplier of 2 (recital 246 of the Decision) is a manifestly disproportionate measure, which is also inadequately reasoned and in breach of the principle of equal treatment.

122 First, ADM observes that, in the lawsuits brought in the United States and Canada for infringements under competition law, it has already paid fines (30 million United States Dollars (USD) in the United States and 2 million Canadian Dollars (CAD) in Canada), paid compensation (of USD 83 million) to consumers, paid some USD 34 million to settle the action brought against it by its shareholders, had one of its employees sentenced to prison in the United States, and has adopted a global policy of compliance with competition law. All those sanctions and measures make the imposition by the Commission of a new deterrent penalty unnecessary and disproportionate.

123 Second, given that undertakings are rational economic entities, if a fine is to act as a deterrent, it is necessary only that it be set at a level at which the expected amount exceeds the profit from the infringement. If undertakings appreciate that the loss associated with the punishment eliminates the cartel profit, the fine will already act as a deterrent. That approach was endorsed by the Court of Justice in *Musique diffusion française and Others* v *Commission*, paragraph 47 above (paragraph 108). It is also reflected in the Guidelines, which provide (at Section 1A, fourth paragraph) that the deterrent effect is to be assessed by reference to the capacity of the cartel participants to cause damage to consumers and consequently require that any illegal cartel surcharge be taken into account when consideration is given to appropriate deterrence. That approach is also commonly found in other Community rules.

124 ADM does not dispute that total turnover may be taken into account for the purposes of calculating the fine. However, attributing disproportionate importance to total turnover results in a disproportionate fine. The Commission confines itself in this regard to defending the uplift applied by comparing it with ADM's total turnover. There is no rational explanation capable of justifying the fact that calculation of the deterrent uplift concentrated on ADM's total turnover. The Commission's approach fails to explain why it was necessary to cancel out ADM's profits from sales of products which were not related to the infringement at issue in order to discourage the parties concerned from pursuing their activities in a citric acid cartel.

125 Third, ADM repeats that an effective deterrent penalty should nullify the expected profit from the cartel (see paragraph 123 above). In the present case, however, it was JBL that made the highest annual sales in the EEA (EUR 77 million) and therefore received the largest amount from the cartel. However, there was no deterrent increase in JBL's fine at that stage of the calculation. ADM, in contrast, with annual sales of EUR 46 million in the EEA, had the basic amount of its fine doubled by a deterrent increase of EUR 21 million. ADM infers from this that the Commission infringed the principle of equal treatment.

126 Fourth, ADM submits that the Commission cannot properly claim in its defence that ADM was simultaneously a party to two other cartels in addition to the citric acid cartel. This was not mentioned in the Decision. Furthermore, in each of the decisions relating to those cartels the Commission applied a multiplier to ensure that the fine was sufficiently deterrent.

127 Fifth, ADM asserts that the Decision does not give sufficient reasons in that regard. The Commission did not state the basis on which an increase of such magnitude could be deemed necessary to have a deterrent effect. It merely stated that larger companies should receive higher fines, but failed to show why it was considered appropriate to double ADM's fine in the present case and whether factors such as the penalties already imposed to deter companies from seeking to profit from the cartel had been taken into account. According to ADM, the Commission had a duty in the present case to set out clearly the reasons for adopting the measure at issue. There are no published cases in which the Commission has added a 'sufficient deterrent' uplift as an additional step in the fines calculation procedure. Moreover, the increase represents a significant part of the fine ultimately imposed on ADM.

128 The Commission contends that the pleas put forward should be rejected.

2. Findings of the Court

(a) Infringement of the principle of proportionality

129 In so far as ADM claims in essence that, given that undertakings are rational economic entities and that, if a fine is to act as a deterrent, it is necessary only that it

be set at a level at which the expected amount exceeds the profit from the infringement, it should be recalled that deterrence is one of the main considerations which must guide the Commission when setting fines (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173, and Case 49/69 *BASF* v *Commission* [1972] ECR 713, paragraph 38).

130 However, if the fine were set at a level which merely negated the profits of the cartel, it would not be a deterrent. It is reasonable to assume that when making financial calculations and management decisions, undertakings take account rationally not only of the level of fines that they risk incurring in the event of an infringement but also the likelihood of the cartel being detected. In addition, if the purpose of the fine were to be confined merely to negating the expected profit or advantage, insufficient account would be taken of the fact that the conduct in question constitutes an infringement of Article 81(1) EC. To regard the fine merely as compensating for the damage incurred would be to overlook not only the deterrent effect, which can relate only to future conduct, but also the punitive nature of such a measure in relation to the actual infringement committed.

131 Similarly, in the case of an undertaking which, like ADM, is active on a large number of markets and has a particularly large financial capacity, to take into account turnover on the relevant market cannot suffice to ensure that the fine has deterrent effect. The larger an undertaking is and the more overall resources it has at its disposal which enable it to act independently on the market, the more it must be aware of the importance of its role as regards the smooth functioning of competition on the market. Consequently, the factual circumstances of the economic power of an undertaking which has been found guilty of an infringement must be taken into account when considering the gravity of the infringement. Accordingly, taking into account ADM's total turnover in order to calculate the amount of the fine does not lead to a disproportionate fine in this instance.

132 Consequently, the plea alleging infringement of the principle of proportionality must be rejected.

(b) Infringement of the principle of equal treatment

133 Under the principle of equal treatment, the Commission must not treat comparable situations differently and must not treat different situations in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

134 ADM claims in essence that, despite JBL's higher citric acid sales (EUR 77 million as opposed to ADM's sales of EUR 46 million), the Commission did not increase JBL's fine by the same amount as ADM's.

135 It should be stated in this respect that applying the multiplier has the objective of ensuring that the fine has deterrent effect even for very large undertakings. JBL's turnover in 2000 was scarcely EUR 314 million whereas ADM's turnover was EUR 13 936 million. Moreover, account should also be taken of the fact that very large undertakings such as ADM have an increased responsibility as regards the maintenance of free competition on markets on which they are active and have, as a general rule, more resources in terms of legal and economic advice which enable them to recognise that their conduct constitutes an infringement under Community competition law.

136 Consequently, the plea alleging infringement of the principle of equal treatment must be rejected.

(c) The infringement of the obligation to state reasons

137 In so far as ADM claims in essence that the Commission did not state why it was considered appropriate to double the fine or whether factors such as the penalties already imposed to deter companies from seeking to profit from the cartel had been taken into account, reference should first be made to the case-law cited at paragraphs 117 and 118 above. Next, it should be recalled that the Commission stated that the reason for applying a multiplier, in particular to the fine calculated for ADM, was the need to ensure that the fine had a sufficiently deterrent effect. In this respect, the Commission relied on the worldwide turnover of the parties concerned (recitals 50 and 241 of the Decision). Finally, at recital 246 of the Decision it stated that it considered it appropriate to apply the multiplier of 2 in order to ensure that the fine to be imposed on ADM had a deterrent effect.

138 As regards in particular the size of the multiplier applied to ADM, the Commission was entitled to refer merely to the size of that undertaking, as indicated in approximate terms by its overall turnover, and to draw attention to the need to ensure that the fine was deterrent. There was no obligation on the Commission, as part of its obligation to state reasons, to indicate the figures relating to the calculation method underlying that choice (see, to that effect, Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 80).

139 The Commission therefore provided sufficient reasoning for the Decision on that point and the plea alleging infringement of the obligation to state reasons must also be rejected.

D — *Errors of assessment relating to the cartel's actual impact on the market*

1. Introduction

140 First of all, it should be recalled that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 98 above, paragraph 54; *Ferriere Nord* v *Commission*, paragraph 98 above, paragraph 33, and *HFB and Others* v *Commission*, paragraph 98 above, paragraph 443). In that context, the actual impact of the cartel on the relevant market can be taken into account as one of the relevant criteria.

141 In its Guidelines (Section 1A, first paragraph), the Commission stated that when assessing the gravity of the infringement it takes account of '[the] actual impact [of the infringement] on the market, where this can be measured', as well as its nature and the size of the relevant geographic market.

142 As far as the present case is concerned, it is clear from recitals 210 to 230 of the Decision that the Commission did in fact set the fine, determined by reference to the gravity of the infringement, taking into account those three criteria. In particular, it considered that the cartel had an 'actual impact' on the citric acid market (recital 230 of the Decision).

143 According to ADM, in that respect the Commission made several errors of assessment in its evaluation of the actual impact of the cartel on the citric acid market. ADM asserts that those errors affect the calculation of the fines.

2. The approach chosen by the Commission to show that the cartel had an actual impact on the market was incorrect

(a) Arguments of the parties

144 ADM claims in essence that the approach chosen by the Commission to show that the infringement had an actual impact on the market was incorrect.

145 ADM complains that the Commission has failed to establish that the cartel had an actual impact on the citric acid market. It observes that, at recital 211 of the Decision, the Commission itself stated that the difference between the prices actually charged and those which would have been applied in the absence of a cartel could not be measured in a reliable manner. In such a situation, instead of at least putting forward an economically sustainable theory as to what would have happened had the cartel not existed, the Commission merely relied on assumptions to the effect that the implementation of the cartel agreements must have produced effects on the relevant market.

146 ADM claims that, despite the fact that during the administrative procedure, ADM submitted to the Commission an expert report dated 30 June 2000, referred to, in particular, at recitals 222 and 223 of the Decision, to which ADM made reference in its reply to the statement of objections and in which it was demonstrated that the

cartel had not had an effect on the relevant market ('the expert report'), the Commission did not carry out an appropriate analysis of the data provided. ADM observes that the expert report stated as follows:

'Thus, capacity constraints and excess demand, followed by increasingly competitive supplies from Chinese imports of citric acid along with substantial additions of capacity by various producers, provide a compelling explanation for the behaviour of prices from 1991 to 1995 ... The fact that, during the period of the infringement, prices did not attain levels of the mid-1980s, despite excess demand, together with the fact that participating producers could not control capacity or new entry, implies rejection of the hypothesis that producers were effective in controlling prices for citric acid during this period.'

147 ADM observes that at recital 226 of the Decision, the Commission itself recognised that the explanations, inter alia those provided by ADM, for the price increases of 1991 and 1992 'may have [had] some validity'. However, the Commission merely concluded that the possibility could not be ruled out that the cartel had an effect on the market.

148 First, according to ADM, it follows that the Commission has not established that the cartel had an actual measurable impact on the market, for the purpose of the Guidelines, but has on the contrary unlawfully reversed the burden of proof on the parties concerned.

149 Second, it follows that the Commission erred in law in stating that price fluctuations are necessarily consistent with an effective cartel. Such a general statement fails to take account of the industrial context and the factors supporting the conclusion

that, for the reasons set out at length in the expert report, prices had not risen above the levels set by the cartel.

150 Third, ADM takes the view that the Commission erred in suggesting that short-term price increases are necessarily the result of an effective cartel. There are a number of competitive product sectors which, faced with similar shortages of capacity and excess demand, have seen price increases of 40% or more over a short period of time.

151 In addition, ADM asserts that in order to show that the cartel had an actual impact on the relevant market, the Commission was not entitled to rely on the fact that the cartel members accounted for 60% of the world market and 70% of the European market for citric acid and that they were involved in a long and complex cartel.

(b) Findings of the Court

152 In view of the complaints put forward by ADM as regards the approach chosen by the Commission to show that the cartel had an actual impact on the citric acid market, it is necessary to summarise the Commission's analysis, as set out in recitals 210 to 228 of the Decision, before adjudicating on the validity of ADM's arguments.

— Summary of the Commission's analysis

153 First of all, the Commission observed that '[t]he infringement was committed by undertakings, which during the material period covered on average over 60% of the world market and around 70% of the European market for citric acid' (recital 210 of the Decision).

154 Next, the Commission stated that '[g]iven that these arrangements were implemented, they had an actual impact on the market' (recital 210 of the Decision). At recital 212, referring to the part of the Decision relating to the description of the facts, the Commission repeated the argument that the cartel agreements had been 'carefully implemented' and added that 'one of the participants [had] declared that it was "surprised at the level of formality and organisation to which the participants had gone to arrive at this arrangement"'. Similarly, at recital 216 of the Decision, the Commission noted that '[i]n the light of the foregoing and of the efforts devoted by each participant to the complex organisation of the cartel, the effectiveness of the implementation cannot be questioned'.

155 Furthermore, the Commission took the view that there was no need 'to quantify in detail the extent to which prices differed from those which might have been applied in the absence of these arrangements' (recital 211 of the Decision). The Commission maintained that 'this cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected the price development of the product, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal factors' (also recital 211). None the less, at recital 213 of the Decision, it described the development of citric acid prices from March 1991 to 1995, noting in essence that between March 1991 and mid-1993 citric acid prices increased by 40% and that, subsequently, they were essentially maintained at that level. It also observed at recitals 214 and 215 of the Decision that the cartel members had fixed sales quotas and devised and applied information, monitoring and compensation mechanisms to ensure implementation of the quotas.

156 Lastly, at recitals 217 to 228 of the Decision, the Commission summarised, analysed and rejected certain arguments put forward by the parties concerned during the administrative procedure. In particular, it summarised the expert report according to which the price development observed would have occurred in any case even in the absence of a cartel. At recital 226 of the Decision, the Commission none the less considered that ADM's arguments, which relied on the expert report, and the arguments put forward by other parties could not be accepted:

'The explanations for the price increases of 1991-1992 provided by ADM, [H&R and JBL] may have some validity, but they do not demonstrate in any convincing manner that the implementation of the cartel agreement could not have played any role in the price fluctuations. Whilst the phenomena described may occur in the absence of a cartel, they are also perfectly consistent with a cartel situation. The fact that the prices for citric acid increased by 40% in 14 months cannot be explained solely in terms of a competitive reaction, but must be interpreted in the light of the facts that the participants had agreed on coordinated price increases and market share allocation, as well as on a reporting and monitoring system. All this would have contributed to the success of the price increases.'

— Findings of the Court

157 First, it should be borne in mind that, according to Section 1A, first paragraph, of the Guidelines, the Commission is to take account, inter alia, of '[the] actual impact [of the infringement] on the market, where this can be measured' when calculating the fine on the basis of the gravity of the infringement.

158 In this regard, it is necessary to analyse the exact meaning of the words 'where this [i.e. the actual impact] can be measured'. In particular, it is a question of establishing whether those words mean that the Commission can take account of the actual impact of an infringement for the purpose of calculating fines only if, and in so far as, it is able to quantify that impact.

159 As the Commission rightly submitted, consideration of the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. When examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. Account must be taken of the objective fact that, because of the price cartel, the parties specifically waived their freedom to compete with one another on prices. Thus, the assessment of the influence of factors other than that voluntary decision of the parties to the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable.

160 Therefore, unless the criterion of Section 1A, first paragraph, of the Guidelines is to be deprived of its effectiveness, the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti-competitive object, such as a price or sales quota cartel, even though it does not quantify that impact or provide any assessment in figures in this respect.

161 Consequently, the actual impact of a cartel on the market must be regarded as having been sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market.

162 In this instance, it follows from the summary of the Commission's analysis (see paragraphs 153 to 156 above) that the Commission relied on two items of evidence

to find that the cartel had had an 'actual impact' on the market. First, it referred to the fact that the cartel members carefully implemented the cartel agreements (see, in particular, recitals 210, 212, 214, and 215) and that, during the material period, those members covered on average over 60% of the world market and around 70% of the European market for citric acid (recital 210 of the Decision). Second, the Commission took the view that the data provided by the parties during the administrative procedure showed that the prices set by the cartel tallied to a certain extent with those actually charged by the cartel members (recital 213 of the Decision).

163 Even if it is true that the wording in recitals 210 and 216 of the Decision could of itself be construed as suggesting that the Commission relied on a causal link between the implementation of a cartel and its actual impact on the market, the fact remains that consideration of the Commission's analysis as a whole shows that, contrary to what ADM states, the Commission did not merely infer from the implementation of the cartel that it had had an actual impact on the market.

164 In addition to the 'careful' implementation of the cartel agreements, the Commission relied on the changes in citric acid prices during the period of the cartel. At recital 213 of the Decision, it described citric acid prices between 1991 and 1995 as set by the cartel members, announced to customers and, to a large extent, applied by the parties. It will be considered below whether, as ADM submits, the Commission made errors in assessing the facts on which it based its findings. Nevertheless, as already held at paragraph 160 above, the Commission cannot be criticised for not seeking to quantify the size of the impact of the cartel on the market or provide any assessment in figures in this respect.

165 Nor can the Commission be criticised for finding that the fact that the cartel members accounted for a very large part of the citric acid market (over 60% of the world market and 70% of the European market) constitutes an important factor

which it must take into account when considering the actual impact of the cartel on the market. It cannot be denied that the likelihood of a price and sales quota cartel being effective will rise in accordance with the size of the market share held by the members of that cartel. Although it is true that, of itself, that fact does not establish actual impact, it is nevertheless the case that, in the Decision, the Commission did not establish such a causal link, but merely took account of it as one factor among others.

166 Moreover, the Commission was entitled to take the view that the weight of that evidence increases with the duration of the cartel. Having regard to the administrative and management costs associated with the sound functioning of a complex cartel concerning, like the one in this instance, price-fixing, market sharing and exchange of information, and taking account of the risks inherent in such unlawful activities, it was reasonable for the Commission to consider that the fact that the undertakings persisted with the infringement over a long period indicates that the cartel members made a certain profit from that cartel and, therefore, that it had an actual impact on the relevant market.

167 Lastly, the fact that, at recital 226 of the Decision, the Commission recognised that the analysis in the expert report may have had 'some validity' whilst none the less finding that it did not demonstrate in any convincing manner that the implementation of the cartel agreement did not play any role in citric acid price fluctuations does not amount to a reversal of the burden of proof. That passage of the analysis shows rather that the Commission carefully weighed up the various arguments for and against a finding that the cartel had an actual impact.

168 It follows from all the foregoing that the approach adopted by the Commission in assessing the actual impact of the cartel on the citric acid market was not incorrect.

3. Assessment of the changes in citric acid prices

(a) Arguments of the parties

169 ADM claims that the Commission's evidence of implementation of the cartel agreement is limited and does not prove actual impact.

170 First, ADM disputes the cogency of the Commission's examination of changes in the price of citric acid. ADM criticises the fact that the Commission limited its analysis to the announcement of prices and did not consider prices actually charged. In fact, according to ADM, most of ADM's prices to customers were below the cartel price throughout the period in question. Cerestar and JBL also stated that they ignored the agreed pricing (recital 217 of the Decision). ADM adds that the average monthly European sales figures supplied to the Commission by ADM, H&R and JBL (see recital 95 of the Decision and the letters from JBL of 28 September 1998, H&R (Bayer) of 23 September 1997 and ADM of 5 December 1997) also support the conclusion that actual prices were generally below the agreed prices.

171 ADM also draws attention to several extracts from sales reports of H&R between March 1991 and September 1994 which show, in its opinion, that there was continual pressure on prices throughout that period.

172 ADM adds that this conclusion is confirmed by customers' reporting of competitive pricing.

173 ADM observes that, at recitals 91, 116 and 217 to 226 of the Decision, the Commission concedes that, during the period from at least mid-1993 to May 1995, there was widespread cheating on the cartel commitments which directly affected cartel prices and that they could not be sustained owing to Chinese imports.

174 Second, ADM disputes the cogency of the Commission's analysis of sales quotas. The analysis was limited to agreed quotas and the introduction of a monitoring and compensation system and the Commission did not consider the amounts of citric acid actually sold by the different parties concerned.

175 On this point ADM observes (i) that it is clear from recital 97 of the Decision and confirmed by the expert report that the rapid increase in demand, particularly in 1991 and 1992, made the system of fixed tonnage quotas unworkable; that the parties abandoned after two months the system of fixed tonnage agreed at the meeting on 6 March 1991; that they replaced it by a quota system based on a percentage of sales and that this system enabled each participant to substantially oversell tonnages of previous years to take advantage of the increase in demand.

176 (ii) ADM notes that recitals 106 and 107 of the Decision and the expert report (paragraphs 35 to 40) show that every year the parties' sales exceeded their quotas or failed to reach them, which led to continual disputes. JBL itself stated, without contradiction by the Commission, that 'it [had] never paid attention to the market shares agreed initially'. The parties' failure to observe the terms of the cartel is consistent with the unconstrained increases in capacity by ADM, JBL and HLR during the period in question.

177 (iii) ADM states that it is clear from recital 106 of the Decision that the compensation and monitoring systems were not effective in holding the parties to their quotas and were a significant cause of dissent within the cartel.

178 ADM observes that in comparable cases the Commission considered that non-observance of the terms of the cartel agreement had resulted in limited impact. For example, in the 'Greek Ferries' case the Commission accepted that discounting from the agreed cartel price had led it to a finding that the actual impact on the market was limited and, in the 'Ferry Operators — Currency Surcharges' case, that customer resistance to price increases had led it to a finding that there was a limited impact on the relevant market. ADM contends that in the present case similar weight should be given to the evidence of discounts on cartel prices and the non-observance of quotas.

179 The Commission rejects ADM's arguments.

(b) Findings of the Court

180 It is settled case-law that in reviewing the Commission's appraisal of the actual impact of the cartel on the market it is particularly important that the Court examine the Commission's assessment of the cartel's effect on prices (see *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraph 148, and, to that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 173, and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 225).

181 Moreover, the case-law states that, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of (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, paragraph 612, and *Ferriere Nord* v *Commission*, paragraph 98 above, paragraph 38) and that in order to assess the actual effect of an infringement on the market the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraphs 619 and 620; *Mayr-Melnhof* v *Commission*, paragraph 180 above, paragraph 235; and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645).

182 It follows, first, that in the case of price agreements the Commission must find — with a reasonable degree of probability (see paragraph 161 above) — that the agreements have in fact enabled the parties concerned to achieve a higher level of price than that which would have prevailed had there been no cartel. Second, it follows that, in making its assessment, the Commission must take into account all the objective conditions in the relevant market and have regard to the economic context and, if appropriate, also the legislative background. It is clear from the judgments of the Court of First Instance in the cartonboard cartel case (see, inter alia, *Mayr-Melnhof* v *Commission*, paragraph 180 above, paragraphs 234 and 235) that account should be taken of the existence of any 'objective economic factors' which indicate that, had there been a 'free play of competition', prices would not have developed in the same way as the prices which were actually charged (see also *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraphs 151 and 152, and *Cascades* v *Commission*, paragraph 180 above, paragraphs 183 and 184).

183 In the present case, by relying on the documents provided by ADM and JBL during the administrative procedure, the Commission analysed the changes in citric acid prices between March 1991 and 1995 and, as corollary measures aimed at sustaining upward pressure on prices, the setting of sales quotas and the introduction of a compensation system.

184 At recital 213 of the Decision, the Commission described as follows the changes in citric acid prices, as agreed and implemented by the cartel members:

'From March 1991 to mid-1993, the prices agreed within the cartel were announced to customers and extensively implemented, in particular during the early years of the cartel. The price increase to [German Marks] DEM 2,25/kg (CAA) by April 1991, decided at the cartel meeting of March 1991, was easily introduced. It was followed by a decision, taken by telephone in July, to increase the price to DEM 2,70/kg (CAA) by August. This price increase was also successfully implemented. A final increase to DEM 2,80/kg (CAA) was agreed at the meeting in May 1992 and was implemented in June 1992. After this date, no further price increase was implemented, and the cartel concentrated on the need to maintain these prices.'

185 Similarly, the Commission observed that, from 1991 to 1994, the cartel members set a fixed and precise tonnage figure for the sales quotas assigned to each cartel member subject to a monitoring system. The Commission noted that those quotas had indeed been implemented and that levels of compliance had been constantly monitored. Further, the Commission observed that the cartel members had agreed upon, and in fact implemented, a compensation scheme designed to penalise cartel members selling above their assigned sales quota and compensate those that did not reach it (recitals 214 and 215 of the Decision, in which reference is made to the 'facts' part of the Decision).

186 ADM does not dispute the Commission's findings of fact as regards the changes in prices and the setting of sales quotas as such but merely claims in essence that, in reality, the prices and quotas were not entirely adhered to.

187 Thus, as regards changes in the price of citric acid, ADM observes that according to several documents sent to the Commission during the administrative procedure and according to the expert report, most of the prices actually charged were below the agreed prices.

188 However, it follows from the figures provided by ADM that there was a permanent parallelism between the prices set and those actually charged. In particular, according to those figures, when, between March 1991 and May 1992, the cartel members decided to increase prices for citric acid used in the food sector from DEM 2.25 per kilo to around DEM 2.8 per kilo, the prices actually charged to customers, which in April 1991 were between DEM 1.9 and DEM 2.1 per kilo, increased to between DEM 2.3 and DEM 2.7 per kilo. It also follows from those figures that, during the entire period that the cartel members had set prices at DEM 2.8 per kilo, the prices actually charged to customers subsequently remained permanently above the prices charged before the rise in prices in 1991 and 1992.

189 The fact that the parties did not comply with their agreement and did not entirely implement the agreed prices does not mean that, in so doing, they applied the prices that they would have charged in the absence of a cartel. As the Commission rightly stated at recital 219 of the Decision, the Court of First Instance has already held, when assessing attenuating circumstances, that an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (*Cascades* v *Commission*, paragraph 180 above, paragraph 230). Moreover, as the Commission stated at recital 226 of the Decision, the cartel enabled its members to coordinate price developments on the market.

190 The same is true of the alleged ineffectiveness of the sales quota system. In this respect, ADM merely argues that, during the period of the cartel, the system was modified to enable each cartel member to sell above its assigned sales quota in order to profit from the increase in demand. That argument cannot succeed. It is not capable of demonstrating that the amounts actually sold by the cartel members

corresponded to those which they would have sold in the absence of a cartel and that the system, even if implemented less effectively than the parties envisaged, did not exert pressure on prices. Moreover, it cannot be ruled out that prices would have changed even more markedly in the absence of a cartel which prevented the parties from competing with one another on price.

191 In the light of the foregoing, the Commission was entitled to find that it had specific and credible evidence showing that the citric acid prices charged within the framework of the cartel were, according to reasonable probability, higher than those which would have prevailed had there been no cartel.

192 Even if, as ADM claims, relying on the economic analysis contained in the expert report, the prices charged by the cartel members were broadly identical to those which would have prevailed had there been no cartel, the fact remains that the Commission was right to state, at recital 226 of the Decision, that the cartel had enabled its members to coordinate price developments. Thus, even if price developments benefited to a large extent from market forces, so that it cannot be claimed that the agreed price levels changed in exactly the same way as the prices actually charged, the fact remains that the parties were at least able to coordinate price developments.

193 Consequently, ADM's argument cannot be accepted.

4. Definition of the relevant market

(a) Arguments of the parties

194 ADM submits that the Commission made errors in its definition of the relevant market. It states that definition of the relevant market is necessary in order to

measure the impact of the cartel on that market and that consequently those errors had an impact on the calculation of the fine. According to ADM, the definition of the relevant product market is an essential part of the analysis which must be undertaken by the Commission if it proposes to take into account the measurable economic impact of the cartel on the relevant product market in setting the fine. Without this analysis, the Commission's finding that there was an impact is no more than a theoretical assessment of the effects on competition potentially linked to restrictive measures. This is not an analysis of the anti-competitive effects observed as a result of the infringement, substantiated with specific details (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 4866).

195 ADM submits that it is clear from recitals 8 to 14 of the Decision that citric acid has substitutes for over 90% of its applications. Likewise, the expert report shows that 'the relevant product market for antitrust analysis is citric acid along with phosphates and also, quite likely, mineral acids'. Furthermore, other citric acid producers expressed the same opinion in the course of the administrative procedure. Finally, ADM claims that the details of the substitutability of citric acid by other products are given in the report 'CEH Marketing Research Report, Citric Acid' by R. Bradley, H. Janshekar and Y. Yoshikawa, published in 1996 in *Chemical Economics Handbook — SRI International* ('the CEH report'), which is also cited by the Commission in the Decision (see recital 72).

196 However, ADM states that, in spite of those facts, the Commission omitted to consider whether citric acid should be deemed a relevant economic market in itself or whether it should be deemed to form part of a wider market including the abovementioned substitute products.

197 The Commission rejects ADM's argument.

(b) Findings of the Court

198 It should be noted first of all that, in the Decision, the Commission did not analyse whether the relevant product market should be limited to citric acid or whether it should be understood, as ADM asserts, more broadly, as encompassing citric acid substitutes. Under the headings 'The Product' (recitals 4 to 14 of the Decision) and 'The Market for Citric Acid' (recitals 38 to 53 of the Decision), the Commission merely described the various applications for citric acid and its market volume.

199 However, in the expert report submitted by ADM to the Commission during the administrative procedure, the relevant product market is analysed and defined as being wider, encompassing substitutes, notably phosphates and mineral acids. Nevertheless, in the Decision, the Commission did not consider ADM's arguments concerning the need to use a wider definition of the relevant product market.

200 ADM's argument can therefore succeed only if it shows that, had the Commission defined the relevant product market in line with ADM's claims, it would have had to find that the infringement did not have an impact on the market defined as that consisting of citric acid and its substitutes. As already held at paragraph 161 above, it is only in such circumstances that the Commission could not have relied on the criterion of the actual impact of the cartel on the market to support its calculation of the fine by reference to the gravity of the infringement.

201 With regard to the Commission's analysis of the price developments and sales quotas at recital 213 et seq. of the Decision, ADM has failed to demonstrate or even put forward any elements which, together, would constitute a body of consistent

evidence showing with reasonable probability that the impact of the citric acid cartel on the wider market encompassing citric acid substitutes was non-existent or at least negligible. Even the expert report, which advocates that the market should be defined more widely, confines its analysis as regards the purported lack of influence of the cartel on price developments to the citric acid market alone.

202 Lastly, ADM is wrong to rely on paragraph 4866 of *Cimenteries CBR and Others* v *Commission*, paragraph 194 above. Although it is true that at that part of the judgment, the Court of First Instance held that the Commission was required to carry out an analysis based on specific evidence and could not confine itself to theoretical assessments, the fact remains that that passage of the judgment did not concern the definition of the relevant product market, but the infringement's actual impact as such on the market.

203 Consequently, the complaint alleging that the relevant product market was defined incorrectly must be rejected.

204 In the light of all the foregoing, the Court concludes that ADM has failed to establish that the Commission committed manifest errors in its assessment of the actual impact of the cartel on the market.

IV — *The duration of the infringement*

205 ADM observes that, at recitals 91, 116 and 217 to 226 of the Decision, the Commission concedes that, during the period from at least mid-1993 to May 1995,

there was widespread cheating on agreements which directly affected cartel prices and that they could not be sustained owing to Chinese imports (see paragraph 173 above).

206 In that respect, ADM claims that the Commission had no justification for applying to ADM the full 10% increase for each year of the infringement (recital 249 of the Decision). In doing so, the Commission infringed the principles of proportionality and equal treatment because it departed from its past practice (Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60)) of increasing the fine by a smaller amount for periods during which the agreement was not observed or implemented.

207 The Commission contends that this plea should be rejected.

208 The Court points out that, at Section B of the Guidelines, the Commission stated that, as regards infringements of medium duration, that is, in general, infringements of between one and five years' duration, it could increase the amount of the fine determined for gravity by up to 50%.

209 In the present case, at recital 249 of the Decision, the Commission found that ADM committed the infringement for four years, which corresponds to a medium duration for the purpose of the Guidelines, and it increased the fine by 40% on account of its duration. It follows from this that the Commission complied with its self-imposed rules in the Guidelines. Moreover, the Court finds that that increase of 40% in view of the duration of the infringement is not manifestly disproportionate in the present case.

210 In so far as ADM relies on the Commission's decision in the VW case (see paragraph 206 above), it should be noted that the facts in that case were different from those here. It is sufficient to note that the VW case concerned a cartel which lasted more than 10 years and that, in accordance with its Guidelines, the Commission increased the fine by an annual percentage rate and not, as in the present case, by a single percentage rate. Moreover, it should be stated that, contrary to ADM's assertion, it in no way follows from the recitals of the decision in that other case that, by that decision, the Commission was seeking to introduce a general practice with which it was required to comply in all subsequent decisions.

211 Consequently, the plea must be rejected.

V — *Aggravating circumstances*

A — *Introduction*

212 At recitals 267 and 273 of the Decision, the Commission found that, together with HLR, ADM was a ringleader of the cartel and consequently increased by 35% the amount of the fine for those two undertakings.

213 ADM disputes that it was a ringleader of the cartel and submits that the Commission was not entitled to increase the fine as it did. In that respect, ADM essentially puts forward four pleas relating to the increase in the fine on account of aggravating circumstances: (i) the Commission was wrong to describe it as a ringleader of the cartel; (ii) the Commission infringed the principle of equal

treatment in so far as it imposed on ADM the same rate of increase as it did on HLR; (iii) the Commission infringed the principles of equal treatment and of proportionality by departing from its previous practice as regards the rate of increase applied to ADM; and (iv) the Decision is inadequately reasoned.

B — *Classification of ADM as a leader of the cartel*

1. Introduction

214 It follows from recitals 263 to 266 of the Decision that, in finding that, together with HLR, ADM must be regarded as a leader of the cartel, the Commission argued in essence that ADM played a decisive role in the establishment of the cartel and a leading role in conducting the various cartel meetings. In this regard, the Commission relied on three different elements.

215 First, at recitals 263 and 264 of the Decision, the Commission relied on the fact that, in January 1991, after entering the citric acid market in December 1990, ADM organised several bilateral meetings with some of the main producers of citric acid, namely H&R, HLR and JBL ('the bilateral meetings organised by ADM in January 1991'). Second, at recital 265 of the Decision, the Commission relied on a statement made by a former representative of ADM who participated in the cartel meetings ('the former representative of ADM') to the FBI during the antitrust proceedings before the United States authorities, as set out in a report drawn up by the FBI ('the FBI report') relating, in particular, to the conduct of another representative of ADM who had also participated in the cartel meetings ('the other representative of ADM'). Third, at recital 266 of the Decision, the Commission referred to a statement made by Cerestar during the administrative procedure ('Cerestar's statement').

216 ADM complains that the Commission erred in its assessment of each of those three elements and that it provided insufficient reasoning for the Decision in this regard. Those complaints will be considered separately in relation to each element. Moreover, ADM asserts that those elements do not in any event lead to the conclusion that ADM acted as a leader in the cartel.

2. The Commission's alleged errors as regards ADM's leader role

(a) The bilateral meetings organised by ADM in January 1991

Arguments of the parties

217 ADM submits that its conduct at meetings in January 1991 which were also attended by H&R, HLR and JBL cannot be regarded as evidence that ADM was the leader in the cartel. To this effect, ADM cites excerpts from recital 264 of the Decision, in which the Commission stated that 'the fact that a round of bilateral meetings took place between ADM and its competitors shortly before the first multilateral cartel meeting [was] not sufficient to show that ADM was the instigator of the cartel'.

218 In any event, ADM submits that the Decision is inadequately reasoned. By stating that the fact that those bilateral meetings took place was not sufficient to show that ADM was the instigator of the cartel, the Commission contradicted its own account of those meetings in recital 263.

219 The Commission contends that ADM's argument should be rejected.

Findings of the Court

220 It should be observed that at recital 263 of the Decision, concerning the bilateral meetings organised by ADM in January 1991, the Commission stated that it had relied on two documents, namely (i) a memorandum of 15 January 1999 drawn up by ADM concerning an interview that the former representative of ADM had had with the Commission services on 11 December 1998 and (ii) the FBI report.

221 As regards the bilateral meetings organised by ADM in January 1991 with the main citric acid producers, namely H&R, HLR and JBL, the Commission found that, notwithstanding the fact that ADM had described those meetings as simply being a means of introducing itself to the other competitors, it was 'very likely that these meetings [had] played a determining role in the establishment (or reestablishment) of the citric acid cartel in March 1991'. According to the Commission, '[i]n view of the very short lapse of time separating this series of meetings from the first multilateral cartel meeting of 6 March 1991, it is most likely that the possibility or intention of setting up a formalised cartel was discussed. This is supported in particular by the content of the discussions held, as reported by an employee of ADM: although the description of the discussions remains vague, the employee indicates that on two occasions at least, a competitor was "disparaged" for the manner in which it conducted its citric acid business'. The Commission took the view that '[t]his expression of resentment against a competitor accused of not behaving properly in the market [was] clearly an indication of the anti-competitive purpose of introducing more discipline to the market' (recitals 74, 75 and 263 of the Decision).

222 Furthermore, at recital 264 of the Decision, the Commission added that 'the fact that a round of bilateral meetings took place between ADM and its competitors shortly before the first multilateral cartel meeting [was] not sufficient to show that ADM was the instigator of the cartel, even though it strongly suggest[ed] that this was the case'.

223 In so far as ADM invokes errors of assessment concerning those bilateral meetings, it should be noted, first of all, that it does not dispute that it organised those meetings. Nor does it complain that the Commission summarised incorrectly the documents on which it relied in this regard. By contrast, ADM submits that the object of those bilateral meetings was only to enable it to introduce itself to the other cartel members.

224 Whilst it is true, as the Commission stated at recital 264 of the Decision, that the information held by the Commission concerning those bilateral meetings was not alone sufficient to show that, during those meetings, ADM had played the role of instigator of the cartel, the fact remains that the Commission was entitled to take the view that the holding of such bilateral meetings, organised by ADM just before the first multilateral cartel meeting, 'strongly' suggested that ADM was an instigator of the cartel.

225 The mere fact that at recital 264 of the Decision, the evidential value of the existence of those bilateral meetings as regards ADM's role as instigator within the cartel was qualified by the Commission does not mean that the Commission's analysis of those meetings was incorrect. Quite to the contrary, the Commission's approach shows that it carefully analysed the documents relied on in finding that the fact that those bilateral meetings took place amounted only to strong evidence that ADM had acted as a leader in the cartel, but did not suffice as a basis for making any definitive findings.

226 Consequently, the Commission did not commit a manifest error of assessment in relying on the fact that those meetings took place as evidence in addition to the two other elements on which it relied in finding that ADM had acted as a leader of the cartel.

227 In so far as ADM pleads infringement of the obligation to state reasons, it must be observed that recitals 263 and 264 of the Decision indicate the Commission's reasoning clearly and unequivocally. Although, at recital 263 of the Decision, the Commission took the view that it was very likely that the successive meetings between ADM and, respectively, H&R, HLR and JBL in January 1991 played a decisive role in the establishment of the citric acid cartel in March 1991, at recital 264 of the Decision, the Commission set out the consequences of that finding for ADM, stating that the fact that a round of bilateral meetings took place between ADM and its competitors shortly before the first multilateral cartel meeting is not sufficient to show that ADM was the instigator, even though it strongly suggests that this was the case. That clarification is not contradictory and does not affect the consistency of the Commission's reasoning. The latter cannot therefore be criticised for providing inadequate reasoning.

228 Consequently, the Commission has not committed a manifest error of assessment or an infringement of the obligation to state reasons in this regard.

(b) The statement of the former representative of ADM to the FBI

Summary of the facts and of the wording of the Decision

229 On 11 and 12 October 1996, the former representative of ADM made a statement at his interview by the Grand Jury in the course of the antitrust proceedings conducted

in the United States which led to a plea agreement. That interview, during which the former representative of ADM was accompanied by his lawyers, was conducted following the adoption of a 'compulsion order'. The interview gave rise to the FBI report of 5 November 1996.

230 It is apparent from a letter sent on 11 October 1996 by the competent United States authorities to the lawyer of the former representative of ADM that that interview was conducted at the request of ADM, that he agreed to submit to the interview on condition that it was allowed to exercise his constitutional right not to reply to questions which could result in him incriminating himself (Fifth Amendment). That letter also mentions that, prior to that interview, the competent United States authorities had granted criminal immunity to the former representative of ADM as regards the facts admitted in his statement, on condition that he replied honestly and truthfully to the questions and supplied all information in his possession. The competent United States authorities also indicated that the statement made by the former representative of ADM at the interview could not be used directly or indirectly against ADM or any of its employees, subsidiaries or affiliates in any criminal prosecution.

231 During that interview of 11 and 12 October 1996, the former representative of ADM gave a detailed description of the manner in which the cartel functioned and of the parties involved. He gave inter alia a description of the periodic highest-level meetings ('Masters' meetings or also 'G-4/5' meetings') and the more technical meetings (called 'Sherpa' meetings), in which he himself participated in to a large extent. In particular, the statement of the former representative of ADM appears at pages 21 and 22 of the FBI report, extracts of which the Commission cited at recital 265 of the Decision.

232 Bayer sent the FBI report to the Commission in connection with the administrative procedure. Moreover, also during the administrative procedure, the Commission interviewed the former representative of ADM at a meeting between the

Commission services and representatives of ADM on 11 December 1998 (see recital 57 of the Decision). Following that meeting, ADM submitted to the Commission an undated memorandum entitled 'Memorandum based upon the interview with [the former representative of ADM in the cartel] at the European Commission of 11 December 1998'.

233 Next, in the statement of objections the Commission relied, inter alia, on the statement of the former representative of ADM as set out in the FBI report. It also annexed that report to the statement of objections.

234 Lastly, in its reply to the statement of objections ADM referred to the statement of its former representative to the FBI in order to underline the extent of ADM's cooperation not only in connection with the procedure before the Commission, but also with the United States authorities. Moreover, ADM itself referred on several occasions to the FBI report in order to claim that it had cooperated fully in the procedure before the Commission, that the cartel had had only a limited impact on the citric acid market and that it should benefit from attenuating circumstances for the purpose of calculating the fine. In particular, ADM relied in this respect on the FBI report in order to show that, in its opinion, it had not acted as a leader of the cartel (although that argument had been made to demonstrate to the Commission that it should benefit from attenuating circumstances).

235 At recital 265 of the Decision, the Commission referred to the FBI report in the following terms:

'During his interview by the FBI in 1996, [the] former representative of ADM at the cartel meetings referred to another representative of ADM at the same meetings and said about him that "the mechanics of the G-4/5 arrangement seemed to be [that other ADM representative]'s idea, and at the 6 March, 1991 meeting in Basel, where

the [citric acid] arrangement was formulated, [that other ADM representative] [had taken] a fairly active role". Referring to the same colleague, he went on to say that [that other ADM representative] was viewed as "The Wise Old Man", and was even dubbed "the Preacher" by [name of a representative of JBL].'

Arguments of the parties

236 ADM claims that the Commission was mistaken in relying on the FBI report as a document showing ADM's 'leadership'.

237 First, ADM submits that the Commission was not entitled to rely on the FBI report as it formed part of the evidence gathered by the investigating authorities of a non-member country to which the procedural safeguards of Community law do not apply. ADM observes that neither the former representative of ADM nor his lawyer was given an opportunity to reread, approve or sign the statement.

238 Such statements are considered inherently unreliable in United States courts. ADM adds that in Case C-60/92 *Otto* [1993] ECR I-5683, paragraph 20, the Court observed that information obtained in the course of national proceedings not covered by the Community privilege against self-incrimination may indeed be brought to the attention of the Commission, in particular by an interested party. However, the Court went on to say that it followed from the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283 that the Commission — or for that matter a national authority — cannot use that information to establish an infringement of the competition rules in proceedings which may result in the imposition of penalties, or as evidence justifying the initiation of an investigation prior to such proceedings.

239 ADM emphasises that it is not arguing that the United States authorities did not apply procedural safeguards. It observes that the former representative of ADM was indeed accompanied by his lawyer and was granted immunity against prosecution. However, according to ADM, it is evidence obtained under the procedures of a non-member country, to which Community law safeguards do not apply. The Commission obviously cannot determine the probative force of a document if it was not informed how and subject to what procedural safeguards it was compiled, including critical factors such as whether the document was sworn on oath or reread by the witness or his lawyer.

240 Second, ADM submits that the Commission was not entitled to rely on the FBI report because ADM had not been given an opportunity to assert its privilege against self-incrimination, as acknowledged by the judgment in *Orkem* v *Commission*, paragraph 238 above. ADM adds that it is irrelevant that the waiver of prosecution concerning ADM applied only to criminal proceedings.

241 ADM observes that the statement in question was made by the former representative of ADM and subject to a waiver of the privilege against self-incrimination on condition that the statement would not be used by the United States authorities against, in particular, the former representative of ADM or ADM itself. However, in the course of the procedure which it initiated, the Commission, unlike the United States authorities, did not give ADM an opportunity to assert its privilege against self-incrimination with regard to the statement. ADM does not object to the Commission's use of those parts of the FBI report which are consistent with the direct testimony of its former representative to the Commission. However, that testimony does not deal with the points relating to the leadership of the cartel on which the Commission relied, referring to the FBI report. ADM complains that, although the Commission interviewed the former representative of ADM in person and had every opportunity to question him in person and by means of subsequent written questions, the Commission did not raise the issue of whether ADM was a leader, nor did it do so at any time during the investigation.

242 Third, ADM submits that the FBI report is inherently unreliable for three reasons.

243 (i) ADM observes that the report was drawn up by FBI agents and United States prosecutors in the furtherance of their case. Such reports have been excluded from United States court proceedings as inadmissible hearsay evidence, because investigators seeking to build a criminal case may not present an entirely full account of what the person interviewed said.

244 (ii) ADM repeats the assertion that neither the former representative of ADM nor his lawyer was given an opportunity to read, approve or sign the statement and that, two years later, during cross-examination concerning his trial testimony, when the former representative of ADM appeared as a witness for the United States authorities, he stated that he had not seen the FBI report before. ADM adds that during the cross-examination the former representative of ADM queried the accuracy of the passage from the report which was put before him on that occasion.

245 (iii) ADM claims that the FBI report is inconsistent regarding ADM's leadership of the cartel. According to ADM, whereas the Commission relies on the statement at page 22 of the report that the superior of the former representative of ADM formulated the arrangement and was actively involved at the initial meeting of 6 March 1991, on page 7 of the report it is stated, with regard to the same meeting, that 'the meeting was "clearly run by [the representative of HLR]", whom the former representative of ADM identifies as "the main protagonist"'.

246 ADM adds that it is clear from the memorandum of 11 December 1998 (see paragraph 232 above) that '[the representative of HLR] ... assumed chairmanship of this informal group', that 'ADM did not contribute much' and that '[the representatives of ADM] mainly listened' (p. 3).

247 Fourth, ADM refers to the statements of the former representative of ADM and his lawyer which were made on 26 February 2002 for the purpose of the present proceedings.

248 Regarding the statement by the lawyer of the former representative of ADM, ADM observes that he states that the notes he made himself of the answers given by the former representative of ADM in the course of his interrogation by the FBI show that the FBI report differs subtly, but importantly, from the actual content of his answers on precisely the issue of leadership. ADM points out that the lawyer's notes are a contemporaneous record, whereas the FBI report paraphrases the words of the former representative of ADM after the event.

249 In fact, (i) the lawyer's notes show that the former representative of ADM said that the role of the other representative of ADM at the meeting of 6 March 1991 had been 'reasonably active', but that he had never 'tended to lead'. The FBI report refers to this as an 'active role', but omitted the important qualification 'reasonably'.

250 (ii) The lawyer's notes show that the FBI did not ask the former representative of ADM whether the mechanics of the 'G-4/G-5' arrangement were the idea of the other representative of ADM. To be more precise, in the context of a series of questions relating to the cartel, the former representative of ADM was asked whether it 'appeared to be [the other representative of ADM]'s idea', to which the former representative of ADM replied 'yes'. The questions meant to establish whether ADM's joining the cartel was the idea of the other representative of ADM,

not whether the mechanics of the arrangement were that other representative's idea. The question and the reply are at least very ambiguous and cannot be equated with the affirmative statement in the FBI report that 'the mechanics of the G-4/G-5 arrangement seemed to be [the other representative of ADM]'s idea'. By contrast, according to ADM, with regard to the discussion of the mechanics of the cartel at the meeting of 6 March 1991, the lawyer's notes record that the former representative of ADM stated, without any ambiguity, that the representative of HLR was the main participant speaking in favour of a quota system. Moreover, it is apparent from those notes that the other representative of ADM 'did not speak up a great deal' and that 'it was his usual practice in meetings to listen and see what happened'. ADM observes that these comments are consistent with the statement of its former representative that the other representative of ADM '[had] never tended to lead' and that 'others had done before'.

251 (iii) ADM observes that the lawyer's notes record that the former representative of ADM did not use the words 'wise old man' in relation to the other representative of ADM.

252 Regarding the statement of the former representative of ADM, ADM asserts that he also confirmed that the statements which he remembers differ from those attributed to him in the FBI report on three points.

253 First, it is apparent from that statement that the other representative of ADM had contributed hardly anything to the meeting of 6 March 1991 and cannot be considered to have led it.

254 Next, it is apparent in the statement by the former representative of ADM that the representative of HLR had invited the former representative of ADM and the other representative of ADM to the meeting of 6 March 1991, chaired the meeting and suggested the reporting and monitoring system relating to the mechanics of the cartel.

255 According to the statement, the former representative of ADM does not recall the other representative of ADM being referred to as 'the wise old man', but he does recall the JBL representative, who acted as chairman of cartel meetings from May 1994, referring to the other representative of ADM as 'the preacher'. It also appears that the former representative of ADM assumed that these nicknames were used because '[the other representative of ADM] generally had a dignified demeanour and usually spoke only when he had something relatively important to say'. Finally, the nickname 'wise old man' was not applied to the other representative of ADM.

256 Fifth, ADM contends that the FBI report is inconsistent with the Commission's own conclusions. At recital 265 of the Decision, the Commission seeks to portray the other representative of ADM, on the basis of the FBI report, as having played a leading role at the initial cartel meeting on 6 March 1991,whereas at recital 78 of the Decision the Commission notes that the meeting 'was organised and chaired by a representative of [HLR]'.

257 ADM also submits that this account of the meeting of 6 March 1991 differs from that given by the Commission in the statement of objections. At paragraph 62 of the latter the Commission noted that this meeting was 'organised and was led by [the HLR representative]'.

258 ADM adds that the central role of the HLR representative at the meeting of 6 March 1991 is also shown by recitals 85 and 89 of the Decision.

259 The Commission contends that the Court should reject all the arguments advanced by ADM.

Findings of the Court

— Introduction

260 ADM puts forward two separate complaints. First, it claims that, by relying on the FBI report, the Commission infringed the procedural safeguards provided under Community law. Second, ADM submits that the Commission failed to assess the content of the FBI report correctly.

— The Commission infringed the procedural safeguards provided under Community law

261 It is common ground that there is no provision that prevents the Commission from relying on a document as evidence that could be used to find that there has been a breach of Articles 81 EC and 82 EC and to set a fine, where as in this instance in the case of the FBI report, the document was established in the context of a procedure which was not conducted by the Commission itself.

262 However, in accordance with the case-law, it is acknowledged that one of the general principles of Community law, of which fundamental rights are an integral part and in the light of which all Community laws must be interpreted, is the right of undertakings not to be compelled by the Commission, under Article 11 of Regulation No 17, to admit their participation in an infringement (*Orkem* v *Commission*, paragraph 238 above, paragraph 35). The protection of that right means that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking to which the question is addressed would in fact be equivalent to the admission of an infringement, such as to undermine the rights of the defence (see Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl*

*Maatschappij and Others* v *Commission* [2000] ECR I-8375, paragraph 273, and Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 64).

263 It is true that the facts of this case are different from those of the abovementioned cases, in which the Commission had put questions to undertakings which were entitled to refuse to reply to them.

264 None the less, where, as in the present case, the Commission, when freely assessing the evidence in its possession, relies on a statement made in a context different from that of the procedure initiated before it, and where that statement potentially contains information that the undertaking concerned would have been entitled to refuse to provide to the Commission by reason of the *Orkem* v *Commission* case-law, paragraph 238 above, the Commission is required to guarantee to the undertaking concerned procedural rights equivalent to those conferred by that case-law.

265 Compliance with those procedural safeguards entails, in a context such as this one, the need for the Commission to carry out an examination automatically if, prima facie, there is serious doubt as to whether the procedural rights of the parties concerned were complied with in the procedure during which they provided such statements. If there is no such serious doubt, the procedural rights of the parties concerned must be deemed to have been adequately safeguarded if, in the statement of objections, the Commission clearly indicates, if necessary by annexing the relevant documents to it, that it intends to rely on the statements in question. In this way, the Commission makes it possible for the parties concerned to comment not only on the content of those statements, but also on any irregularities or special circumstances concerning their composition or submission to the Commission.

266 In the present case, first, account must be taken of the fact that the FBI report was submitted to the Commission by a competitor of ADM, Bayer, which had also taken part in the cartel (see paragraph 232 above) and that ADM did not claim that that document had been obtained illegally by Bayer or by the Commission.

267 Second, it should be noted that the FBI report is a document compiled by the competent United States authority for the purpose of taking action against secret cartels, which was produced before the United States courts during the trial relating to the same cartel as the one at issue here. It contained no outward sign which should have automatically prompted the Commission to doubt its evidential value. In so far as, in that context, ADM relies on the fact that, in the letter of 11 October 1996 sent by the competent United States authorities to the lawyer of the former representative of ADM, it was stated that the information provided by that individual in the report could not be used either against him or ADM, it should be noted that that restriction referred explicitly to criminal proceedings under United States law and not to proceedings such as those before the Commission.

268 Third, and more fundamentally, it should be observed that, in the statement of objections, the Commission stated that it intended to rely on that report and that it annexed that document to the statement. It therefore enabled ADM to comment not only on the content of that document, but also on any irregularities or special circumstances concerning its composition, such as those raised before the Court (see in particular paragraphs 243 and 244 above), or its submission to the Commission, irregularities or circumstances, which, according to ADM meant that the Commission could not rely on that document without infringing the procedural rights guaranteed by Community law.

269 However, ADM did not complain in its reply to the statement of objections about the fact that the Commission had taken account of that document. Quite to the

contrary, it itself expressly relied on that document in support of its arguments, including as to whether it had acted as a leader of the cartel. In addition, ADM does not claim even to have brought the unreliability of the FBI report to the Commission's attention at any other time during the administrative procedure or to have asked the Commission to question the former representative on the veracity of comments which appear in that report.

270 In such a situation, the Commission did not infringe the procedural rights guaranteed by Community law by relying, in its unfettered evaluation of the evidence in its possession, on the FBI report.

— The Commission failed to assess the content of the FBI report correctly

271 In so far as ADM claims that the FBI report is inconsistent (paragraph 245 above), it should be noted that, in the passage of the FBI report on which the Commission relied at recital 265 of the Decision, the former representative of ADM stated that the arrangement was the idea of the other representative of ADM and that he played an active role at the first cartel meeting on 6 March 1991. Similarly, he added that the other representative of ADM was viewed as 'The Wise Old Man', and was even dubbed 'the Preacher' by the representative of JBL. By contrast, at page 7 of that report, it is stated regarding that meeting of 6 March 1991 that '[t]he meeting was "clearly run by [the representative of HLR]", whom [the former representative of ADM] identifies as "The Main Protagonist"'.

272 It follows that the former representative of ADM had the impression that the representatives of ADM and HLR played a decisive role during that meeting, one of them (the representative of HLR) having essentially organised and directed the meeting, the other (the representative of ADM) having played a leading role in defining the content of the agreements concluded.

273 That is indeed the Commission's reading of that document. It is apparent from recitals 268 to 272 of the Decision that it took the view that both ADM and HLR had acted as leaders in the cartel. At recital 269, the Commission relied in this regard on the FBI report, even though it cited a different passage from that relied on by ADM.

274 Consequently, ADM is wrong to allege that there were inconsistencies in the FBI report.

275 In so far as ADM alleges contradictions between the FBI report and the statement of the former representative of ADM to the Commission, as set out in the memorandum composed by ADM (paragraph 246 above), it must be observed that, even if the description of the role played by the representatives of ADM during the meetings in question was different from that described in the FBI report, the fact remains that, as was held at paragraph 270 above, the Commission was entitled to rely on the FBI report and cannot be criticised for giving more credence to that report than to the memorandum composed by ADM relating to the Commission's questioning of that former representative of ADM, which had taken place *in tempore suspecto*.

276 In so far as ADM asserts that there are contradictions in the Commission's own findings in the Decision and in the statement of objections (paragraphs 256 to 258 above), it must be observed that, at recitals 78, 85 and 89 of the Decision and at paragraph 62 of the statement of objections, it is stated that it was the representative of HLR who organised and chaired the meeting of 6 March 1991. However, that cannot call in question the Commission's finding that ADM was a joint leader. Nothing precludes, as in the present case, one party from leading and organising a meeting and another party from playing a highly active role, as described at recital 265 of the Decision, and both parties from being regarded as leaders of the cartel because of their respective roles.

277 In so far as ADM relies on the statements by the former representative of ADM and his lawyer, drawn up on 26 February 2002 for the purposes of this procedure, which contain a description different from the statements made by the former representative of the ADM to the FBI (paragraphs 247 to 255 above), it is sufficient to observe that ADM at no point claimed during the administrative procedure before the Commission that the FBI report did not contain an exact description of the statements made by the former representative of ADM (see paragraph 234 above). Moreover, the Commission did not commit a manifest error of assessment by attaching greater evidential value to the FBI report, produced during the administrative procedure, than to the subsequent statements made *in tempore suspecto* for the purposes of this procedure.

278 Consequently, ADM has failed to establish that the Commission assessed the content of the FBI report incorrectly.

279 It follows from all the foregoing that the Commission did not commit a manifest error in its assessment of the FBI report.

(c) Cerestar's statement

Arguments of the parties

280 First, ADM observes that, even accepting that the Commission may rely on Cerestar's evidence, chairmanship of Sherpa meetings shows, at the most, active involvement, but not leadership of the cartel.

281 ADM adds that Sherpa meetings were meetings of junior representatives of each party concerned. They took place only from June 1993, and dealt solely with technical issues (recital 117 of the Decision). Some were not concerned with the illegal arrangement, but with legitimate activities for a trade association, such as assessing the possibility of other uses for citric acid in order to expand the market and considering an anti-dumping complaint against Chinese producers. These meetings were in contrast to the main 'Masters' meetings which took place throughout the period of the cartel and at which key issues (quota setting, price increases, monitoring mechanisms, compensation payments) were decided.

282 Second, ADM submits that Cerestar's evidence is generally suspect because Cerestar's recollection of meetings is defective. Details are given of only 3 of the 17 meetings identified by Cerestar as 'possible' cartel meetings. Six of the meetings recalled by Cerestar did not take place, according to the evidence of the other participants and the Commission's findings.

283 Third, ADM asserts that Cerestar's evidence relating specifically to the Sherpa meetings contains errors. Cerestar positively identifies only one such meeting during the whole of its involvement with the cartel (namely a meeting on 15 April 1994 at O'Hare Airport in Chicago) and states that 'Mr [D.] does not recall specifics'. However, according to the testimony of the other participants, this meeting did not take place. Furthermore, Cerestar mentioned three other meetings. According to ADM, Cerestar stated that it did not attend other meetings after 2 November 1994, which is not surprising because certain Sherpa meetings also dealt with non-cartel matters and the Commission did not distinguish between those Sherpa meetings and other meetings.

284 Fourth, ADM alleges that Cerestar's statement is inconsistent with the statement by the former representative of ADM which was made for the purpose of the procedure before the Commission. Given the unreliability of Cerestar's evidence and its inability to specify the dates when and places where Sherpa meetings were held, ADM submits that the statement by the former representative of ADM for the purpose of the procedure before the Commission should be regarded as the more credible. According to that statement, there was no agreed or formally appointed chairman of the meetings of junior representatives of the participating undertakings and it is misleading to allege that the former representative of ADM tended to prepare matters and make proposals for price lists. ADM admits that its former representative occasionally brought prepared data to meetings, but the others did likewise. In the same way, all the participants contributed to proposing prices. The only occasions on which the former representative of ADM recalls preparing price lists for the others were when exchange rates were applied to the agreed prices, but this rarely happened.

285 The Commission rejects ADM's arguments.

Findings of the Court

286 It should first be observed that at recital 266 of the Decision, the Commission referred to Cerestar's statement as follows:

'In its statement of 25 March 1999, Cerestar ... also declares that "although [the representatives of HLR and JBL] normally chaired Masters meetings, it was [Cerestar's] clear impression that [the representative of ADM] played a leading role. [The representative of ADM] chaired the Sherpa meetings and tended to prepare matters and make the proposals for the price lists to be agreed".'

287 As regards the 'leading role' that, according to Cerestar's statement, the former representative of ADM played in the top level cartel meetings ('Masters' meetings), it should be noted that ADM merely submits that is apparent from its own statements that it had not played a 'leading role' in those meetings and that its own statements have the same legal value as those of Cerestar.

288 It should be noted that Cerestar's statement is in this respect consistent with that of the former representative of ADM in the FBI report. As to the credence to be given to Cerestar's statement, it is undisputed that Cerestar did not play an active role in the cartel, even though that was not held to be an attenuating circumstance (see recitals 282 and 283 of the Decision).

289 As regards the role played by the former representative of ADM at the technical-level meetings ('Sherpa' meetings), Cerestar stated that, generally, that he had organised and directed those meetings and had made technical proposals. It is therefore irrelevant that, in its statement, Cerestar only provided details about some of the cartel meetings.

290 Lastly, the Court has already held that ADM could not properly argue that Cerestar's statement is inconsistent with the statement of the former representative of ADM for the purposes of the procedure before the Commission. The Commission did not commit a manifest error of assessment by attaching greater evidential value to that statement than to subsequent statements made *in tempore suspecto* for the purposes of these legal proceedings.

291 Consequently, the Commission did not commit a manifest error in its assessment of Cerestar's statement.

3. Classification of ADM as a leader of the cartel

(a) Arguments of the parties

292 On the basis of the Commission's past practice, ADM contends that, even if the Commission did not err in relying on the FBI Report and Cerestar's statement, the elements relied on by the Commission on the basis of those documents show at most that ADM played an active part in the cartel, but not that it acted as a leader.

293 In ADM's submission, the Commission accepts that it did not instigate the cartel (recital 264 of the Decision), did not act as a secretariat for the collection, monitoring and distribution of sales data (recital 272 of the Decision), did not act as a mediator in disputes between participants (recital 270 of the Decision) and, finally, did not coerce or invite other undertakings to participate in the cartel (recital 271 of the Decision). By contrast, the Commission attributed each of those functions to HLR and also found that HLR chaired and organised the initial meeting of 6 March 1991 and continued to chair meetings without interruption until May 1994 (recitals 120 and 268 of the Decision).

294 Consequently, according to ADM, the Commission infringed its own administrative practice and the principle of equal treatment.

295 The Commission disputes the merits of ADM's argument.

(b) Findings of the Court

296 Where an infringement has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them (*Suiker Unie and Others* v *Commission*, paragraph 181 above, paragraph 623), which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established (see Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 150, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 264).

297 It follows, in particular, that the role of 'ringleader' played by one or more undertakings in a cartel must be taken into account in setting the fine, in so far as undertakings which have played such a role must therefore bear a special responsibility by comparison with other undertakings (Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 45; *Mayr-Melnhof* v *Commission*, paragraph 180 above, paragraph 291).

298 Section 2 of the Guidelines, under the heading of 'aggravating circumstances', contains a non-exhaustive list of circumstances which can give rise to an increase in the basic amount of the fine and includes in particular 'the role of leader in or instigator of the infringement'.

299 In the present case, it is clear from the foregoing analysis that the Commission did not commit a manifest error of assessment in relying on three different elements in order to find that, together with HLR, ADM had acted as a leader in the cartel, namely (i) the bilateral meetings organised by ADM in January 1991, (ii) the FBI Report and (iii) Cerestar's statement. Those three items of evidence relied on by the Commission point to the same conclusion, namely that during the initial phase of the cartel ADM acted as an instigator of the cartel and that during the operational phase of the cartel ADM had a predominant role in comparison with the other cartel members.

300 Although it is true that, as the Commission accepted at recital 273 of the Decision, other members of the cartel had also carried out activities frequently associated with a leadership role, the fact remains that ADM does not put forward any argument from which it is apparent that the role of those other members was as significant as that of it and HLR. Furthermore, it is apparent from recital 273 of the Decision that the Commission had regard to the fact that other members of the cartel had also carried out activities frequently associated with a leadership role when setting the amount of the increase at 35%.

301 The fact put forward by ADM that the Commission also attributed the role of leader to HLR cannot modify that finding (see paragraph 276 above). Similarly, the fact that, as the Commission stated at recital 77 of the Decision, some of the parties concerned, including in particular JBL, had already taken steps to set up a cartel on the citric acid market before ADM had taken the initiatives outlined by the Commission cannot call in question the finding that ADM acted as a leader, inter alia, in setting up the cartel which was the subject of the Decision.

302 Consequently, the Commission did not commit an error of assessment in finding that ADM was a leader in the cartel.

C — *Breach of the principle of equal treatment in so far as the Commission applied the same rate of increase to ADM as to HLR*

1. Arguments of the parties

303 ADM submits that, even accepting the Commission's view of ADM's role, in contrast to its own role in the cartel HLR had a pivotal role in the arrangement,

exhibiting the characteristics usually regarded by the Commission as indicating leadership in other cases. By comparison, ADM had a minor role which was, at most, comparable with the position of JBL, which was considered to be an active member of the cartel (see recitals 120 and 284 of the Decision). ADM complains that the Commission found no aggravating circumstances in relation to JBL and has therefore breached the principle of equal treatment.

304 The Commission contends that the plea should be rejected.

2. Findings of the Court

305 The Court observes that it is clear from recitals 268 to 272 of the Decision that, in finding that HLR had acted as a leader in the cartel, the Commission relied on the fact that the representative of that undertaking organised and chaired the first cartel meeting, that he chaired the other meetings until 18 May 1994 (see recital 120 of the Decision) and that he endeavoured, throughout HLR's participation in the cartel, to ensure that it ran smoothly by drawing the attention of the other cartel members to the need to keep the cartel dealings secret, whilst explaining to Cerestar the mechanisms of the agreements between the members when it joined the cartel.

306 As regards ADM, the Commission essentially took account of the decisive role played by its representatives in setting up the cartel and of its active membership during the operation of the cartel (see paragraph 299 above).

307 The Commission was entitled to take the view that ADM's role during the initial phase of the cartel was at least equivalent to that of HLR in terms of gravity.

308 Consequently, the plea alleging breach of the principle of equal treatment must be rejected.

D — *Breach of the principles of equal treatment and of proportionality in so far as the Commission departed from its past practice regarding the increase applied to ADM's fine*

1. Arguments of the parties

309 ADM submits that, even accepting the Commission's opinion of ADM's role in the cartel, the Decision breaches the principles of equal treatment and proportionality in that the Commission departed from its practice in previous cases by applying an increase for leadership of more than 25% in the present case.

310 ADM observes that in 'Greek Ferries', 'Alloy Surcharge' and, prior to the Guidelines, 'Cartonboard' and 'Polypropylene', the Commission applied an increase of only 20% to 25% to the fines. Larger increases are appropriate only where there is a combination of aggravating factors, including leadership. Thus, in the Pre-insulated Pipes case, the Commission increased ABB's fine by 50% by reason of various factors in combination.

311 The Commission claims that the pleas put forward should be rejected.

2. Findings of the Court

312 It should be recalled that the Commission has a discretion when setting the amount of the fine (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59). The fact that in the past the Commission imposed a particular rate of increase in the amount of fines where there were aggravating circumstances does not mean that it is estopped from raising those rates, within the limits set out in Regulation No 17 and in the Guidelines, if that is necessary in order to ensure the implementation of Community competition policy.

313 In so far as ADM alleges breach of the principle of proportionality, it should be borne in mind that, taking account of the fact that the Commission must set the fine at a level which ensures that it has a sufficiently deterrent effect, the Commission did not exceed its discretion in taking the view that the ringleader role played by ADM and HLR in the cartel justified a 35% increase in the respective fines to be imposed on those two parties.

314 In so far as ADM claims breach of the principle of equal treatment, it must be borne in mind that the Commission's decision-making practice does not constitute the legal basis for imposing fines in competition matters, since that is formed by Article 15(2) of Regulation No 17.

315 Nevertheless, it should be recalled that, when applying that provision to each individual case, the Commission must observe general principles of law, which include the principle of equal treatment as interpreted by the Community courts (see paragraph 133 above).

316 As regards ADM's comparisons with other Commission decisions imposing fines, it follows that those decisions can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case (see, to that effect, Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 187).

317 As it is, the applicant has failed to adduce sufficient evidence to conclude that those conditions have been met in this instance. In particular, ADM does not refer to any decisions contemporaneous with those of the 'Citric Acid' case. In any event, when fixing the amount of the fine, the Commission must ensure that its action has the necessary deterrent effect. Therefore, particularly in the case of cartel leaders, even a considerable increase in the level of fines imposed on account of aggravating circumstances could be considered justified as a means of ensuring full compliance with the competition rules.

318 The pleas alleging breach of the principles of equal treatment and proportionality must therefore be rejected.

E — *Infringement of the obligation to state reasons in the assessment of aggravating circumstances*

319 According to ADM, the reasoning of the Decision is inadequate because it does not show why the Commission found that there were aggravating circumstances in relation to ADM or why the Commission found it necessary to increase ADM's fine by 35%.

320 The Commission observes that the Decision is adequately reasoned in recitals 263 to 267.

321 The Court draws attention to the case-law cited in paragraphs 117 and 118 above and observes that, in the present case, it is apparent from recitals 263 to 265 of the Decision that the Commission set out the criteria which it used to find that ADM had acted as a ringleader of the cartel. The Commission essentially took account of the decisive role that the representatives of that party had played in setting up the cartel and of its highly active membership during the operation of the cartel. Furthermore, as regards the size of the increase applied, it is clear from recital 273 of the Decision that the Commission had regard to the fact that other members of the cartel had also carried out activities usually associated with a leadership role.

322 In those circumstances, it cannot be claimed that the Commission failed to provide adequate reasoning concerning the increase of 35% applied on account of aggravating circumstances.

323 Consequently, the plea alleging infringement of the obligation to state reasons must be rejected.

324 In the light of all the foregoing, the pleas relied on by ADM as regards the increase in the amount of the fine on account of aggravating circumstances must be rejected.

## VI — *Attenuating circumstances*

### A — *Preliminary observation*

325 As regards the Commission's assessment of the attenuating circumstances, ADM alleges errors of assessment relating (i) to the termination of its involvement in the cartel as soon as the competent authorities intervened, (ii) to the failure to take account of damages and (iii) to the adoption of a code of conduct by ADM.

### B — *Termination of ADM's involvement in the cartel as soon as the competent authorities intervened*

#### 1. Arguments of the parties

326 ADM submits that the third indent of paragraph 3 of the Guidelines recognises that termination of the infringement as soon as the Commission intervenes is an attenuating circumstance but that, in the present case, it did not benefit from it.

327 In addition, the facts of the present case are almost identical to those of the Amino Acids case (Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24, 'the Amino Acids case')),

in which the Commission reduced the fines by 10%. Further, ADM relies on *ABB Asea Brown Boveri* v *Commission* (paragraph 35 above, paragraph 238), in which the Court of First Instance held that undertakings which had previously cooperated with the Commission to put an end to the cartel should be granted a reduction in their fine.

328 Finally, contrary to the Commission's submission, there are cases in which cartels have continued after the authorities have intervened.

329 ADM infers from this that the Commission infringed the principles of proportionality and equal treatment.

330 The Commission observes that putting an end to a secret cartel when it has been discovered does not merit a reward and consequently there is no right to have such termination taken into account when the amount of the fine is assessed.

2. Findings of the Court

331 Section 3 of the Guidelines, entitled 'Attenuating circumstances', provides for a reduction in the basic amount where there are particular attenuating circumstances, such as, for example, termination of the infringement as soon as the Commission intervenes (in particular as soon as it carries out checks).

332 In this connection, it should however be borne in mind, first, that, for the purpose of establishing a highly competitive common market, Article 3 EC provides that the activities of the Community are to include a system ensuring that competition in the internal market is not distorted. Article 81(1) EC, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, is one of the main instruments for ensuring the implementation of that system.

333 Next, it should be recalled that it is for the Commission both (i) 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 and (ii) to investigate and punish individual infringements. In order to do so, the Commission has the power to impose fines on undertakings which, whether intentionally or negligently, infringe inter alia Article 81(1) EC (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 47 above, paragraph 105).

334 It follows that, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 47 above, paragraph 106). Only by taking into account those factors is it possible to ensure that the action taken by the Commission for the purpose of maintaining undistorted competition on the common market is fully effective.

335 A purely literal analysis of the third indent of paragraph 3 of the Guidelines could give the impression that the mere fact that an offender terminates an infringement as soon as the Commission intervenes constitutes, generally and without reserve, an

attenuating circumstance. However, such an interpretation would reduce the effectiveness of the provisions for maintaining effective competition, as it would weaken both the penalty which could be imposed for an infringement of Article 81 EC and the deterrent effect of such a penalty.

336 Unlike other attenuating circumstances, the fact of terminating an infringement as soon as the Commission intervenes is not inherent in any particular individual characteristic of the offending party itself or the specific facts of the particular case, since it results mainly from the — external — intervention of the Commission. Thus, termination of an infringement only after the Commission has intervened should not be rewarded in the same way as an independent initiative of the offending party, and merely constitutes an appropriate and normal reaction to that intervention. Moreover, the fact of termination merely marks a return by the offending party to lawful conduct and does not enhance the effectiveness of the actions taken by the Commission. Lastly, the alleged attenuating nature of the fact of termination cannot be justified solely by the incentive to terminate the infringement to which it relates, especially in the light of the above findings. It should be noted in this respect that the classification of the continuation of an infringement after the Commission intervenes as an aggravating circumstance (see, to that effect, Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 102 et seq.) already rightly constitutes an incentive to terminate the infringement, but, quite unlike the attenuating circumstance at issue, does not reduce the penalty or its deterrent effect.

337 Thus, if termination of an infringement as soon as the Commission intervenes were to be recognised as an attenuating circumstance, that would unduly impair the effectiveness of Article 81(1) EC by weakening both the penalty and its deterrent effect. Consequently, the Commission could not place itself under an obligation to consider the mere fact that the infringement was terminated as soon as it intervened to be an attenuating circumstance. Accordingly, the third indent of paragraph 3 of the Guidelines must be interpreted restrictively so as not to undermine the effectiveness of Article 81(1) EC.

338 Consequently, that provision must be interpreted as meaning that solely the particular circumstances of the specific case in which an infringement is actually terminated as soon as the Commission intervenes can warrant that termination being taken into account as an attenuating circumstance (see, to that effect, *ABB Asea Brown Boveri* v *Commission*, paragraph 35 above, paragraph 213). ADM is therefore wrong to submit that the Commission acted illegally in the Decision because it should automatically have taken into consideration ADM's termination of the infringement as soon as the Commission intervened, in accordance with the Guidelines.

339 However, the illegality alleged by ADM could be interpreted as relating to the failure to take account of the termination of its infringement in the specific context of this case.

340 In the present case, it should however be recalled that the infringement in question relates to a secret cartel whose object is price fixing and market sharing. That type of cartel is expressly forbidden by Article 81(1)(a) and (c) EC, and constitutes a particularly serious infringement. The parties must therefore have been aware of the unlawful nature of their conduct. The secret nature of the cartel confirms the fact that the parties were aware of the unlawful nature of their actions. Consequently, the Court finds that there can be no doubt that the infringement was committed intentionally by the parties in question.

341 The Court of First Instance has already held that the fact that an intentional infringement was terminated cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention (Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraph 138, and Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 498).

342 In the light of the foregoing, the Court finds that, in the present case, the fact that ADM terminated the infringement as soon as a competition authority intervened is not capable of constituting an attenuating circumstance.

343 That finding is not affected by the fact that, in the present case, it was after the intervention of the United States authorities and not of the Commission that ADM put an end to the anti-competitive practices at issue (see recitals 128 and 193 of the Decision). ADM's termination of the infringement as soon as the United States authorities intervened does not make that termination more intentional than if it had occurred as soon as the Commission intervened.

344 ADM also relies on *ABB Asea Brown Boveri* v *Commission* (paragraph 35 above, paragraph 238) in support of its argument, in so far as the Court of First Instance held in that judgment that undertakings which had previously cooperated with the Commission to put an end to the cartel should be granted a reduction in their fine. In this regard, it is sufficient to note that that judgment does not lead to the conclusion that the fact that the applicant terminated the infringement as soon as a competition authority intervened constitutes an attenuating circumstance in every case. Moreover, in the passage relied on by ADM, the judgment formulates the principle that where the conduct of the undertaking concerned made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it, that factor must be taken into account. That implies an initiative by the undertaking concerned which goes beyond merely terminating the infringement after the Commission has intervened. Consequently, that case-law does not call in question the analysis set out above.

345 As regards the Amino Acids case (see paragraph 327 above), relied on by ADM in order to show that there had been an infringement of the principles of equal treatment and of proportionality, the Court considers, first, that an administrative practice cannot arise from one case alone. Moreover, the mere fact that the Commission assessed conduct in a certain manner in its previous decisions does not mean that it is obliged to do so also when adopting a subsequent decision (see, by

analogy, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 357; *Mayr-Melnhof*, paragraph 180 above, paragraph 368, and *LR AF 1998* v *Commission*, paragraph 41 above, paragraphs 234 and 337). Lastly and in any event, the Court considers that that case, in so far as it represents only the Commission's assessment, is not capable of affecting either the above analysis based on one of the key Community objectives or the case-law under *Aristrain* v *Commission* and *Ensidesa* v *Commission*, paragraph 341 above.

346 Accordingly, for the reasons set out above, the failure in the present case to take the termination of the infringement as soon as the United States competition authorities intervened into account as an attenuating circumstance cannot be regarded as incorrect.

C — *Failure to take account of damages*

1. Arguments of the parties

347 ADM estimates that it paid some USD 15.7 million in damages to non-US buyers, of which between USD 6.8 million and USD 11.7 million are accounted for by purchases in the EU. ADM submits that the Commission is wrong to state that it was not required to take account of damages paid in civil actions (recital 335 of the Decision). According to ADM, the Commission ought to have taken them into account as an attenuating circumstance.

348 The Commission contends that the Court should reject that plea.

2. Findings of the Court

349 The payments relied on by ADM as an attenuating circumstance concern damages that ADM paid to non-US buyers, part of which relate to purchases in the European Union. Given that ADM was ordered to pay treble damages as part of its punishment in the United States, the damages to which ADM refers are potentially not merely compensatory but also include a punitive element.

350 In so far as those damages constitute a sanction (treble damages), the Court considers that the payment of those damages does not amount to an attenuating circumstance that the Commission should have taken into account in the present case. The payment by ADM of a sanction in the United States is only the consequence of the proceedings brought in the United States. The payment of that sanction is unrelated to any particular characteristic of ADM and is insufficiently related to facts of which the Commission should take account. The payment of that sanction cannot therefore call in question the fact or gravity of the infringement.

351 In so far as the damages at issue amount to compensation for European Union purchasers, the Court considers that the proceedings at issue and the payments demanded by the Commission, on the one hand, and by the United States authorities on the other clearly do not pursue the same objectives. Whilst in the first case the Commission seeks to sanction an infringement of competition law in the Community or the EEA by means of a fine, in the second case the United States authorities seek to compensate victims of ADM's dealings. The payment of those damages is therefore insufficiently related to facts of which the Commission should take account.

352 Consequently, when setting the amount of the fine the Commission was not required to take account of the fact that ADM had already paid damages in actions brought in the United States.

353 ADM submits however that, by failing to take account of damages paid to purchasers of citric acid in the EEA as an attenuating circumstance, the Commission infringes the principle of equal treatment in that it departs from its practice in similar cases.

354 The Court observes in this respect that ADM bases the existence of such a practice on one case alone, namely the 'Pre-Insulated Pipe Cartel' case (Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81] of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1)). However, it is not possible to establish the existence of a Commission practice on the basis of one case alone and ADM fails to demonstrate that the two cases are comparable. ADM does not indicate how the compensation it paid in the present case is of the same order as that at issue in the abovementioned case, namely significant and limited to one producer in the sector and its owner. Moreover, as recalled at paragraph 345 above, the mere fact that the Commission assessed conduct in a certain manner in its previous decisions does not mean that it is obliged to do so also when adopting a subsequent decision.

355 The complaint alleging infringement of the principle of equal treatment in so far as the Decision departed from a practice according to which payment of damages to purchasers on the relevant market constitutes an attenuating circumstance must therefore be rejected.

D — *ADM's adoption of a code of conduct*

1. Arguments of the parties

356 ADM contends that, when calculating the fine, the Commission ought to have taken account of the fact that ADM had set up a rigorous and ongoing programme for compliance with the competition rules incorporating, in particular, the adoption of a code of conduct addressed to all company employees and the establishment of a special department.

357 In addition, the adoption of the compliance programme, the change of management and the departure of the senior executives involved in the infringement shows genuine contrition by ADM. Furthermore, ADM had not until then been subject to any adverse finding under Community competition law. ADM infers from this that the Commission infringed the principle of proportionality.

358 The Commission contends that the Court should reject that plea.

2. Findings of the Court

359 As regards the implementation of the compliance programme, it has already been held that, whilst it is important that an undertaking takes steps to prevent fresh infringements of Community competition law from being committed in the future by members of its staff, the taking of such steps does not alter the fact that an

infringement has been committed. The Commission is therefore not required to take a circumstance such as that into account as an attenuating circumstance, especially where the infringement in question amounts, as in this instance, to a manifest infringement of Article 81(1) EC (*Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraph 373; *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 41 above, paragraphs 280 and 281, and *ABB Asea Brown Boveri* v *Commission*, paragraph 35 above, paragraph 221).

360 That plea must therefore also be rejected.

## VII — *ADM's cooperation during the administrative procedure*

### A — *Introduction*

361 As regards its cooperation during the administrative procedure, ADM essentially puts forward four pleas: (i) infringement of the Leniency Notice and thus of the principle of the protection of legitimate expectations in so far as the Commission did not find that ADM was the first to adduce decisive evidence of the cartel's existence; (ii) breach of the principle of the protection of legitimate expectations in so far as the Commission created justified expectations on ADM's part that it would apply Section B of the Leniency Notice; (iii) breach of the principle of equal treatment in so far as it treated ADM and Cerestar differently; (iv) breach of the principles of equal treatment and of proportionality in so far as the Commission reduced the fine by only 50%.

362 Before examining the merits of those pleas, it is necessary to summarise the Commission's assessment of the undertakings' cooperation during the administrative procedure, as apparent from recitals 294 to 326 of the Decision.

363 First of all, under Section B of the Leniency Notice (see paragraph 6 above), the Commission allowed Cerestar a 'very substantial reduction' of 90% of the fine which would have been imposed if it had not cooperated. In that context, the Commission acknowledged that Cerestar had been the first undertaking to adduce evidence of the cartel's existence at a meeting with the Commission on 29 October 1998. It adds that the 'information provided by [Cerestar] at the meeting of 29 October 1998, which corresponds to the information provided later in the written statement of 25 March 1999, was sufficient to establish the existence of the cartel and was communicated to the Commission before ADM provided such information' (recital 306 of the Decision). Consequently, the Commission rejected ADM's arguments to the effect that it met the conditions laid down in Section B of the Leniency Notice in order to qualify for a 'very substantial reduction' of the amount of the fine, adding 'that ADM was a leader of the cartel' (recitals 305 to 308 of the Decision).

364 Furthermore, under Section D of the Leniency Notice, the Commission allowed ADM a 'significant reduction' of 50% in the amount of the fine. The Commission took account in this respect of the fact that, during a meeting held on 11 December 1998, ADM had provided the Commission with an oral account of the cartel and that, on 15 January 1999, it had communicated to the Commission a written statement confirming this account. The Commission accepted that 'the information submitted by ADM was detailed and therefore extensively used by the Commission in the pursuit of its investigation'. Together with the information obtained from Cerestar, it was used to draft requests for information that greatly helped to trigger the admission by the other parties concerned that they had participated in the cartel. In addition, the Commission found 'that ADM [had been] able to provide the Commission with documents contemporaneous with the infringement, including handwritten notes taken during cartel meetings and price instructions relating to the decisions taken by the cartel' (recitals 312 to 315 of the Decision).

B — *ADM was the first to adduce decisive evidence of the cartel's existence*

1. Arguments of the parties

365 ADM submits that the Commission failed to abide by the terms of the Leniency Notice, thus breaching the principle of the protection of legitimate expectations. The 50% reduction in ADM's fine allowed under Section D of the Leniency Notice is insufficient. According to ADM, contrary to the Commission's observation at recital 308 of the Decision, ADM was the first to adduce decisive evidence of the cartel's existence within the meaning of Section B(b) of the Notice. On the other hand, contrary to the Commission's view expressed at recital 305 of the Decision, the information provided by Cerestar at the meeting of 29 October 1998 with the Commission services was not decisive for the purpose of that provision of the Leniency Notice.

366 First, Cerestar provided no information on the cartel prior to 12 May 1992, the date when Cerestar first become involved in it. The Commission's knowledge of the cartel during the period before that date was due to information first provided by ADM.

367 Second, Cerestar's statement of 18 March 1999 was inconclusive and inaccurate regarding the dates of meetings and members of the cartel. It specified 32 meetings on various dates between 14 November 1991 (before Cerestar joined the cartel) and 17 July 1996 (well after the cartel was disbanded). Cerestar states that 9 of them were definitely meetings of the cartel, 8 were 'possible' cartel meetings and 15 were not or 'increasingly unlikely to be' cartel meetings. The identity of the participants was

given for 3 of the 17 meetings described as 'definite' or 'possible' cartel meetings. Six of the meetings described as cartel meetings did not in fact take place at all, according to the evidence of the other parties concerned and the Commission's findings.

368 Third, Cerestar later admitted, in a letter of 7 May 1999 to the Commission, that a number of the meetings identified as cartel meetings had not, on further consideration, taken place.

369 Fourth, Cerestar's statement is vague and inconclusive as to the object of the meetings. No details were given of agreed prices or quotas (except the quotas fixed for Cerestar itself).

370 Fifth, it is unclear whether, like ADM, Cerestar provided the Commission with first-hand witness evidence. However, Cerestar found it necessary to amplify and clarify its oral statement of 29 October 1998.

371 Sixth, the Commission sent a further request for more detailed information to Cerestar itself on 3 March 1999 on the basis of ADM's submissions. Cerestar had the opportunity to study the request, which referred to specific meeting dates and places and was based on ADM's cooperation, before sending the Commission its final statement of 25 March 1999 (dated 18 March 1999).

372 By contrast, ADM's own evidence, it maintains, was decisive. At the meeting of 11 December 1998 it gave the Commission first-hand witness testimony, contemporary documentary evidence and documents evidencing the context and

implementation of the cartel agreement. ADM's evidence provided extensive and accurate details of meetings, those present, compensation and monitoring systems, prices and quotas, as the Commission itself admitted at recitals 313 and 314 of the Decision.

373 The Commission contends that the Court should reject the pleas.

2. Findings of the Court

374 Section B of the Leniency Notice, entitled 'Non-imposition of a fine or a very substantial reduction in its amount', provides:

'An undertaking which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the [undertakings] involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another [undertaking] to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if [it] had not cooperated.'

375 It follows from the wording of Section B of the Leniency Notice that an undertaking cannot benefit from a very substantial reduction in the amount of the fine or even from exemption from the fine within the meaning of this section unless it meets all the conditions laid down in Section B(a) to (e) of that notice.

376 It is sufficient to note in the present case that, as the Commission observed at recital 308 of the Decision, ADM could not, in any event, benefit from a reduction of the fine or even from exemption from the fine under Section B of the Leniency Notice. ADM failed to meet one of the cumulative conditions laid down therein, namely that of Section B(e), according to which an undertaking which has, in particular, acted 'as an instigator or [played] a determining role in the illegal activity' cannot benefit from such a reduction or even from exemption from the fine.

377 As held at paragraph 302 above, the Commission did not commit an error of assessment in finding that ADM had acted as a leader in the cartel. Even if the Leniency Notice, the Guidelines and the Decision do not use exactly the same terms in this regard, it follows from the spirit of Section B(e) of the Leniency Notice that it is not the Commission's intention to grant a very substantial reduction of the fine or even total exemption from it if the party concerned has played a particularly determining role within the cartel, such as that of leader, inciter or instigator.

378 It must therefore be found that the pleas alleging infringement of the Leniency Notice and of the principle of the protection of legitimate expectations in so far as ADM was the first to adduce decisive evidence of the cartel's existence are ineffective and there is no need to consider whether the Commission was right to find that it was Cerestar which was the first to provide decisive information for establishing the cartel's existence.

379 Consequently, the pleas alleging infringement of the Leniency Notice and of the principle of the protection of legitimate expectations must be rejected.

C — *Breach of the principle of the protection of legitimate expectations*

1. Arguments of the parties

380 ADM asserts that, at various meetings with the Commission services and in correspondence prior to and after ADM's submission of evidence on 11 December 1998, the Commission confirmed that ADM had been the first to cooperate with it within the meaning of Section B of the Leniency Notice.

381 At a meeting on 10 December 1998 between ADM, its legal adviser and the Commission services, the head of the unit dealing with the case confirmed that ADM was the first to cooperate, as is clear from the notes of the meeting made by ADM's legal adviser on the same day. Furthermore, the Commission referred in its letter of 19 January 1999 to Section B of the Leniency Notice. This point was confirmed by ADM's legal adviser in his reply. Finally, in a letter of 5 February 1999, the Commission once again referred to Section B(b) of the Notice.

382 However, according to ADM, at recital 308 of the Decision the Commission changed its assessment of ADM's cooperation, although in the course of the administrative procedure ADM, in reliance on the Commission's representations, submitted evidence to the Commission on 11 December 1998 and during subsequent, continuous and unreserved cooperation with the Commission. Therefore, according to ADM, it must be concluded that the Commission breached the principle of the protection of legitimate expectations.

383 The Commission contends that the plea should be rejected.

2. Findings of the Court

384 The right to rely on the principle of the protection of legitimate expectations, which is a general principle of Community law, extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain justified expectations (Case 265/85 *Van den Bergh en Jurgens* v

*Commission* [1987] ECR 1155, paragraph 44, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 33).

385 It is necessary to consider whether, as ADM submits, the Commission gave it precise assurances to the effect that it would grant it a reduction of the fine under Section B of the Leniency Notice.

386 First, it seems to follow from the handwritten notes that ADM's lawyer made at the meeting of 10 December 1998 between the representatives of ADM and the Commission that a Commission official said on that occasion that ADM was the first to cooperate with it in the 'Citric Acid' case ('[Name of official] confirmed that we were the first to cooperate in the citric acid case'). Although that sentence does indeed seem to support ADM's claim, it is not however as explicit as ADM would like to portray it.

387 Second, in a letter sent on 19 January 1999 to ADM's lawyer, the head of the unit dealing with the case, referring to the meeting of 11 December 1998, noted as follows:

'At the meeting, [ADM] agreed, following a full discussion on the matter, to provide the Commission with a written statement containing all information available to it concerning the conspiracy in the citric acid market in which it [had] participated, within the terms of the [Leniency Notice] and in particular [Section B(d)].'

388 At the end of that letter, the head of the unit dealing with the case reiterated 'the importance of the requirement contained in [Section B(d)] of the [Leniency Notice]'.

389 In its reply of 1 February 1999, ADM's lawyer confirmed 'that [its] client intend[ed] to maintain continuous and complete cooperation under [Section B(d) of the] Leniency Notice'.

390 Lastly, in a letter sent on 5 February 1999 to ADM's lawyer, the head of the unit dealing with the case, referring to the memorandum which it had communicated to the Commission on 15 January 1999, noted as follows:

'[T]he whole object of your voluntary approach to the Commission under the Leniency Notice is that the material provided is in a form which constitutes (decisive) evidence against the other participants in the cartel.'

391 It is apparent from the foregoing that the Commission, alluding to Section B of the Leniency Notice, did indeed seek to encourage the parties concerned to cooperate with it fully by making that exercise as attractive as possible.

392 In that respect, the Commission indicated to ADM that it was in principle 'eligible' for a very substantial reduction of the fine under Section B of the Leniency Notice and undertook to examine the documents submitted by ADM in order to check whether it did indeed fulfil the criteria laid down in that notice, and in particular those laid down in Section B(d) thereof.

393 By contrast, in all the letters prior to dispatch of the statement of objections and the adoption of the Decision, the Commission did not give any precise assurances — and indeed was not able to do so — to the effect that it would grant ADM a reduction in the fine under Section B of the Leniency Notice.

394 It is only on the basis of an assessment of all the information submitted by the undertakings during the administrative procedure that the Commission can decide whether one of them qualifies for a reduction of the fine under Section B of the Leniency Notice, as indeed the Commission stated unambiguously at paragraph 159 of the statement of objections.

395 Consequently, the plea alleging breach of the principle of the protection of legitimate expectations must be rejected.

D — *Breach of the principle of equal treatment in so far as the Commission treated ADM and Cerestar differently*

1. Arguments of the parties

396 According to ADM, the difference in the treatment of Cerestar and itself breaches the principle of equal treatment because they cooperated in similar circumstances, at the same stage of the procedure and for the same period.

397 ADM submits that both cooperated in response to the Commission's request for information which was sent to all producers in June-July 1998 and neither was aware of the other's cooperation. As to the time of the cooperation, from the initial admission of participation in the cartel to the dispatch of a full written statement to the Commission, ADM's cooperation was given over a similar period and began and ended before that of Cerestar.

398 ADM observes that in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraphs 246 to 248, the Court held that the appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors, such as the order in which they are questioned by the Commission. However, that is what occurred here. ADM asserts that the date on which the companies agreed to the date of a meeting with the Commission to give an oral description of the cartel stems from a purely random factor. ADM contends that it should not be prejudiced in that way because of the length of time which it took to carry out extensive documentary research in the United States and to arrange to obtain direct witness testimony for the Commission with a view to providing evidence of the cartel's existence in accordance with Section B(b) of the Leniency Notice. The corrections, re-worded statements and additional information provided by Cerestar show that ADM's concern to provide the Commission with accurate, detailed and extensive information was well founded.

399 The Commission contends that the Court should reject the plea.

2. Findings of the Court

400 ADM's argument is based essentially on the principles outlined by the Court in paragraphs 238 to 248 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 398 above. In this connection, it should be recalled that in that judgment, as well as, indeed, in Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraphs 132 to 141, the Court of First Instance examined the Commission's application of Section D of the Leniency Notice. The Court found in essence that in order to ensure that it does not conflict with the principle of equal treatment, the Leniency Notice must be applied in such a way that, as regards the reduction of fines, the Commission must treat in the same way undertakings that provide the Commission, at the same stage of the procedure and in similar circumstances, with similar information concerning the conduct imputed to them. The Court added that the mere fact that one of those undertakings was the first to acknowledge the alleged facts in response to the questions put to them by the Commission at the same stage of the procedure cannot constitute an objective reason for treating them differently.

401 It should be noted that in those other cases, and unlike in this case, it was common ground that the cooperation of the undertakings concerned did not fall within the scope of Sections B and C of the Leniency Notice. As is apparent from paragraph 219 of *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 398 above, the Commission applied the provisions of Section D of that notice to all the undertakings concerned by the contested decision. Those other cases therefore merely raised the question whether, by treating the applicants differently from another undertaking concerned, within its available margin of assessment for

applying Section D of that notice, the Commission infringed the principle of equal treatment.

402 By contrast, in the present case, ADM seeks to show in essence that it was because of purely random factors that Cerestar was the first to have had an incentive to cooperate with the Commission and that it was for that reason that Cerestar was granted a reduction under Section B of the Leniency Notice. ADM implies that if it had been the first to agree a date for a meeting with the Commission in order to provide it with a description of the cartel, it would have obtained a more substantial reduction in the amount of the fine, at least under Section C of that notice, since it would have been able to be the first to provide the information communicated by Cerestar. ADM does not therefore rely on the case-law set out in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 398 above, to show that the Commission applied Section D of the Leniency Notice to it in a discriminatory manner in comparison with the other cartel members.

403 It should be observed that, unlike Sections B and C of the Leniency Notice, Section D of that notice does not provide for different treatment for the undertakings concerned on the basis of the order in which they cooperate with the Commission. Consequently, in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 398 above, and in *Acerinox* v *Commission*, paragraph 400 above, the Commission took account of that factor even though it was not expressly provided for in Section D of that notice.

404 Thus, even though the Commission must have a wide margin of assessment in organising the procedure in order to ensure that the system of cooperation between the undertakings in question and the Commission concerning secret cartels is successful, the Commission must nevertheless not act arbitrarily.

405 In this respect, it should be recalled that, at recitals 54 and 55 of the Decision, the Commission stated that, after the intervention of the United States authorities in the citric acid market, it sent in August 1997 requests for information to the four largest producers of citric acid in the EC. In response to a written question from the Court of First Instance, the Commission confirmed that that request was sent, inter alia, to ADM. In June 1998 and July 1998 further requests for information were sent to the main producers of citric acid in the EC, including ADM. A first request for information was also addressed to Cerestar. The dispatch of those further requests for information is confirmed both by the Commission in its reply to the Court's questions and by ADM itself (see paragraph 397 above). It was following that request for information that Cerestar requested a meeting with the Commission on 29 October 1998 and that, during that meeting, it expressed its wish to cooperate with the Commission and adduced evidence of a cartel affecting the EEA citric acid market. The Commission cannot therefore be criticised for having acted in an arbitrary manner towards ADM as regards the organisation of a procedure which includes the dispatch of requests for information.

E — *Breach of the principles of equal treatment and of proportionality in so far as the Commission reduced the fine by only 50%*

1. Arguments of the parties

406 Referring to the arguments set out in paragraphs 365 to 372 above, ADM claims that the Commission is not bound by its own Leniency Notice and that it ought to have allowed ADM a reduction which was the same as or greater than that granted to Cerestar. ADM adds that its cooperation in the course of the administrative procedure was at least equivalent to that of Stora Kopparbergs Bergslags AB in the Cartonboard case, where the Commission reduced the fine by two thirds.

407 Therefore, according to ADM, the Commission breached the principles of equal treatment and of proportionality.

408 The Commission contends that the plea should be rejected.

2. Findings of the Court

409 Article 15(2) of Regulation No 17, which is the legal basis for imposing fines in the event of infringement of the Community competition rules, confers on the Commission a margin of assessment in fixing fines (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127), which is, in particular, a function of its general policy in competition matters (*Musique diffusion française and Others* v *Commission*, paragraph 47 above, paragraphs 105 and 109). It was against that background that, in order to ensure the transparency and objectivity of its fining decisions, the Commission adopted and published the Leniency Notice in 1996. The Notice constitutes an instrument intended to define, while complying with higher-ranking law, the criteria which it proposes to apply in the exercise of its discretion; the consequence is a self-limitation of that power (see, by analogy, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89, and *Tokai Carbon and Others* v *Commission*, paragraph 63 above, paragraph 157), in so far as the Commission must comply with guidelines which it has imposed upon itself (see, by analogy, Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57).

410 Thus, contrary to what ADM submits, the Commission was required to apply the criteria which it imposed on itself in the Leniency Notice (*Tokai Carbon and Others*

v *Commission*, paragraph 63 above, paragraph 157). That application of the criteria set in the Leniency Notice is not, in the present case, capable of being affected by the provision of the Guidelines which provides that effective cooperation by the undertaking in the proceedings is an attenuating circumstance. The last indent of paragraph 3 of the Guidelines states expressly that only effective cooperation outside the scope of the Leniency Notice is an attenuating circumstance. In the present case, ADM cooperated from the start under the Leniency Notice, which thus precludes that cooperation from being taken into account as an attenuating circumstance. Furthermore, as regards the reduction in the amount of ADM's fine, the Court finds that, having regard to the information communicated by ADM as part of its cooperation, that reduction is not disproportionate. Lastly, as regards breach of the principle of equal treatment in the light of the Cartonboard case (paragraph 406 above), the Court observes that that decision was adopted in 1994, that is before the application of the Leniency Notice, and that ADM does not establish that the evidence that it adduces in the Decision is equivalent to the detailed evidence adduced by Stora in the Cartonboard case. There has therefore been no breach of the principle of equal treatment in this respect.

411 Consequently, the pleas alleging infringement of the principles of equal treatment and of proportionality must be rejected.

## VIII — *Defects in the administrative procedure*

### A — *Scope of the infringement alleged against the parties*

#### 1. Arguments of the parties

412 ADM observes that, at recital 158 of the Decision, the Commission indicated those factors which, in the agreements and arrangements made in connection with the

cartel, were relevant in order to find an infringement of Article 81(1) EC and Article 53(3) of the EEA Agreement. However, ADM maintains that two of those factors were not mentioned in the statement of objections, namely, that the parties had, first, restricted production capacity (second indent) and, second, had designated a producer who was to 'lead' price increases in each national market (fourth indent).

413 ADM disputes the assertion that this omission did not materially affect the examination of facts and evidence and the calculation of the fine. ADM submits that, in the administrative procedure, it argued that it was precisely the absence of capacity restrictions which lessened the effect of the cartel, a submission rejected by the Commission which, on the contrary, found that there was an actual impact on the market.

414 ADM concludes that, in accordance with the form of order it seeks, Article 1 of the Decision must be annulled in so far as it finds, in conjunction with recital 158 of the Decision, that the parties restricted production capacity and designated from among their number a producer who was to 'lead' price increases in each national segment of the relevant market.

415 The Commission contends that although these two factors were not included in the statement of objections they were only two out of eight factors which could be identified in the infringement in question and were presented as examples rather than in the form of an exhaustive list. They did not materially affect the descriptive and probatory elements in the statement of objections and had no bearing at all on the calculation of ADM's fine.

## 2. Findings of the Court

### (a) Introduction

416 It should be borne in mind that, according to the case-law, the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42; Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63, upheld on appeal in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855; Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 138).

417 It is therefore necessary to consider whether, in the statement of objections, the Commission set out in sufficiently clear, albeit succinct, terms the conduct alleged against ADM in the Decision, including the two factors relied on by ADM, in such a way as to enable it properly to identify the conduct complained of.

418 In this connection, it should be observed that the Commission found at recital 158 of the Decision that there had been an infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement by virtue of the following:

— 'allocating markets and market shares quotas,

— freezing/restricting/closing down production capacity,

— agreeing concerted price increases,

— designating the producer which was to "lead" price increases in each national market,

— circulating lists of current and future target prices in order to coordinate price increases,

— devising and applying a reporting and monitoring system to ensure the implementation of their restrictive agreements,

— sharing out, or allocating customers,

— participating in regular meetings and having other contacts in order to agree on those restrictions and to implement and/or modify them as required'.

419 It is undisputed that at paragraph 134 of the statement of objections, which contains, like recital 158 of the Decision, a summary of the complaints alleged against the parties concerned, the Commission did not explicitly refer to the factors contained in the second and fourth indents of recital 158 of the Decision.

420 It is therefore necessary to assess whether, on reading the statement of objections as a whole, those factors emerged sufficiently clearly to enable the parties concerned to assert their rights of defence.

(b) The allegation relating to the freezing, restricting and closing down of production capacity

421 At the second indent of recital 158 of the Decision, the Commission alleges that the parties concerned froze, restricted and closed down production capacity. It is true that that allegation is connected with (or is a consequence of) the allegation made at the first indent of recital 158 of the Decision in which the Commission alleges that the parties concerned allocated market share quotas.

422 However, those two allegations, as the Commission itself accepts, are not identical, one relating to production capacities, the other relating to sales quotas. In this

regard, it should also be borne in mind that Article 81(1) EC draws a distinction between (b) limitation or control of production and (c) sharing of markets.

423 In the statement of objections, the Commission referred merely to the fixing of sales quotas (see, in particular, paragraphs 63, 70, 79 to 82, 86 and 87).

424 ADM is therefore right to claim that the allegation relating to the freezing, restriction and closing down of production capacity was not referred to in the statement of objections and that that conduct could not therefore be imputed to it in the Decision.

425 Consequently, Article 1 of the Decision must be annulled in so far as, read in conjunction with recital 158, it finds that ADM and the other cartel members froze, restricted and closed down citric acid production capacity.

(c) The allegation relating to the designation of a producer who was to 'lead' price increases in each national segment of the relevant market

426 At the fourth indent of recital 158 of the Decision, the Commission alleges that the parties concerned designated a producer who was to 'lead' price increases in each national segment of the relevant market.

427 In this connection, it should be noted that, in the statement of objections, the Commission did not set out that allegation, relating to the conclusion of an agreement on price increases, in such a way as to enable the parties concerned properly to identify the conduct complained of by the Commission.

428 ADM is therefore right to submit that the allegation relating to the designation of a producer who was to 'lead' price increases in each national segment of the relevant market was not referred to in the statement of objections and that that conduct could not therefore be imputed to it in the Decision.

429 Consequently, Article 1 of the Decision must be annulled in so far as, read in conjunction with recital 158, it finds that ADM and the other cartel members designated a producer who was to 'lead' price increases in each national segment of the relevant market.

B — *Application of a deterrent factor and ADM's classification as one of the leaders in the cartel*

1. Arguments of the parties

430 First, ADM claims that it was not given an opportunity to comment on the use in evidence of the FBI report and Cerestar's statement of 18 March 1999.

431 Second, ADM complains that the Commission failed to inform it during the administrative procedure that it was regarded as a leader in the cartel and to indicate the evidence on which that conclusion was based.

432 Third, ADM submits that its rights of defence were infringed in that it was not given an opportunity during the administrative procedure to comment on the application to the starting amount of a multiplier of 2 for deterrent purposes, which is not provided for in the Guidelines.

433 The Commission contends that the Court should reject the complaints put forward.

2. Findings of the Court

434 It should be observed that, according to settled case-law, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the parties concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (*Musique diffusion française and Others* v *Commission*, paragraph 47 above, paragraph 21).

435 Therefore, as regards determining the amount of fines, the rights of defence of the undertakings concerned are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235, and *HFB and Others* v *Commission*, paragraph 98 above, paragraph 312). That conclusion is all the more compelling because, by publishing the Guidelines, the Commission has informed interested parties in detail of the method for calculating any fine and the manner in which it will take account of those guidelines. It is not called in question by the fact that the guidelines make no express reference to a multiplier, since they state that it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

436 As regards the present case, it should be noted that, in the statement of objections, the Commission set out the principal elements of fact and of law that could justify the fine which it planned to impose on ADM, the amount of which it would determine by reference in particular to the gravity and the duration of the infringement.

437 Moreover, the Commission stated at paragraph 160 of the statement of objections that it intended to set the fines at a level of sufficient deterrence. Similarly, at paragraph 161 of the statement of objections, the Commission stated in essence that, in assessing the gravity of the infringement, it intended to take into account the fact that it was a very serious infringement which had the object of restricting competition and which, furthermore, in the light of the very nature of the agreements concluded, had a serious impact on competition.

438 Observance of the rights of defence of the undertakings concerned does not require the Commission to state more precisely in the statement of objections the manner in which it will take account, where relevant, of each of those factors when setting the

level of the fine. In particular, the Commission was not required to state either that ADM could be considered to be a ringleader of the cartel or the size of the increase which it might apply to ADM's fine for that reason (see, to that effect, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 20).

439 In so far as ADM claims that it was not given an opportunity to comment on the use as evidence of the FBI report and Cerestar's statement of 18 March 1999, it should be recalled that the Commission annexed those documents to the statement of objections and that the parties were therefore able to express a view on this point, including as regards their use as evidence.

440 Finally, it is clear that dividing members of cartels into groups constitutes a practice developed by the Commission on the basis of the Guidelines. The Decision was therefore adopted in a context well known by ADM and part of a consistent decision-making practice (see, to that effect, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 77).

441 Consequently, the plea alleging infringement of the rights of the defence must be rejected.

**Exercise of unlimited jurisdiction**

442 Having regard to all the pleas relied on by ADM, it is apparent that only ADM's complaints that the Commission failed to communicate certain factors used against ADM in the statement of objections are well founded. It was thus accepted at

paragraph 424 above that ADM was right to claim that the allegation relating to the freezing, restriction and closing down of production capacity was not referred to in the statement of objections and that that conduct could not therefore be alleged against it. In addition, it was accepted at paragraph 428 above that ADM was right to submit that the allegation relating to the designation of a producer who was to 'lead' price increases in each national segment of the relevant market was not referred to in the statement of objections and that that conduct could not therefore be alleged against it.

443 Given that the Court has found this illegality, it must rule on whether it is necessary to amend the Decision. The Court finds in this respect that account should be taken of the fact that the cartel, which essentially concerned price fixing, allocation of sales quotas and a compensation system organised by the cartel members with the objective of ensuring that the cartel was fully effective, constitutes a very serious infringement of the Community competition rules. It was a single and continuous infringement.

444 Next, the Court finds that it is apparent from the recitals of the Decision, in particular as regards the assessment of the gravity of the infringement on account of its actual nature and the actual impact on the citric acid market, that the two factors that the Commission failed to refer to in the statement of objections were superfluous in view of the price fixing agreements, the allocation of sales quotas and the compensation system organised by the cartel members.

445 Therefore, in the exercise of its unlimited jurisdiction, the Court finds that, notwithstanding the omissions by the Commission in the statement of objections, it is not necessary to modify the amount of the fine set by the Commission.

## Costs

446 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

447 In the present case, the Commission has been unsuccessful only in so far as it failed to refer, in the statement of objections, to two of the allegations made against ADM in the Decision (see paragraphs 425 and 429 above) which were superfluous in view of the other allegations made by the Commission. ADM has failed in respect of all its other heads of claim.

448 In such a situation, the Court will make an equitable assessment of the case in holding that the Commission is to pay one tenth of ADM's costs and that ADM will pay the remainder of its own costs as well as those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Article 1 of 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), in so far as, read in conjunction with recital 158, it finds that Archer Daniels Midland Co. froze, restricted and closed down citric acid production capacity;**

2. **Annuls Article 1 of Decision 2002/742 in so far as, read in conjunction with recital 158, it finds that Archer Daniels Midland Co. designated a producer who was to 'lead' price increases in each national segment of the relevant market;**

3. **Dismisses the remainder of the action;**

4. **Orders the Commission to pay one tenth of the costs incurred by Archer Daniels Midland Co.;**

5. **Orders Archer Daniels Midland Co. to pay the remainder of its own costs and the costs incurred by the Commission.**

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon J. Azizi

Registrar President

Table of contents