JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 September 2006 *

In Case T-329/01,

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 A. Whelan, A. Bouquet and W. Wils, acting as Agents,

defendant,

APPLICATION for annulment of Article 1 of Commission Decision C(2001) 2931 final of 2 October 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.756 — Sodium

* Language of the case: English.

Gluconate) in so far as it pertains to the applicant, or at least to the extent that it finds the applicant was party to an infringement after 4 October 1994, and for annulment of Article 3 of that decision in so far as it pertains to the applicant or, in the alternative, annulment or reduction of the fine imposed on it by the decision,

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

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

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 18 February 2004,

gives the following

Judgment

Facts

1 Archer Daniels Midland Co. ('ADM') is the parent company of a group of companies which operate in the cereal and oil seed processing industry. ADM entered the sodium gluconate market in 1990.

2 Sodium gluconate is a chelating agent, products which inactivate metal ions in industrial processes. Those processes are used, inter alia, in industrial cleaning (bottle washing, utensil cleaning), surface treatment (de-rusting, degreasing, aluminium etching) and water treatment. Chelating agents are thus used in the food industry, the cosmetics industry, the pharmaceutical industry, the paper industry, the concrete industry and in various other industries. Sodium gluconate is sold worldwide and competing undertakings have a worldwide presence.

3 In 1995, total sales of sodium gluconate on a worldwide level were around EUR 58.7 million and sales in the European Economic Area (EEA) around EUR 19.6 million. At the material time, almost all of the sodium gluconate produced worldwide was in the hands of five undertakings namely (i) Fujisawa Pharmaceutical Co. Ltd ('Fujisawa'), (ii) Jungbunzlauer AG ('Jungbunzlauer'), (iii) Roquette Frères SA ('Roquette'), (iv) Glucona vof ('Glucona'), a joint venture controlled jointly, until December 1995, by Akzo Chemie BV, a wholly-owned subsidiary of Akzo Nobel NV ('Akzo'), and Cooperatieve Verkoop- en Productiervereniging van Aardappelmeel en Derivaten Avebe BA ('Avebe') and (v) ADM.

4 In March 1997, the United States Department of Justice informed the Commission that following an investigation into the lysine and citric acid markets, an investigation had also been opened into the sodium gluconate market. In October and December 1997 and February 1998, the Commission was informed that Akzo, Avebe, Glucona, Roquette and Fujisawa acknowledged that they had participated in a cartel to fix the price of sodium gluconate and to allocate sales volumes of the product in the United States and elsewhere. Pursuant to agreements entered into with the United States Department of Justice, those undertakings and ADM were fined by the United States authorities. The fine imposed on ADM with regard to the cartel on the sodium gluconate market was part of the global USD 100 million fine paid in the context of the lysine and citric acid cases.

5 On 18 February 1998, 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 main producers, traders and customers of sodium gluconate in Europe. That request was not sent to ADM.

6 Following receipt of the request for information, Fujisawa approached the Commission and announced that it had cooperated with the United States authorities in the course of the investigation described above and that it wished to cooperate with the Commission under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). On 12 May 1998, following a meeting with the Commission on 1 April, Fujisawa supplied a written statement and a file of documents providing a summary of the cartel's history and a number of documents.

7 On 16 and 17 September 1998, the Commission carried out inspections pursuant to Article 14(3) of Regulation No 17 at the premises of Avebe, Glucona, Jungbunzlauer and Roquette.

8 On 10 November 1998, the Commission sent a request for information to ADM. On 26 November 1998, ADM announced that it intended to cooperate with the Commission. During a meeting held on 11 December 1998, ADM provided a 'first instalment of [its] cooperation'. A statement from the company and documents relevant to the case were subsequently handed to the Commission on 21 January 1999.

9 On 2 March 1999, the Commission sent detailed requests for information to Glucona, Roquette and Jungbunzlauer. By letters of 14, 19 and 20 April 1999, those undertakings made it known that they wished to cooperate with the Commission

and provided it with certain information about the cartel. On 25 October 1999, the Commission sent additional requests for information to ADM, Fujisawa, Glucona, Roquette and Jungbunzlauer.

10 On 17 May 2000, the Commission, on the basis of the information supplied to it, sent a statement of objections to ADM and the other undertakings concerned for infringement of Article 81(1) EC and Article 53(1) of the Agreement on the EEA ('the EEA Agreement'). ADM and all the other undertakings 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.

11 On 11 May 2001, the Commission sent additional requests for information to ADM and the other undertakings concerned.

12 On 2 October 2001, the Commission adopted Decision C(2001) 2931 final relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/E-1/36.756 — Sodium Gluconate; 'the Decision'). The Decision was notified to ADM by letter of 12 October 2001.

13 The Decision includes the following provisions:

'Article 1

[Akzo], [ADM], [Avebe], [Fujisawa], [Jungbunzlauer] and [Roquette] have infringed Article 81(1) EC and — from 1 January 1994 onwards — Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the sodium gluconate sector.

The duration of the infringement was as follows:

— in the case of [Akzo], [Avebe], [Fujisawa] and [Roquette], from February 1987 to June 1995,

— in the case of [Jungbunzlauer], from May 1988 to June 1995,

— in the case of [ADM], from June 1991 to June 1995.

...

Article 3

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

(a)	[Akzo]	EUR 9 million
(b)	[ADM]	EUR 10.13 million
(c)	[Avebe]	EUR 3.6 million
(d)	[Fujisawa]	EUR 3.6 million
(e)	[Jungbunzlauer]	EUR 20.4 million
(f)	[Roquette]	EUR 10.8 million

...'

14 In calculating the amount of the fines, the Commission applied in the Decision the methods set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and the Leniency Notice.

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

16 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 sodium gluconate market and the scope of the relevant geographic market, the undertakings concerned had committed a very serious infringement (recital 371 of the Decision).

17 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 relevant undertakings' worldwide turnover from the sale of sodium gluconate in 1995, the last year of the infringement, communicated by the relevant undertakings following the Commission's requests for information, and from which the Commission calculated the respective market shares of those undertakings, the Commission divided the undertakings into two categories. In the first category, it placed the undertakings which, according to the data in its possession, held worldwide shares in the sodium gluconate market above 20%, namely Fujisawa (35.54%), Jungbunzlauer (24.75%) and Roquette (20.96%). The Commission set a starting amount of EUR 10 million for those undertakings. In the second category, it placed the undertakings which, according the data in its possession, held worldwide shares in that market of below 10%, namely Glucona (approximately 9.5%) and ADM (9.35%). The Commission set the starting amount of the fine at EUR 5 million for those undertakings, that is to say, for Akzo and Avebe, which jointly owned Glucona, at EUR 2.5 million each (recital 385 of the Decision).

18 In order to ensure that the fine had a sufficient deterrent effect and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission also adjusted the starting amount. Consequently, taking account of the size and the worldwide resources of the undertakings concerned, the Commission applied a multiplier of 2.5 to the starting amount for ADM and Akzo and therefore increased that starting amount, so that it was set at EUR 12.5 million as regards ADM and EUR 6.25 million as regards Akzo (recital 388 of the Decision).

19 As regards the duration of the infringement committed by each undertaking, the starting amount was moreover increased by 10% per year, i.e. an increase of 80% for Fujisawa, Akzo, Avebe and Roquette, of 70% for Jungbunzlauer and of 35% for ADM (recitals 389 to 392 of the Decision).

20 Accordingly, the Commission set the basic amounts of the fines at EUR 16.88 million as regards ADM. As regards Akzo, Avebe, Fujisawa, Jungbunzlauer and Roquette, the basic amount was set at EUR 11.25 million, EUR 4.5 million, EUR 18 million, EUR 17 million and EUR 18 million respectively (recital 396 of the Decision).

21 Second, on account of aggravating circumstances, the basic amount of the fine imposed on Jungbunzlauer was increased by 50% on the ground that the undertaking had acted as ringleader of the cartel (recital 403 of the Decision).

22 Third, the Commission examined and rejected the arguments of certain undertakings, including ADM, that there were attenuating circumstances which should have applied in their case (recitals 404 to 410 of the Decision).

23 Fourth, under Section B of the Leniency Notice, the Commission allowed Fujisawa a 'very substantial reduction' (namely 80%) of the fine which would have been imposed if it had not cooperated. In addition, the Commission took the view that ADM did not meet the conditions laid down in Section C of the Leniency Notice and did not qualify for a 'substantial reduction' of the amount of its fine. Finally, under Section D of that notice, the Commission allowed ADM and Roquette a 'significant reduction' (namely 40%) of the fine, and allowed Akzo, Avebe and Jungbunzlauer a 20% reduction (recitals 418, 423, 426 and 427 of the Decision).

Procedure and forms of order sought by the parties

24 ADM brought the present action by application lodged at the Registry of the Court of First Instance on 21 December 2001.

25 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.

26 The parties presented oral argument at the hearing on 18 February 2004.

27 By letter of 21 July 2006, ADM requested the Court of First Instance to consider a new plea based on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') on the ground that those guidelines constitute a matter of law and of

fact which has come to light in the course of the procedure within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance. Having regard to the general principle of sound administration of justice, the Court, without reopening the procedure, invited the Commission to comment on ADM's request. By letter of 11 August 2006, the Commission expressed the view that there were no grounds for acceding to ADM's request.

28 ADM claims that the Court should:

— annul Article 1 of the Decision in so far as it pertains to it, or at least to the extent that it finds that it was party to an infringement after 4 October 1994;

— annul Article 3 of the Decision insofar as it pertains to it;

— in the alternative, annul or substantially reduce the fine imposed on it;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the application;

— order ADM to pay the costs.

Law

30 The pleas put forward by ADM, all of which relate to the setting of the fine imposed on it, concern (i) whether the Guidelines apply to this case, (ii) the gravity of the infringement, (iii) the duration of the infringement, (iv) the existence of attenuating circumstances, (v) its cooperation during the administrative procedure and (vi) observance of the rights of the defence.

A — *Whether the Guidelines apply*

1. *Infringement of the principles of legal certainty and non-retroactivity of penalties*

(a) Arguments of the parties

31 ADM submits that the method of calculating fines laid down by the Guidelines differs fundamentally from the Commission's previous fining practice which, as the Commission acknowledges in the Decision (recital 395), 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.

32 ADM observes that during the period to which this case relates (1991 to 1994 or 1991 to 1995), the Commission consistently applied this practice and imposed fines of generally between 2% 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 43 to 153 times higher than those imposed on the basis of the former practice.

33 ADM acknowledges that the Commission has discretion to increase fines where competition law policy requires higher dissuasive fines. However, in imposing a fine of 43 to 153 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 requires the imposition of fines 43 to 153 times higher than those obtaining when the former standard practice applied. 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, 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.

34 ADM submits that the undertakings concerned must be able to carry on business in conditions which are predictable. Thus, as the Guidelines also explain (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 which the Commission adopts in calculating fines under Article 15(2) of Regulation No 17 may be predicted with a sufficient degree of certainty.

35 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.

36 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.

37 The Commission contends that the plea should be rejected.

(b) Findings of the Court

38 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 and Others* 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).

39 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.

40 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 38 above, paragraphs 209 to 212).

41 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 38 above, paragraphs 215 to 223).

42 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.

43 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* v *Commission*, paragraph 38 above, paragraph 225).

44 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 38 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 38 above, paragraph 56).

45 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 38 above, paragraph 228).

46 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 38 above, paragraphs 229 and 230).

47 Thus, without prejudice to the arguments set out in paragraph 99 et seq. below, 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.

48 Similarly, the fact alleged by ADM — even if it were established — that the application of the new policy results in fines of 43 to 153 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 41 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.

49 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.

50 Consequently, the plea alleging infringement of the principles of legal certainty and non-retroactivity of penalties must be rejected.

2. *Breach of the principle of equal treatment*

(a) Arguments of the parties

51 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 sodium gluconate cartel.

52 The Commission contends that that plea should be rejected.

(b) Findings of the Court

53 It is settled case-law that the application of the method set out in the Guidelines in calculating the fine imposed does not constitute discriminatory treatment 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 adoption and publication of the Guidelines (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraphs 69 to 73, and 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 Accordingly, for the reasons given in the judgments cited in the previous paragraph, the plea alleging breach of the principle of equal treatment must also be rejected.

B — *The gravity of the infringement*

1. *Introduction*

55 ADM submits 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 failure to have regard to, or to have sufficient regard to the limited size of the sodium gluconate market, (iii) the fact that the need for deterrence was taken into account twice in relation to the fine, (iv) the application of a multiplier to the starting amount and (v) the actual impact of the cartel on the market.

56 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.

57 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 sodium gluconate market and the scope of the relevant geographic market, the undertakings concerned had committed a very serious infringement which had affected the whole of the EEA (recitals 334 to 371 of the Decision).

58 Next, the Commission considered that it was necessary to apply to the undertakings concerned 'differential treatment in order to take account of the effective capacity of the offenders to cause significant damage to competition and ... set the fine at a level which ensures it has a 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 378 and 379 of the Decision).

59 For the purposes of assessing those elements, the Commission chose to rely on the worldwide sodium gluconate turnover of the undertakings concerned during the last year of the infringement, namely 1995. In this respect, the Commission found that 'given [that the sodium gluconate market is] global, these figures g[a]ve 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 381 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, and thus to withhold competitive reserves from the EEA market. 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 381 of the Decision).

60 On that basis, the Commission chose to establish two categories of undertakings: first, that composed of the 'three major producers of sodium gluconate with worldwide market shares above 20%' and, second, that composed of undertakings 'which had significantly lower market shares in the worldwide sodium gluconate market (below 10%)' (recital 382 of the Decision). Thus, the Commission set a starting amount of EUR 10 million for undertakings in the first category, which included Fujisawa, Jungbunzlauer and Roquette, which had market shares of approximately 36, 25 and 21% respectively, and a starting amount of EUR 5 million for undertakings in the second category, namely Glucona and ADM, which each had market shares of approximately 9%. Since Glucona was jointly owned by Akzo and Avebe, the Commission set basic amounts of EUR 2.5 million for each of those companies (recital 385 of the Decision).

61 Finally, in order to ensure that the fine had a sufficiently deterrent effect and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission adjusted the starting amount. Consequently, taking account of the size and the worldwide resources of the undertakings concerned, the Commission applied a multiplier of 2.5 to the starting amount for ADM and Akzo and thus increased the fine to EUR 12.5 million as regards ADM and to EUR 6.25 million as regards Akzo by reference to the gravity of the infringement (recital 388 of the Decision).

2. *The failure to have regard to, or to have sufficient regard to the relevant product turnover*

(a) Arguments of the parties

62 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.

63 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).

64 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 44 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).

65 Furthermore, the judgment of the Court of First Instance in Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 442, confirms that attributing disproportionate importance to an undertaking's total size in assessing the fine is unlawful.

66 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 395). In relying in those decisions on that basis of calculation, the Commission set fines of between 2% 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 66 000 and EUR 236 000. However, in failing to adhere to that basis of calculation, the Commission imposed on ADM fines which were 43 to 153 times higher than those which would have been imposed on that basis.

67 ADM submits that the Commission's approach tends to penalise a low value niche product in the same way as a cartel in a high value, economically significant commodity. At no stage in the calculation of the fines did the Commission take sufficient account of ADM's limited sales of sodium gluconate.

68 ADM adds that, even looking at its sodium gluconate sales in the EEA throughout the entire period of the cartel and not simply throughout one year, the Commission's fine is still manifestly disproportionate. ADM's total EEA sodium gluconate turnover for the period from June 1991 to June 1995 (the time during which the Commission alleges ADM participated in the cartel) amounted to only approximately EUR 7.83 million and so the fine represents 216% of that amount. ADM's total EEA sodium gluconate turnover for the period from June 1991 to October 1994 (which ADM claims is the full period of its participation in the cartel) was approximately EUR 5.96 million and the fine imposed was equivalent to 283% of that amount. Whichever precise period of participation in the cartel is taken, the fine exceeds by more than 200% the total sales throughout the entire period of ADM's participation in the cartel. Indeed, a fine representing 644% of annual sales would be the result of the method followed by the United States authorities to which the Commission refers had the cartel lasted 32 years (instead of less than four).

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

70 Second, ADM submits that the Guidelines suggest 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'.

71 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.

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

73 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.

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

(b) Findings of the Court

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

Infringement of the principle of proportionality

76 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 *HFB and Others* v *Commission*, paragraph 65 above, paragraph 443).

77 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 44 above, paragraphs 120 and 121; *Parker Pen* v *Commission*, paragraph 63 above, paragraph 94; *SCA Holding* v *Commission*, paragraph 63 above, paragraph 176; *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraph 188; and *HFB and Others* v *Commission*, paragraph 65 above, paragraph 444).

78 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.

79 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.

80 In any event, the mere fact, relied on by ADM, that the fine imposed exceeds turnover through sales of that product in the EEA during the period of the cartel, or even exceeds it significantly, is not sufficient to show that the fine is disproportionate. 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. The merits of the Decision in relation to some of those criteria will be considered below, as they arise in ADM's arguments.

81 The plea alleging infringement of the principle of proportionality inasmuch as the fine imposed exceeds ADM's turnover in sales of that product in the EEA during the period of the cartel must therefore be rejected.

Infringement of the Guidelines

82 As the Court of First Instance has already had occasion to note, the Guidelines 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 38 above, paragraph 283, upheld on appeal in *Dansk Rørindustri and Others* v *Commission*, paragraph 38 above, paragraph 258, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraph 187).

83 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.

84 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).

85 In particular, the Commission submitted in its pleadings that, when assessing, for the purpose of differentiating between the undertakings concerned, the actual impact of the offending conduct of each undertaking on competition, it must take account of the relevant product turnover.

86 As is clear from recitals 378 to 382 of the Decision, contrary to what ADM submits, the Commission did indeed take account of the relevant product turnover of the parties concerned in that context. As already noted at paragraphs 58 and 60 above, in order to apply that differential treatment to the undertakings concerned, the Commission relied on their worldwide sodium gluconate turnover during the last year of the infringement, namely 1995.

87 In the present case, the cartel is made up of undertakings which hold virtually the entire 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 sodium gluconate 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.

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

Infringement of the obligation to state reasons

89 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).

90 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 76 above, paragraph 54).

91 In the present case, the Commission did not calculate the fine on the basis of the turnover for the relevant product in the EEA. Contrary to what ADM asserts, the Commission was not required to calculate the amount of the fine to be imposed on an undertaking on the basis of its turnover for the relevant product in the EEA (see paragraphs 86 and 87 above). Consequently, it cannot be criticised for failing to state why it did not use that factor in calculating the fine imposed.

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

3. *The failure to have regard to, or to have sufficient regard to the limited size of the relevant product market*

(a) Arguments of the parties

93 ADM submits that the Commission, when calculating the fine, and contrary to its assertion at recital 377 of the Decision, has not, or at the least, has not correctly taken into account the limited size of the relevant product market.

94 First, the Commission set the starting amount for all the undertakings concerned at EUR 40 million and for ADM alone at EUR 5 million (recital 385 of the Decision). The amount of EUR 40 million represents more than 200% of 1995 EEA sodium gluconate sales for all the undertakings concerned. In addition, the final fine settled on by the Commission represented 438% (prior to reduction for cooperation), and 294% (after reduction), of 1995 EEA sodium gluconate sales (recitals 396 and 440 of the Decision).

95 Second, comparing the fine which the Commission imposed on it in this instance with the fines imposed in the Zinc phosphate case, Commission Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/E-1/37.027 — Zinc Phosphate) (OJ 2003 L 153, p. 1), ADM submits that the Commission infringed the principle of equal treatment. Although the two cases are partly contemporaneous and are comparable not only as regards the size of the relevant markets but also as regards the gravity and duration of the infringement, the Commission took into account the limited size of the zinc phosphate market in Europe and in that case set the aggregate fine at EUR 11.95 million (75% of overall relevant product sales) as opposed to the aggregate fine of EUR 40 million in the sodium gluconate case (over

200% of relevant EEA product sales). Furthermore, in the Zinc phosphate case, the basic amount was set at EUR 3 million for undertakings with over 20% market share and at EUR 0.75 million for the undertaking which had a significantly smaller market share. However, in the sodium gluconate case, the Commission set the starting amount for calculating the fine at EUR 10 million for undertakings with over 20% market share and at EUR 5 million for undertakings with a significantly smaller market share.

96 Third, ADM submits that the Decision is also inadequately reasoned on that point, since there is a contradiction between recital 377, on the one hand, and recitals 394 and 395 on the other. At recital 377, the Commission stated that it had taken into account relevant product turnover, while, at recitals 394 and 395, it rejects ADM's submissions that relevant product turnover be taken into account.

97 The Commission contends that the pleas put forward should be rejected. As regards the comparison of this case with the Zinc phosphate case, the Commission maintains that in that instance, first, the fines originally calculated had been halved by virtue of the maximum limit of 10% of overall turnover laid down in Article 15 of Regulation No 17 and, second, the Commission found there to be no aggravating circumstances. Furthermore, any remaining differences in the treatment of the two cases are justified by the Commission's discretion in this domain.

(b) Findings of the Court

98 ADM alleges infringement, first, of the principle of proportionality, second, of the principle of equal treatment and, third, of the obligation to state reasons.

Infringement of the principle of proportionality

99 It should be borne in mind that, in accordance with Article 15(2) of Regulation No 17, the fine is set on the basis of the gravity and duration of the infringement. Furthermore, in accordance with the Guidelines, the Commission sets the starting amount on the basis of the gravity of the infringement, taking into account the actual nature of the infringement, its actual impact on the market and the scope of the geographic market.

100 That legal framework does not therefore in itself require the Commission to take account of the small size of the product market.

101 However, according to case-law, when assessing the gravity of an infringement, the Commission must take account of a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (*Musique diffusion française and Others* v *Commission*, paragraph 44 above, paragraph 120). Those factors attesting to the gravity of the infringement may, depending on the circumstances, include the size of the relevant product market.

102 Consequently, although the size of the market may constitute a factor to take into consideration when determining the gravity of the infringement, its significance varies according to the particular circumstances of the case.

103 In the present case, the infringement concerns in particular a price cartel which, by its very nature, is intrinsically very serious. Furthermore, the undertakings party to the cartel supplied over 90% of the world market and 95% of the European market

(recital 9 of the Decision). Finally, it is apparent that sodium gluconate is a raw material used in a number of very different finished products, therefore affecting several markets (recitals 6 and 8 of the Decision). In that context, the small size of the relevant market, assuming it is proven, is of only secondary importance in relation to all the other factors attesting to the gravity of the infringement.

104 In any event, account must be taken of the fact that the Commission found that the infringement had to be regarded as very serious for the purpose of the Guidelines which, for such cases, provide that the Commission may 'envisage' a starting amount in excess of EUR 20 million. However, in this case, according to recital 385 of the Decision, the Commission set a starting amount of only EUR 10 million for undertakings in the first category and of EUR 5 million for undertakings in the second category, which corresponds to half, or even a quarter of the amount which it could have 'envisaged' for very serious infringements under the Guidelines.

105 That determination of the starting amount of the fine confirms that, as it stated at recital 377 of the Decision, the Commission had regard, inter alia, to the limited size of the relevant product market.

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

Infringement of the principle of equal treatment

107 It should be pointed out that, in accordance with settled law, the principle of equal treatment is infringed only where comparable situations are treated differently or

different situations are treated in the same way, unless such difference in 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).

108 It should also be pointed out that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, as that framework is established by Article 15(2) of Regulation No 17, as supplemented by the Guidelines (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 38 above, paragraphs 209 to 213, and the case-law cited therein).

109 Furthermore, the determination of the amount of fines falls within the Commission's wide discretion, so that traders cannot have a legitimate expectation in the Commission's determination of such amounts (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 38 above, paragraphs 171 and 172, and the case-law cited therein).

110 Finally, it should be borne in mind that the mere fact that the Commission has found in its previous decisions that a type of conduct justified a fine of a certain amount in no way means that it is obliged to do so also in a subsequent decision (see, inter alia, by analogy, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 357; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368; and *LR AF 1998* v *Commission*, paragraph 38 above, paragraphs 234 and 337).

111 Thus, in the present case, it must be held that the simple reference by ADM to the Zinc phosphate decision is in itself ineffective, since the Commission was not required to assess this case in the same manner.

112 As regards the application of the principle of equal treatment in the present case, it should be noted that the Commission's other fining decisions are in principle only of an indicative nature, a fortiori where the facts of those other decisions, such as markets, products, the undertakings and periods concerned, are not the same as those in the contested decision (see, to that effect, Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 187).

113 In the present case, it must be held that, prima facie, the circumstances of the cartel to which the Decision relates differ from those in the Zinc phosphate decision. The zinc phosphate market cartel was limited to the territory of the EEA, whilst the sodium gluconate cartel was worldwide. Moreover, contrary to the circumstances of this case, only relatively small undertakings were involved in the zinc phosphate market cartel. Thus, the worldwide turnover of the undertakings involved in the Zinc phosphate decision ranged between EUR 7.09 million and EUR 278.80 million in 2000, whilst in this case the worldwide turnover of the undertakings involved ranged between EUR 314 million and EUR 14.003 billion in 2000, with ADM having worldwide turnover of EUR 13.936 billion.

114 In any event, even if all the circumstances relevant for the purposes of determining the appropriate amount in the Zinc phosphate decision could be regarded as comparable to those of this case, the Court considers, under its unlimited jurisdiction, that the basic amount set by the Commission for the infringement committed by ADM in this instance is appropriate in the light of all the factors referred to by the Commission in the Decision and in the light of the assessment of some of those factors in this judgment.

115 Consequently, ADM may not rely on the Commission's decision in the Zinc phosphate case in order to show that there has been an infringement of the principle of equal treatment in this case.

Infringement of the obligation to state reasons

116 Concerning the contradiction alleged by ADM between recital 377, on the one hand, and recitals 394 and 395 of the Decision on the other, it should be noted that at recital 377 of the Decision the Commission stated that it had had regard to the limited size of the sodium gluconate market when determining the starting amounts. Contrary to what ADM submits, the Commission did not contradict that statement when, at recital 395 of the Decision, it rejected the arguments put forward in particular by ADM which allege, in essence, that the Commission should have set the fines by reference to the turnover of the undertakings concerned on the relevant market. First, the fact that certain parties, including ADM, achieve only a small turnover on the relevant market does not necessarily indicate that that market is of limited size. Second, as was already stated at paragraph 104 above, in setting a starting amount of only EUR 10 million in this instance notwithstanding that it was an infringement which, by its very nature, was very serious, the Commission took account of the limited size of the market. Accordingly, the Decision is not contradictory on those points.

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

4. *Deterrence taken into account twice in relation to the fine*

(a) Arguments of the parties

118 ADM claims that the Commission took deterrence into account twice when calculating the fine: first, when classifying the role of the cartel participants for the purpose of setting the starting amount (recitals 378, 382 and 385 of the Decision)

and, second, when applying an uplift of 250% to take account of ADM's size and overall resources (recitals 386 to 388 of the Decision). In any event, if the arguments which the Commission has advanced before the Court are correct, the Decision is vitiated on this point by inadequate reasoning.

119 The Commission denies that it took deterrence into account twice in relation to the fine. On the contrary, it took two distinct consecutive steps, based on different criteria, in order to set the fine at a level ensuring that it had a sufficiently deterrent effect (recitals 378 and 380 of the Decision). Moreover, the Commission maintains that the Decision is adequately reasoned on this point.

(b) Findings of the Court

120 ADM thus pleads infringement, first, of the Guidelines and, second, of the obligation to state reasons.

Infringement of the Guidelines

121 As ADM correctly submits, the Commission stated that it was necessary to set the fines at a deterrent level when applying to the cartel members differential treatment on the basis of their market share, thus placing ADM in the category of undertakings with market share of less than 10% (recitals 378, 382 and 385 of the Decision). Similarly, the Commission relied on that argument when applying to certain members of the cartel, including ADM, the multiplier of 2.5 to take account of their size and overall resources (recitals 386 to 388 of the Decision).

122 However, in order to set the starting amount of the fine on the basis of the gravity of the infringement, the Commission first categorised the infringement as such, taking into account objective factors, namely the actual nature of the infringement, its impact on the market and the geographic scope of that market. Second, the Commission took account of factors relating to the individual undertakings, namely the circumstances linked specifically to each member of the cartel, such as the size of the undertaking and its overall resources. It was in this second part of its analysis that it pursued, inter alia, the objective of ensuring that the fine was sufficiently deterrent.

123 As the Commission correctly submits, even if it referred to that objective twice in that second part of its analysis, in reality it carried out only one calculation, which it divided into two steps, and which was intended to set the fine for each individual member of the cartel at a level such that, taking account of their specific circumstances, the aim of deterrence could be attained in the light of all the objective and individual factors relating to the gravity of the infringement.

124 Contrary to what ADM submits, the Commission did not therefore 'count twice' the deterrent element of the fine.

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

Infringement of the obligation to state reasons

126 It should be noted that ADM has not put forward any specific argument in support of its assertion and has merely complained that the Commission did not provide a statement of reasons for counting the deterrent element of the fine twice.

127 In any event, it has already been found, at paragraphs 121 to 125 above, that the Commission did not take the deterrent element of the fine into account twice. It did not therefore need to give a specific statement of reasons in that regard.

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

5. *Application of a multiplier to the starting amount*

(a) Arguments of the parties

129 ADM submits that increasing the starting amount by a multiplier of 2.5 is a manifestly disproportionate measure, which is also inadequately reasoned and in breach of the principle of equal treatment.

130 First, 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 44 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.

131 Even if it were accepted that a fine which is capped at the level of potential profits was insufficient, a rational basis for a deterrent fine would be to estimate the cartel's expected profits as a percentage of sales of the affected product with some uplift to take account of error rates. That is precisely the rationale for the approach adopted in the United States. The Court of Justice (*Musique diffusion française* v *Commission*, paragraph 44 above, paragraph 108) and the Court of First Instance (*HFB and Others* v *Commission*, paragraph 65 above, in particular paragraph 456) have recognised in their case-law that there is a link between deterrence and the profits which may result from the cartel.

132 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 undertakings concerned from pursuing their activities in a sodium gluconate cartel.

133 Second, in its reply, ADM puts forward an alternative plea. If the Court of First Instance were to accept, contrary to the foregoing submissions, that the deterrent uplift were justified by ADM's size and overall resources, it would none the less remain the case that the Commission could not properly add to the EUR 7.5 million deterrent uplift a further 35% increase in the fine on account of duration. There is some logical justification for such an increase only where the deterrent uplift is based on expected cartel profits. The longer the duration of the cartel, the greater the potential profits and therefore an increase aimed at taking account of the duration of the cartel is appropriate. The correct method of calculating the fine would have been to apply the uplift only to the basic amount of EUR 5 million. The

Commission itself appears to have intended that result, since at recital 392 of the Decision, it stated that 'the starting amount of the fine determined for gravity (recital 385) [was] therefore increased by 35%'. Recital 385 of the Decision, however, refers only to the initial starting point of EUR 5 million.

134 Third, ADM submits that the Commission infringed the principle of equal treatment in taking into account for the purpose of the uplift in the starting amount of the fine the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (recital 386 of the Decision).

135 The undertakings involved in the infringement are all multinational groups with worldwide turnover in excess of EUR 300 million, which consequently all have access to in-house and external legal advice enabling them to determine whether they run the risk of entering into an illegal cartel and to assess the consequences of infringement.

136 In addition, the Decision is inadequately reasoned on this point.

137 The Commission submits that the argument concerning the further increase of 35% to take account of duration is a new plea, which must be rejected as inadmissible by virtue of Article 48(2) of the Rules of Procedure of the Court of First Instance. The Commission also contends that all the other pleas put forward should be rejected.

(b) Findings of the Court

138 ADM thus pleads infringement, first, of the principle of proportionality, second, of the principle of equal treatment and, third, of the obligation to state reasons.

Infringement of the principle of proportionality

139 ADM raises two separate complaints in connection with this plea.

140 First, ADM claims in essence that, 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. In this respect, it should be recalled that deterrence is one of the main considerations which must guide the setting of fines (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173, and Case 49/69 *BASF* v *Commission* [1972] ECR 713, paragraph 38, and the case-law cited in paragraph 90 above).

141 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. Thus, both the deterrent effect and the punitive effect of the fine are reasons why the Commission should be able to impose a fine which, depending on the circumstances of the case, may even substantially exceed the profit expected by the undertaking in question.

142 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 setting the amount of the fine in order to ensure that it has deterrent effect.

143 Furthermore, as the Commission stated without being contradicted by ADM, the fine set for ADM after the multiplier of 2.5 had been applied represents only a tiny proportion, i.e. 0.0538% of its total annual turnover and cannot be regarded as disproportionate from that point of view either.

144 Second, in its reply, ADM claims that the Commission could not under any circumstances add to the amount of EUR 7.5 million, which already included an uplift for deterrence, a further 35% increase in the fine on account of duration. In this respect, it should be borne in mind that, under Article 48(2) of the Rules of Procedure, the introduction of a new plea in law in the course of proceedings is not allowed unless it is based on matters of law or of fact which come to light in the course of the procedure. By contrast, a plea which constitutes an amplification of a

submission previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. The same applies to a submission made in support of a plea in law (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156).

145 In the present case, ADM claimed in its application that the multiplier of 2.5 was excessive, maintaining in essence that it went beyond what was necessary to ensure that the fine had deterrent effect. It asserts in its reply, and in the alternative to the previous complaint that, in any case, the Commission should have applied the increase of 35% on account of the duration of the infringement, not to the amount obtained after the multiplier of 2.5 had been applied, but to the amount determined before the application of that multiplier. In so doing, ADM puts forward a complaint which is closely connected with that advanced in the application, thus merely amplifying the plea previously set out. Consequently, the merits of that complaint must be considered.

146 As regards the merits of the complaint put forward by ADM, the Commission was right to apply the multiplier based on the duration of the infringement to the basic amount which had already been increased by the multiplier of 2.5. In this respect, as has just been held (see paragraphs 140 to 143 above), the multiplier of 2.5 is a deterrent factor which ensures, first, that the fine has a sufficiently deterrent effect in the light of the characteristics of the undertaking concerned. However, nothing prevented the Commission from then increasing the figure thus obtained by a second multiplier which takes account of the nature of the infringement. The more ready undertakings are to commit very serious infringements over a long period of time, the greater is the need for deterrence.

147 As to the reference to recital 385 in recital 392 of the Decision, the Commission accepted before the Court that this was an error. However, that error does not undermine the lawfulness of the Decision, since it is clear from the way in which the increase for duration was calculated and from the reference to the starting amount

determined for the gravity of the infringement, which includes the uplift on account of the multiplier of 2.5, that the Commission had in mind the adjusted basic amount for gravity. That is also clear from the logical sequence of the Commission's analysis which, at recitals 378 to 388 of the Decision, took account, step by step, of the specific circumstances of the various undertakings concerned. It therefore becomes apparent that the reference at recital 392 concerned, in actual fact, not just recital 385, but recitals 385 to 388. In that context, regard should also be had to the fact that the Guidelines state that taking into account the duration of the infringement will point 'to a possible increase in the amount of the fine' (Section 1B, paragraph 2).

148 ADM is therefore wrong to criticise the Commission for adding to the uplift based on the need for deterrence a further 35% increase in the fine on account of duration.

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

Infringement of the principle of equal treatment

150 ADM claims that the undertakings involved in the infringement all belonged to multinational groups which consequently all had access to in-house and external legal advice enabling them to determine whether they ran the risk of entering into an illegal cartel and to assess the consequences of infringement.

151 In this connection, it should be observed that, in the Decision, the Commission did indeed envisage two reasons for applying to the starting amount of the fine of certain members of the cartel, including ADM, a multiplier of 2.5. The Commission claimed that it was necessary, first, to ensure that the fine had a sufficiently deterrent effect and, second, to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (recital 386 of the Decision).

152 However, it is apparent from recital 388 of the Decision that it was essentially to ensure that the fine had a deterrent effect that the Commission decided to apply to ADM the multiplier of 2.5. As already mentioned in paragraphs 139 to 143 above, the Commission was right to have regard to the need to ensure that the fine had a sufficiently deterrent effect and, more particularly, it was right to consider, as stated at recital 387 of the Decision, that the appropriate starting point for a fine resulting from the criterion of the relative importance in the market concerned required further upward adjustment to take account of the size and overall resources of the undertakings concerned. Further, given that ADM and Akzo each had worldwide turnover of approximately EUR 14 billion in 2000 while the other cartel members only had turnover of between approximately EUR 300 million and EUR 3 billion, it cannot be disputed that, in order to achieve that objective, the Commission was entitled to draw a distinction between two categories of cartel members according to their size and overall resources and to increase the basic amount of the fine for ADM and Akzo by a multiplier of 2.5.

153 The Court considers that the legal and economic knowledge and infrastructures of the undertakings concerned can be taken into account in order to increase the amount of the fine. In the present case, ADM does not dispute that it has such legal and economic knowledge and infrastructures. An undertaking such as ADM having worldwide turnover of approximately EUR 14 billion in 2000 can moreover be considered to have such knowledge and infrastructures. Consequently, the Commission was right to find that the existence of such knowledge and infrastructures was a ground for increasing the basic amount of ADM's fine. That

finding cannot be called in question by ADM's argument that the undertakings in the other category also have legal and economic knowledge and infrastructures such as to justify an increase in their fines too. Even if that were the case and the Commission was wrong not to find that the undertakings in that second category also had such knowledge and infrastructures, ADM could not in any event rely on that argument in order to obtain a reduction of the increase imposed on it.

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

Infringement of the obligation to state reasons

155 ADM asserts, without putting forward any arguments, that the Decision is inadequately reasoned as regards the multiplier of 2.5. In this respect, it should be observed that at recital 386 of the Decision, the Commission referred to the two reasons already mentioned in paragraph 151 above in order to apply the multiplier. Next, at recital 387 of the Decision, the Commission explained that, on the basis of the figures set out in recital 48 of that decision, it was necessary to place the cartel members in two categories. Finally, at recital 388 of the Decision, it stated that it considered it appropriate to apply the multiplier of 2.5 in order to ensure that the fine had a deterrent effect.

156 As regards 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).

157 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.

6. *Errors of assessment relating to the cartel's actual impact on the market*

(a) Introduction

158 First of all, it should be recalled that the gravity of infringements has to be determined by reference to numerous factors (see paragraph 76 above). In that context, the actual impact of the cartel on the relevant market can be taken into account as one of the relevant criteria.

159 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.

160 As far as the present case is concerned, it is clear from recitals 334 to 388 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 sodium gluconate market (recital 371 of the Decision).

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

(b) The approach chosen by the Commission to show that the cartel had an actual impact on the market was incorrect

Arguments of the parties

162 ADM submits that the Commission has failed to adduce evidence that the cartel had an actual impact on the sodium gluconate market, in particular because of errors made in the way that the Commission arrived at that conclusion.

163 First of all, in ADM's submission, the Commission merely found that the cartel had effectively been implemented and inferred from this that the cartel must also have had an actual impact on the market. ADM states that, as is apparent from Section 1A, first paragraph, of the Guidelines and as the Commission itself recognised at recital 341 of the Decision, the implementation of a cartel should not be confused with the actual impact of the cartel on the relevant market.

164 Similarly, ADM is of the opinion that the Commission was not entitled to rely on the relatively long duration of the cartel in order to find that it had had an actual impact on the relevant market. ADM submits that the Commission has failed to adduce evidence of an actual impact, but has merely relied — unlawfully — on a presumption to that effect.

165 Finally, as regards the changes in sodium gluconate prices, ADM submits that the Commission has not, as it was required to do under Section 1A, first paragraph, of the Guidelines, adduced evidence that the cartel had a 'measurable' impact on those changes. By contrast, in ADM's submission, the Commission relied only on a graph found at Roquette's premises during the inspection and, when comparing the Commission's findings derived from that graph with the arguments developed by ADM, the Commission noted that those 'arguments ... did not demonstrate in any convincing manner that the implementation of the cartel agreement could not have played any role in the price fluctuations' (recital 359 of the Decision). Similarly, ADM criticises the fact that, without denying the validity of its arguments as such, the Commission merely observed that the development of sodium gluconate prices, as evidenced by that graph, '[was] also perfectly consistent with a cartel situation' (also recital 359 of the Decision). In ADM's submission, in adopting that approach, the Commission has failed to adduce evidence that the cartel had an actual impact on the market but has, on the contrary, unlawfully reversed the burden of proof on the parties.

166 The Commission accepts that the criteria for determining the implementation and the actual impact of the cartel should not be confused and that it is for the Commission to adduce evidence that the cartel had an actual impact on the market. However, it submits that in this instance it did not reverse the burden of proof but, by contrast, adduced evidence to the requisite legal standard that the cartel did have such an impact.

Findings of the Court

167 In view of the complaints put forward by ADM as regards the approach chosen by the Commission to show that the cartel had had an actual impact on the sodium

gluconate market, it is necessary to summarise the Commission's analysis, as set out in recitals 340 to 369 of the Decision, before adjudicating on the validity of ADM's arguments.

— Summary of the Commission's analysis

168 First, at recital 340 of the Decision, the Commission started its analysis as follows:

'The Commission considers that the infringement, committed by undertakings which during the period covered by this Decision covered over 90% of the world market and 95% of the European market for sodium gluconate, had an actual impact on the sodium gluconate market in the EEA because it was carefully implemented. As the arrangements were specifically designed to restrict sales quantities, raise prices higher than they would otherwise have been and restrict sales to certain customers, they must have altered the normal pattern of market behaviour and therefore have had an effect on the market.'

169 At recital 341 of the Decision, the Commission stated that, '[t]o the greatest extent possible, a distinction [had been] drawn between the question of the implementation of the agreements and the question of the effects produced in the market by this implementation' but that 'none the less, there [was], understandably, some overlap between the factual elements used to reach conclusions on these two points'.

170 That being so, the Commission first analysed the implementation of the cartel (recitals 342 to 351 of the Decision). The Commission submits that various elements

relating to what it considered to be the cornerstone of the cartel, namely the sales quotas, showed that the cartel had been implemented. Further, the Commission relied on the fact that '[t]he cartel was characterised by a continuous concern for the fixing of target and/or minimum prices' and added that, in its opinion, '[t]hese prices must have had an effect on the participants' behaviour, notwithstanding the fact that they may not have been attained systematically by the cartel participants' (recital 348 of the Decision). The Commission concluded that 'the effectiveness of the implementation [of the cartel] could not be questioned' (recital 350 of the Decision).

171 Second, the Commission assessed the impact of the infringement on the sodium gluconate market. It first referred to the assessment of the relevant market at recitals 34 to 41 of the Decision. Next, referring to the assessment already carried out at recitals 235 and 236 of the Decision, the Commission, relying on the two tables ('the graphs') found at Roquette's premises (recital 354 of the Decision), stated as follows:

'The price development as it is set out in the [graphs] found at Roquette during the investigation suggests that the goal pursued by the participants to the cartel was at least partly reached. The two [graphs] present the evolution of the price of sodium gluconate in [French francs (FRF)] in Europe from 1977 to 1995, and show that in 1985 the European sodium gluconate price plunged. It is likely that this movement resulted from the collapse of the earlier cartel and the subsequent increase in the use of production capacity. By the end of 1986, the price was around 50% lower than at the beginning of 1985. There is a strong probability that the enforcement of the new cartel agreements, from 1986 onwards, significantly contributed to the steep price increase of 1987-1989, when the price doubled. After a decrease in price in 1989 that remained smaller than the one of 1985, the price remained until 1995 some 60% higher than in 1987.'

172 At recitals 235 and 236 of the Decision, to which recital 354 thereof refers, the Commission noted as follows:

'(235) Two documents, found at Roquette's premises during the inspection, are self-explanatory and constitute evidence of the results achieved by the sodium gluconate cartel. Among them is a [graph] presenting the average "European" price of sodium gluconate from 1977 until 1995.

(236) In a striking manner, [one of the graphs] shows that in 1981 and 1987, when respectively the "first" and "second" cartel agreements were enforced, prices rocketed. In 1985, the prices suddenly fell, which corresponds to the end of the "first" cartel, when Roquette pulled out of the agreement. Between 1987 and 1989, there was a steep price increase, during which the price of sodium gluconate was basically multiplied by two. From 1989 until 1995 it remained some 60% higher than in the slack of 1987. It should be noted that by contrast with the 1981-1986 period, the price of sodium gluconate could be maintained at a significantly high price until 1995.'

173 Next, the Commission summarised, analysed and rejected the various arguments put forward by the parties concerned during the administrative procedure to dispute the conclusion that it had drawn from the graphs found at Roquette's premises. So far as concerns ADM's arguments, which claimed in particular that that price development would have also occurred in the absence of a cartel, the Commission stated as follows (recitals 359, 365 and 369 of the Decision):

'(359) ... The arguments developed by ADM 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 scenario proposed by ADM may occur in the absence of a cartel, it is also perfectly consistent with a cartel situation. The increase in capacity in the mid-80's may have been both the cause and the result of the collapse of the first cartel (1981-1985). As for the developments from 1987 onwards, they are fully consistent with the re-activation of the cartel over that period. Therefore, the fact that the price of sodium gluconate started to increase could not be exclusively explained in terms of a purely competitive reaction, but must be interpreted in the light of the fact that the participants had agreed on "floor prices" and market-share allocation as well as a reporting and monitoring system. All this would have contributed to the success of the price increases.

...

(365) [One of the graphs] found at Roquette confirms that during the period from 1991 to 1995, when ADM was involved in the cartel, prices remained stable or fell slightly. There is no evidence of any major decrease in prices let alone evidence that the price level would have been unprofitable. A more plausible explanation for ADM's exit from the market would be that immediately after joining the cartel, it encountered major technical problems which persisted. Therefore, it was never able to meet its sales quotas.

...

(369) Finally, it is inconceivable that the parties would have repeatedly agreed to meet in locations across the world to allocate sales quotas, fix prices and allocate customers over such a long period, having regard, inter alia, to the risks involved, if they had perceived the cartel as having no effect or only a limited impact on the sodium gluconate market.'

— Findings

174 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.

175 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.

176 As the Commission rightly submitted, consideration of the impact of a cartel on the market in question 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.

177 Therefore, unless that criterion, which can be taken into account when setting the amount of the fine, is to be deprived of its effectiveness, the Commission cannot be criticised for referring to the actual impact of a cartel on the relevant market, notwithstanding the fact that it cannot quantify that impact or provide any assessment in figures in this respect.

178 Consequently, the actual impact of a cartel on the relevant 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.

179 In this instance, it follows from the summary of the Commission's analysis (see paragraphs 168 to 173 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 had carefully implemented the cartel agreements (see, in particular, recital 340, reproduced in paragraph 168 above) which continued over a long period (recital 369 of the Decision, reproduced in paragraph 173 above). Second, the Commission took the view that the graphs found at Roquette's premises show that the prices set by the cartel tallied to a certain extent with those actually charged on the market by the cartel members (recital 354 of the Decision, see paragraph 171 above).

180 Contrary to what ADM claims, the Commission did not merely infer from the effective implementation of the cartel that there had been an actual impact on the sodium gluconate market. As is apparent from the extracts from the Decision cited above, the Commission sought as far as possible to examine the implementation of the cartel and its actual impact on the market separately, considering, in essence, that the implementation of a cartel is a necessary precondition for demonstrating its actual impact but that it is not a sufficient condition (see, to that effect, recital 341 of the Decision). It is true that at recital 341 of the Decision, the Commission acknowledged that there was 'understandably, some overlap between the factual elements used to reach conclusions on these two points' — the reason why the Commission did not always use, as ADM submits, the appropriate terms in each of those parts of its analysis. However, the fact remains that ADM was wrong to complain that the Commission had confused the implementation with the actual impact of the cartel. Furthermore, because it is a precondition for the actual impact of a cartel, the effective implementation of a cartel constitutes an initial indicator that the cartel has had an actual impact.

181 In addition, the Commission cannot be criticised for finding that, in a case such as this, where the members of the cartel covered over 90% of the world market and 95% of the EEA market for sodium gluconate and devoted considerable efforts to organising, following up and monitoring the agreements of that cartel, its implementation amounted to a strong indication of effects on the market, especially since (see paragraph 179 above) the Commission did not confine itself to that analysis in the present case.

182 Moreover, the Commission was entitled to take the view that the weight of that evidence increases with the duration of the cartel. The sound functioning of a complex cartel concerning, as in this instance, price-fixing, market-sharing and exchange of information leads inter alia to significant administrative and management costs. It was therefore reasonable for the Commission to consider that the fact that the undertakings persisted with the infringement and ensured that it was managed efficiently over a long period, despite the risks inherent in such unlawful activities, indicates that the cartel members made a certain profit from that cartel and, therefore, that it had an actual impact on the relevant market, even if that impact was not quantifiable.

183 As far as the graphs found at Roquette's premises are concerned, it is apparent from the Commission's analysis (see paragraphs 171 and 172 above) that, without claiming that those graphs amounted to irrebuttable proof that the cartel had an impact on prices and without even seeking to quantify that impact, the Commission found that there was a 'strong probability' that the enforcement of the agreements had 'significantly contributed' to the price development.

184 It will be considered below whether, as ADM submits, the Commission made errors in assessing the facts on which it based its findings. However, in the light of what was already held at paragraph 178 above, ADM is wrong to complain that the approach adopted by the Commission to show that the cartel had influenced the development of sodium gluconate prices was incorrect. That finding is not called into question by the fact that, in response to ADM's arguments, the Commission contended in essence that it was unable to rule out that that price development could also have occurred in the absence of a cartel but that, in view of the effective implementation of the cartel and the parallelism between the actual prices and the agreed prices, that

argument was not convincing. Thus the Commission did not, as ADM submits, require the undertakings in question to adduce evidence to the contrary, i.e. evidence which, for the reasons set out in paragraph 177 above, is often practically impossible to adduce, but, on the contrary, carefully weighed up the various arguments for and against its own conclusion.

185 It follows from all the foregoing that the approach adopted by the Commission in assessing the actual impact of the cartel on the sodium gluconate market was not incorrect.

(c) Assessment of the changes in sodium gluconate prices

186 ADM submits that the evidence which the Commission has put forward does not support the finding that there was a 'strong probability that the enforcement of the new cartel agreements, from 1986 onwards, significantly contributed to the steep price increase of 1987-1989, when the price doubled' (recital 354 of the Decision). In that context, it puts forward two different arguments.

The Commission had insufficient information and failed to have regard to the other factors referred to during the administrative procedure

— Arguments of the parties

187 ADM submits that it is unlikely that the cartel had any effects additional to the effects of market forces. It is apparent from the recitals of the Decision that the

undertakings concerned themselves indicated that the price set between 1986 and 1987 did not cover the costs of raw materials; even in 1989 when the price was at a high point, those costs were not covered. In such a situation, ADM submits that the price would have increased in any event, even in the absence of a cartel.

188 ADM also submits that the Commission had very little information about the period between 1987 and 1989: it has no evidence relating to the price agreed before 9 August 1989. ADM submits lastly that the prices for the 1986-1987 period suggest that there may have been a predatory strategy to force FinnSugar, the company from which ADM had bought the technology to produce sodium gluconate in 1989, to give up its expansion plans.

189 The Commission disputes that assessment, stating that, when the price of a product is ruinous and supply exceeds demand, the price can increase only if one of the undertakings on the market is ruined and exits that market and that in this instance no single undertaking could have raised prices by a unilateral decision without losing market share. The Commission therefore takes the view that, although that increase could have occurred in the absence of a cartel, the cartel existed and offers the most plausible explanation for the price movements.

— Findings of the Court

190 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 (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraph 148, and, to that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 173, and *Mayr-Melnhof* v *Commission*, paragraph 110 above, paragraph 225).

191 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 76 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 110 above, paragraph 235; and Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645).

192 It follows, first, that particularly in the case of price agreements there must be a finding by the Commission that such agreements have in fact enabled the undertakings 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 110 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 38 above, paragraphs 151 and 152, and *Cascades* v *Commission*, paragraph 190 above, paragraphs 183 and 184).

193 In the present case, ADM does not dispute the Commission's findings of fact. In particular, ADM does not dispute the Commission's description of the price development, first, in the section of the facts relating to the description of the events (recitals 76 to 80 of the Decision) and, second, in the analysis of the impact of the cartel on the market (recital 354 of the Decision) based on the graphs found at Roquette during the inspection.

194 The material facts, as set out in the recitals of the Decision, can be summarised as follows:

— in spring 1984, the previous cartel came to an end (recital 76 of the Decision);

— for approximately two years (i.e. until about spring 1986), the sodium gluconate market was dominated by free competition (recital 77 of the Decision);

— in May 1986, the first initiatives were taken to set up the new cartel (recital 79 of the Decision);

— in February 1987, the new cartel was agreed and continued, with several amendments, until 1995 (recitals 79 and 80 of the Decision).

195 Next, the changes in the sodium gluconate price, as set out in recital 354 of the Decision, can be summarised as follows:

— in 1985, sodium gluconate prices plunged and, in 1986, they had virtually halved in relation to the beginning of 1985;

— between 1987 and 1989, sodium gluconate prices doubled;

— in 1989, prices fell again, but to a lesser extent than in 1985, and stabilised until 1995 at a level approximately 60% higher than in 1987.

196 First, it follows that, in order to assess whether such agreements have in fact enabled the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel, the Commission correctly compared (i) sodium gluconate prices between the end of the previous cartel and the conclusion of the new cartel in February 1987, a period during which the market was characterised by free competition, with (ii) the prices charged after 1987, taking into account the passage of a certain amount of time necessary for the effective implementation of the cartel.

197 Similarly, in order to compare the situation of the prices actually charged with the situation that would have prevailed had there been no cartel, the Commission correctly pointed out that, between 1989 and 1995, prices were relatively stable. As the Commission stated at recital 42 of the Decision, without being contradicted on that point by ADM, the sodium gluconate market was, in principle, subject to significant variations. Consequently, the Commission was entitled to find that, had there been no cartel, the parties could not have expected a certain stability in the price of sodium gluconate. ADM has failed to put forward any argument to refute that finding.

198 Second, as regards the doubling of prices between 1987 and 1989, it must be held that, if, as ADM submits, the price of sodium gluconate was at a ruinous level in 1987 and there was an excess of supply, as there was in 1986 and 1987, it is inconceivable that prices could have increased in the absence of an external factor. If supply was in excess, prices would have decreased or remained low until the product became scarce again on account of one the operators leaving the market through, for example, bankruptcy or a takeover. However, in the present case, the Commission found that prices increased when the new cartel was actually set up.

199 In the light of the foregoing, the Commission was entitled to find that it had specific and credible evidence showing that the cartel had had an actual impact on the market which was, for the purpose of the Guidelines, 'measurable' by comparing the hypothetical price which, according to reasonable probability, would have prevailed had there been no cartel and the price charged in pursuance of the cartel.

200 The arguments put forward by ADM do not invalidate that finding. In particular, the argument relied on by ADM that, according to statements by its competitors, even when that price was at a high point it did not even cover the costs of raw materials is irrelevant. Assuming that that argument were established, it could not be ruled out that the applicable price in the absence of a cartel on a market in which competition had not been disturbed would also be below the cost of raw materials but possibly at a level even further away from the production cost. The Commission therefore correctly analysed the various arguments put forward by ADM and the other parties during the administrative procedure (see also paragraph 183 above).

201 Consequently, ADM was wrong to allege that the Commission had insufficient information and failed to have regard to the other factors referred to during the administrative procedure.

ADM was not a member of the cartel at the time of the increase in sodium gluconate prices between 1987 and 1989

— Arguments of the parties

202 ADM asserts that the period of increase in sodium gluconate prices between 1987 and 1989 was prior to its involvement in the cartel and that, consequently, the

Commission was not entitled to impose a higher fine on it on account of the cartel's economic impact at a time when ADM was not a participant.

203 The Commission disputes the validity of that argument.

— Findings of the Court

204 It is settled case-law that the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating the cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 150 and 152, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraphs 160 and 167).

205 As the Commission rightly contends, even if ADM joined the cartel only after the price of sodium gluconate doubled between 1987 and 1989, it benefited throughout the period of its participation from the achievements of the cartel prior to its membership, namely a steep price increase and a stabilisation of prices at a high level. Moreover, it helped to ensure that the cartel continued.

206 The Commission was therefore entitled to consider the cartel as a whole when determining the actual impact of the cartel in respect of all the parties involved. The question of when ADM became involved in the cartel is irrelevant for the purposes of determining the actual impact of the cartel.

207 Consequently, the complaint based on the fact that ADM was not a member of the cartel at the time when sodium gluconate prices increased between 1987 and 1989 must be rejected.

(d) Definition of the relevant market

Arguments of the parties

208 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.

209 First, ADM states that although the Commission acknowledged in the Decision that sodium gluconate may, depending on the relevant use, be replaced by other agents, it none the less excluded sodium gluconate substitutes from its definition of the relevant market.

210 In doing so, the Commission did not conform to its own established practice of recognising that partial substitutes can form part of the relevant market. Similarly, ADM submits that the Commission incorrectly applied the Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5; 'the Notice on market definition').

211 In its submission, the evidence indicates that if purchasers of sodium gluconate had turned to alternative chelating agents, they would have eliminated a small but significant price rise and that consequently the market is wider than the Commission suggested. Taking as its basis a publication entitled *Chemical Economics Handbook* (B. Davenport et al. SRI International: 'the CEH 2000 Report'), it points out that:

— measured by price correlation, the following agents are closer substitutes to sodium gluconate than gluconic acid: glucoheptonate; HEDTA (powder); aminotri (acid); NTA (dry) acid; aminotri (NA5 salt) and EDTA (dry) acid;

— glucoheptonate is a closer substitute for gluconic acid than is sodium gluconate;

— the correlation between sodium gluconate and glucoheptonate prices is over 96%, suggesting that these prices move in virtual lock step;

— the correlations between all of the chelating agents discussed in the CEH Report and sodium gluconate are above 60%, suggesting that sodium gluconate prices have been very sensitive to movements in prices of other chelating agents;

— price correlations between gluconic acid and other chelating agents are greater than 60% except for two alternate forms of NTA.

212 ADM cites the Notice on market definition (paragraph 39), several Commission decisions on concentrations and the judgment of the Court of Justice in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR 1-8417, paragraph 100, and argues that high correlation between product prices is evidence that they belong to the same product market for competition law purposes. It is apparent from the CEH 2000 Report that there is price competition across all chelating agents and that sodium gluconate and glucoheptonate are generally interchangeable in many applications.

213 ADM submits that the CEH 2000 Report findings are borne out by the responses of consumers questioned by the Commission in the course of its investigation, by the responses provided by the undertakings concerned to the Commission and by those undertakings' internal memoranda.

214 Therefore, both the evidence identified by the Commission (from which it has nevertheless drawn mistaken conclusions) and the CEH 2000 Report demonstrate that the relevant market should have been more broadly defined to include products such as, in particular, gluconates and glucoheptonates, gluconic acid, glucophetonic acid, 'mother liquors' and lignosulfonates.

215 The arguments advanced by the Commission in the Decision cannot, in ADM's view, undermine that conclusion. It is irrelevant whether the substitutes for sodium gluconate are imperfect or partial since, as is clear from paragraph 17 of the Notice on market definition, the Commission is required to assess whether a substitute would divert sufficient sales to defeat a small but significant price rise and not whether a substitute would capture all of a product's sales, which would be the case with a perfect substitute. In addition, it is incorrect that the absence of a general

substitute for sodium gluconate in relation to all its possible applications, supports the proposition that sodium gluconate is a relevant product market for competition law purposes (recital 37 of the Decision). In particular, the Commission has not pointed to a specific application for which sodium gluconate has no substitute.

216 Similarly, the Commission's arguments based on Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 are mistaken. (i) In that case the Court applied the test of whether there was a sufficient degree of interchangeability between all the products on the same market for the same use. That test is reflected in the economic theories underlying the Notice on market definition and ADM relies on it in its submissions. (ii) The facts of *Hoffmann-La Roche* are different from those of the present case. Whilst in that case, Vitamins C and E had no substitutes in nutritional uses, in this case the Commission has not identified any use for which sodium gluconate has no substitute. (iii) It is plausible that if only limited quantities of Vitamins C and E had been sold for technical uses, substitute products would not have impacted on the price fixing strategy developed by the applicant in *Hoffmann-La Roche*. The limited diversion of sales to substitute products for technical uses would not have negated the price rise because of the profits to be expected from larger sales of the products at higher prices for nutritional uses for which no substitute was available.

217 ADM submits that, in any event, the Commission's attribution of key importance, at recital 37 of the Decision and in its defence (paragraph 78), to the testimony of customers is debatable. Recital 37 of the Decision defines customers as 'compounders, which formulate a variety of products for different industries, thus exploiting two or more properties of sodium gluconate'. There is no support for that

assertion. The CEH 2000 Report suggests that undertakings which buy sodium gluconate in order to use it to make other products are generally industry specific. None of the customers questioned appears to fit the Commission's definition.

218 ADM also observes that in the matter of the Dow Chemical Company, the United States Federal Trade Commission concluded that chelating agents, regardless of application, form an economic market.

219 Second, ADM points out that, at recital 38 of the Decision, the Commission states that 'the vast majority of the customers to whom the Commission sent a request for information on the issue of substitutability have replied that they would not be able to substitute sodium gluconate with another product in their industrial process'. In ADM's submission, that conclusion is wrong. The evidence gathered by the Commission from customers is selective, ambiguous and undermined by the nature of the questions asked.

220 In this connection, ADM submits (i) that 5 of the 12 end-users who responded to the question asked by the Commission considered sodium gluconate to be substitutable, although one of them indicated that the substitute was gluconic acid. Those responses were confirmed by a distributor which indicated, unprompted, that there were a number of substitutes. The purchasers who replied to the question and confirmed that sodium gluconate was substitutable represented the majority of companies active in surface treatment and industrial cleaning (Solvay, Chemische Werke Kluthe and Henkel), accounted for 50% of sodium gluconate sales and included two of the largest customers by volume (Henkel and British Gypsum).

221 (ii) ADM claims that of the other customers questioned, only one gave a reasoned view for its answer, whilst in its Notice on market definition (paragraph 40), the Commission itself stated that answers on this subject can be taken into account only when they are sufficiently backed by factual evidence.

222 (iii) In ADM's submission the questionnaire sent by the Commission did not ask the right question. It merely asked whether purchasers could replace sodium gluconate rather than asking what their reaction would be to a small but significant permanent price increase. Furthermore, of the negative responses, only one was reasoned and it was not possible to determine clearly whether minor technical difficulties impeded substitution or whether purchasers could never switch to another product even in the face of a sustained price increase in sodium gluconate.

223 Third, ADM observes that at recital 38 of the Decision, the Commission found that 'the simple fact that the sodium gluconate producers entered into, participated in and devoted resources to a cartel on sodium gluconate for a long time, and that they chose not to extend it into other products, such as mother liquors, confirms that they considered sodium gluconate to be a relevant product market.'

224 ADM maintains that the evidence suggests, contrary to the Commission's assertion, that the parties were concerned by the possibility of customers turning to substitute products not controlled by the cartel members and that they sought unsuccessfully to extend the arrangements to mother liquors to prevent cheating on the cartel. Further, the evidence relied on by the Commission, namely the fact that parties participated in the cartel, may be for any number of reasons and does not as such support the conclusion drawn.

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

Findings of the Court

226 It must be observed as a preliminary point that at recitals 34 to 41 of the Decision the Commission examined the relevant product market and defined that market as

consisting of sodium gluconate in its solid and liquid forms and its basic product, gluconic acid. Furthermore, in response to the arguments raised by ADM during the administrative procedure, the Commission accepted that sodium gluconate had a number of partial substitutes depending on the field of application, but found no evidence that those products would effectively constrain pricing of sodium gluconate. On the contrary, it found that several factors contradicted ADM's contention. Thus it argued that there was no general substitute for sodium gluconate and that, given that that product was more environmentally friendly, certain users preferred it to potential substitutes. Moreover, it found that that view was confirmed, first, by the replies provided by customers of the cartel members and, second, by the very existence of the cartel which was limited to sodium gluconate and thus in its view constituted evidence that the members themselves regarded the market as being limited to sodium gluconate (recitals 37 and 38 of the Decision).

227 Furthermore, in the part of the Decision relating to the actual impact of the cartel on the market, the Commission referred to the review of the market summarised in the preceding paragraph (recital 353 of the Decision).

228 ADM asserts in essence that by excluding sodium gluconate substitutes, the Commission defined the relevant product market too restrictively.

229 In this respect, it should be stated, first, that ADM does not raise this complaint that the relevant product market was incorrectly defined in order to show that the Commission infringed Article 81(1) EC. It does not deny that it acted in breach of that provision by participating in the cartel on the sodium gluconate market. ADM

seeks merely to establish in this respect that the Commission imposed on it an excessive fine, in particular because it found, in ADM's opinion, that the cartel had had an actual impact on the relevant product market and took into account that factor when setting the fine.

230 However, that argument can be accepted only if ADM demonstrates that, had the Commission defined the relevant product market differently, it would have had to find that the infringement did not have an actual impact on the market defined as that consisting of sodium gluconate and its substitutes (see paragraph 178 above).

231 Only by demonstrating the above would it be possible to call in question the Commission's determination of the amount of the fine by reference to the gravity of the infringement.

232 As already held at paragraphs 196 and 197 above, in the present case, in concluding that the infringement had an actual impact on the sodium gluconate market, the Commission compared the prices actually charged with those that would have prevailed had there been no cartel and relied on two factors in this respect. First, it compared the sodium gluconate prices charged during the period prior to the cartel, characterised by free competition, with those charged after a certain period of time which was necessary for the actual setting up of the cartel in 1989. Second, it found that between 1989 and 1995 prices were relatively stable whereas generally the market was characterised by considerable fluctuations in prices (recital 354 of the Decision).

233 In such a situation, if ADM's argument alleging errors in the definition of the market is to succeed, it has to show that a comparison of the prices actually charged on the wider market — corresponding to its definition of the market — with those which

would have prevailed on that wider market had there been no cartel, indicates that the cartel had no impact on that market. As already held at paragraph 178 above, it is only in such circumstances that the Commission could not have relied on the criterion of the actual impact of the cartel when calculating the fine by reference to the gravity of the infringement.

234 In this respect, ADM merely asserts that '[t]he Commission's conclusions on the relevant product market are central to its findings on economic impact', that the errors allegedly committed by it 'vitiate the Commission's view of economic impact and its assessment of fines' and, lastly, that, if the Commission had defined the market by including within it sodium gluconate substitutes, it 'would have concluded that any attempt by the parties to control the price of sodium gluconate would have been ineffective'.

235 It is true that the ADM devotes a significant part of its pleadings to analysing the data relating to the gelatine market and the discussion of economic theories for defining the relevant market in competition law.

236 However, ADM makes no attempt whatsoever to refute the Commission's analysis in the Decision as regards the sodium gluconate market, if only by providing a rough comparison between the prices which had actually been charged, during the cartel, on the wider chelating agent market with those which, in all probability, would have prevailed on that wider market had there not been a cartel limited to sodium gluconate.

237 ADM therefore fails to demonstrate or put forward any elements which, together, would constitute a body of consistent evidence showing with reasonable probability that the impact of the sodium gluconate cartel on the wider chelating agent market was non-existent or at least negligible.

238 Consequently, the complaint alleging that the relevant market was defined incorrectly must be rejected and it is not necessary to consider whether, as ADM claims, the Commission erred in law by excluding, for the purpose of the Decision, sodium gluconate substitutes from the relevant product market.

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

C — *Errors in assessing the duration of the infringement*

240 ADM submits that the Commission committed errors of assessment in considering that the infringement continued until June 1995. It asserts that it terminated its involvement in the cartel at the meeting of 4 October 1994 in London and that the meeting held between 3 and 5 June in Anaheim (California) cannot be regarded as a further part of the infringement. ADM therefore maintains that the fine must be reduced accordingly.

1. *Termination of ADM's involvement in the cartel at the meeting of 4 October 1994 in London*

(a) Arguments of the parties

241 In ADM's submission, the Commission was wrong in rejecting its arguments and in concluding, at recitals 319 to 323 of the Decision, that ADM did not cease to be involved in the cartel at the meeting of 4 October 1994 but continued to be involved until June 1995.

242 First, referring to the judgments of the Court of First Instance in Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 85, and *BPB de Eendracht* v *Commission*, paragraph 107 above, paragraph 203, ADM argues that an undertaking ceases to participate in a cartel where it openly disassociates itself and withdraws from the agreement. ADM did so at the meeting of 4 October 1994.

243 At that meeting, ADM's representatives informed the other participants that it would leave the group if outstanding issues on quotas were not resolved. No agreement was reached and ADM's representatives left, as is apparent from the Commission's document No 6. ADM points out that the Commission endorsed that account of the meeting of 4 October 1994 (recital 228 of the Decision). Those facts are consistent not only with the Commission's conclusion that the meetings had become progressively more strained prior to the meeting of 4 October 1994 but also with the evidence provided by Jungbunzlauer to the Commission concerning that meeting.

244 In addition, ADM observes that on confirming its withdrawal from the cartel, it ceased reporting sales figures to the cartel — something the Commission

acknowledges at recital 228 of the Decision. Contrary to the Commission's interpretation at recital 321 of the Decision, that action was not merely a negotiating strategy which illustrated ADM's firm intention to continue with the restrictive activities. It was an objective step, which was clearly understood by the other parties and indicated that ADM had ceased to participate in the cartel.

245 The Commission contends that that argument must be rejected.

(b) Findings of the Court

246 First, it should be borne in mind that, according to the case-law cited by ADM itself (see paragraph 242 above), it could be concluded that ADM definitively ceased to belong to the cartel only if it had publicly distanced itself from what occurred at the meetings.

247 However, it follows from ADM's own description of the facts, which, moreover, are consistent with those in the Decision (see, in particular, recitals 228 and 321) that at the meeting of 4 October 1994 in London ADM did not distance itself openly from the cartel objectives and the methods to be used for implementing those objectives, in particular the allocation of sodium gluconate sales quotas between its members. On the contrary, it follows that ADM sought in vain to resolve the disagreements breaking out between the cartel members and to reach a compromise on sales quantities. Such an approach testifies rather to an acceptance of the principle that the cartel would continue to be implemented. Consequently, at paragraph 321 of the Decision, the Commission was entitled to describe ADM's conduct at that meeting as a negotiating strategy designed to obtain more concessions from the other members of the cartel rather than as an end to its involvement in that cartel.

248 Nor is it evident from any document relied on by ADM that the other cartel members would have understood its conduct at that meeting as meaning that it was publicly distancing itself from the terms of the cartel.

249 Indeed, Jungbunzlauer's letter to the Commission of 21 May 1999 does not describe ADM's conduct at the meeting of 4 October 1994 in London. It merely states that '[w]hen, in London on 4 October 1994, Roquette declared it would no longer observe any of the [cartel] agreements, all arrangements came to an end'.

250 In Fujisawa's letter to the Commission of 12 May 1998, Fujisawa gave no account of that meeting; moreover, as is apparent from recital 224 of the Decision, it did not participate in it. Quite to the contrary, in that letter Fujisawa stated that the cartel was terminated only in 1995.

251 Nor does Jungbunzlauer's description of that meeting in its letter of 30 April 1999 to the Commission contain any indication that, at that meeting, ADM stated that it wished to withdraw from the cartel. On the contrary, Jungbunzlauer stated in that letter that ADM had requested a reallocation of sales quantities but that that request was not accepted.

252 Second, in so far as ADM argues that, following that meeting, it ceased reporting sales figures to the other cartel members, it must be observed that, as is clear from recitals 81 to 90 of the Decision, the cartel consisted in a complex mechanism intended to divide markets, fix prices and exchange information about customers. The mere fact — even if it were established — that, following that meeting, ADM ceased reporting its sales figures to the other cartel members does not demonstrate that the cartel ceased to exist or that ADM ceased to participate in it.

253 Consequently, ADM has failed to establish that the Commission committed errors of assessment in considering that ADM did not terminate its involvement in the cartel at the meeting of 4 October 1994 in London.

2. *The nature of the meeting held from 3 to 5 June 1995 in Anaheim*

(a) Arguments of the parties

254 ADM submits that contrary to the Commission's contention (recitals 232 and 322 of the Decision), the meeting of 3 to 5 June 1995 cannot be considered a further part of the infringement. The meeting coincided with an industry meeting and at that meeting the parties sought to aggregate historic sales data on an anonymous basis (recital 232 of the Decision). The proposed blind exchange of information on volume was not an illegal form of information exchange. It involved the parties aggregating sales volumes in a manner that did not indicate any firm-specific information to any of the participants. It did not entail any firm-specific sales monitoring, price agreements or sales allocation, which the Commission found were the key elements of the sodium gluconate cartel. In any event, the system planned by the participants to achieve the aim of establishing a total market figure failed.

255 The evidence contained in a document obtained from Roquette and mentioned by the Commission at recitals 233 and 322 of the Decision, according to which that meeting dealt with 'compensation' and the 'worldwide production target' and 'price', is vague and ambiguous. Furthermore, it is not witness testimony but a summary of

the arrangement, prepared by a United States prosecuting authority, which formed the basis of discussion with Roquette's witnesses. As a prosecution statement based on unknown sources, the document can have little probative value against the accounts of the eyewitnesses involved.

256 As to the fax of 1 May 1995 from Glucona to the hotel where the June 1995 meeting was to be held, ADM states that from that document it can be seen that the reservation was for 6 June 1995, whereas the meeting took place on 3 to 5 June 1995. The reservation could relate to a different meeting and, even if it related to the cartel, it shows, at most, that Glucona believed it might be able to persuade the others to reconstitute the cartel.

257 The Commission contends that this argument must be rejected.

(b) Findings of the Court

258 First, it should be observed that, as the Commission notes at recital 232 of the Decision, ADM does not dispute that, at that meeting, attended by all the cartel members, the participants discussed sales volumes of sodium gluconate in 1994. In particular, the Commission observed — and ADM did not dispute — that, according to ADM, Jungbunzlauer had asked it 'to bring ADM's total 1994 sodium gluconate sales figures' (recital 232 of the Decision).

259 It should be noted that that approach was the same, in essence, as the standard practice within the cartel, which aimed to ensure that allocated sales quotas were adhered to and which, as is apparent from recitals 92 and 93 of the Decision, consisted in the cartel members communicating their sales figures before each meeting to Jungbunzlauer, which would aggregate those figures and distribute them during the meetings.

260 Second, ADM confirms the Commission's description of events at recital 232 of the Decision, according to which a new information exchange system relating to sales volumes was proposed at the meeting. That system was supposed to make it possible to establish, anonymously, that is in such a way that no member of the cartel could know the figures of another member, the total size of the sodium gluconate market as follows:

'[C]ompany A would write down an arbitrary number that represented a portion of its total volume. Company B would then show to company C the sum of company A + company B's number. Company C would add to that sum the total volume of company C. Company A would then add to that the remainder of this total volume and report the total to the group.' (recital 233 of the Decision.)

261 ADM cannot properly argue that that system does not constitute an infringement of Article 81 EC merely because it does not entail any firm-specific price-fixing agreement, allocation of sales quotas and sales monitoring.

262 The Commission was entitled to find that that conduct constituted a fresh attempt by the cartel members to 'restore order on the market' and to maintain their anti-competitive practices implemented during previous years, aimed at ensuring control of the market through joint action, albeit, if necessary, in different forms and by different methods, and it is not necessary to assess whether, viewed in isolation, that

conduct constituted an infringement of the competition rules. The fact that the cartel members had tried to set up an 'anonymous' system of information exchange, as described in paragraph 260 above, could reasonably be interpreted by the Commission as a logical consequence of the conduct of the undertakings within the cartel which, as recital 93 of the Decision in particular shows, was characterised by a 'context of growing mutual suspicion', but whose aim was none the less to share the market. From that point of view, the Commission was entitled to consider that by setting up the new information exchange system the cartel members showed that there 'was still a firm intent to work out a solution to carry on with anti-competitive arrangements' (recital 322 of the Decision) and to 'keep control of the market through joint action' (recital 232 of the Decision).

263 Third, the brief note written by Roquette at that meeting and which the Commission referred to at recitals 233 and 322 of the Decision ('6.95 Anaheim: Discussion: compensation; 44,000MT worldwide production target; price') can reasonably be regarded as confirming the Commission's argument, even if it is true that, viewed in isolation and taken out of context, that note gives only an imprecise idea of the content of the discussions held during the meeting of 3, 4 and 5 June 1995. Moreover, contrary to what ADM submits, since Roquette submitted that document unprompted to the Commission during the administrative procedure, the Commission was entitled to use it to support its argument.

264 Fourth, the various statements of the cartel members referred to by ADM are not capable of undermining the Commission's position. The statement of a Roquette employee, attached to Roquette's letter of 22 July 1999, according to which that meeting 'led to nothing and served no purpose at all', which is consistent with Jungbunzlauer's statement in its letter of 30 April 1999, is irrelevant, since it confirms that that meeting did not modify the functioning of a single continuing

infringement (recital 254 of the Decision). Thus, that letter does not show the absence of any intention on the part of the cartel members to maintain the infringement.

265 In that respect, it should be borne in mind that for the purpose of examining the application of Article 81(1) EC to an agreement or a concerted practice, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342; *Commission* v *Anic Partecipazioni*, paragraph 204 above, paragraph 99; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 178; Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 87).

266 Fifth, the fact that that meeting was held in the context of a general industry meeting is irrelevant, since it does not exclude the possibility that the undertakings concerned used that general meeting to discuss the cartel.

267 Consequently, the Commission was entitled to find that ADM participated in the cartel until June 1995.

268 In the light of all the foregoing, it must be held that ADM has failed to establish that the Commission erred in its assessment of the duration of the infringement.

D — *Attenuating circumstances*

269 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 prior to the investigation, (ii) to the fact that there was no need to ensure that the fine had a deterrent effect and (iii) to the adoption of a code of conduct by ADM.

1. *Termination of ADM's involvement in the cartel*

(a) Arguments of the parties

270 ADM submits that the third indent of paragraph 3 of the Guidelines recognises that 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' is an attenuating circumstance. It takes the view that in the present case, it should have benefited from that attenuating circumstance, given that it put an end to the infringement as soon as the United States competition authorities intervened. 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 of the EC Treaty 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 the judgment in Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 238, in which the Court of First Instance held that undertakings which had cooperated with the Commission to put an end to the cartel should be granted a reduction in their fine. Finally, contrary to the Commission's submission, there are cases in which cartels have continued after the authorities have intervened.

271 The Commission submits that ADM is not entitled to rely on the third indent of paragraph 3 of the Guidelines in this instance. It is inconceivable that secret cartels should continue once they have been discovered. Therefore, it is inappropriate to apply the attenuating factor on the ground that the infringement ended as soon as the Commission intervened.

(b) Findings of the Court

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

273 The Commission acknowledges in the Decision that ADM and the other cartel members put an end to the infringement as soon as the United States authorities intervened on 27 June 1995 (recital 234 of the Decision).

274 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.

275 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 44 above, paragraph 105).

276 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 44 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.

277 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.

278 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 circumstances. 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.

279 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.

280 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 270 above, paragraph 213).

281 In the present case, it should 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.

282 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).

283 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.

284 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 (recital 234 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.

285 ADM again relies on *ABB Asea Brown Boveri* v *Commission* (paragraph 270 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.

286 As regards the Amino Acids case (see paragraph 270 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, as recalled at paragraph 110 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. 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 282 above.

287 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.

2. *No need to ensure that the fine has a deterrent effect*

(a) Arguments of the parties

288 ADM observes that in the various proceedings before the United States courts relating to the lysine and citric acid cases, it has already paid more than USD 250

million on account of antitrust violations. The Commission should have taken that into account as an attenuating factor, as it has done in previous practice (Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (Case IV/31.865, PVC) (OJ 1989 L 74, p. 1)).

289 The Commission contends that that argument must be rejected.

(b) Findings of the Court

290 It should be noted at the outset 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).

291 Thus, the Court of Justice and the Court of First Instance have already held on a number of occasions that, where the actions on which the two sanctions are based arise out of the same set of agreements but nevertheless differ as regards both their object and their geographical emphasis, that principle does not apply (Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, paragraphs 3 and 4; Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 11; *Tréfileurope* v *Commission*, paragraph 242 above, paragraph 191; and Case T-149/89 *Sotralentz* v *Commission* [1995] ECR II-1127, paragraph 29).

292 In the present case, the payments referred to by ADM concern in part other cartels, namely those relating to the lysine and citric acid markets. Second, so far as concerns the sodium gluconate cartel, under the principle of territoriality there is no conflict in the exercise by the Commission and by the competition authorities of non-member States of their power to impose fines on undertakings which infringe the competition rules of the EEA and of those States (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraph 90, and Case 44/69 *Bunchler* v *Commission* [1970] ECR 733, paragraphs 52 and 53, and, by analogy, as regards concentrations, in respect of Community competence regarding the effects of unlawful conduct in parallel with the powers of non-Member State competition authorities, Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 95 and 98). The Commission was not therefore required to take account of those circumstances under the principle of *ne bis in idem*.

293 In so far as ADM asserts that the Commission has already taken account of such a factor in the past as attenuating circumstances when setting fines, it is sufficient to recall that, in accordance with case-law, the mere fact that in its earlier decisions the Commission took into consideration certain factors as attenuating circumstances does not mean that it is obliged to act in the same manner in any given case (see, to that effect, *Hercules Chemicals* v *Commission*, paragraph 110 above, paragraph 357, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraphs 417 and 419).

294 In any event and for the sake of completeness, it should be noted, first, that ADM refers to just one decision and, second, that, in reply to a written question from the Court of First Instance, the Commission demonstrated to the Court that its now settled practice is not to apply such an attenuating circumstance in situations comparable to the present one.

295 Consequently, ADM was wrong to criticise the Commission for not granting it a reduction in the fine, on the ground that there was no need for deterrence.

3. *ADM's adoption of a code of conduct*

(a) Arguments of the parties

296 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.

297 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.

298 The Commission contends that those arguments must be rejected.

(b) Findings of the Court

299 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)(a) and (b) EC (*Dansk Rørindustri and Others* v *Commission*, paragraph 38 above, paragraph 373, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 38 above, paragraphs 280 and 281).

300 Furthermore, in so far as ADM adds that it had not until then been subject to any adverse finding under Community competition law, it should be noted that, although in the opposite case the Guidelines provide that the Commission may find that there were aggravating circumstances in the case of an undertaking which has already committed one or more infringements of the same type, it does not follow that, where the infringement in question is the first of that type committed by the undertaking in question, it should receive favourable treatment by virtue of an attenuating circumstance.

301 Consequently, ADM was wrong to criticise the Commission for not granting it a reduction in the fine because it adopted a code of conduct.

302 It follows from all the foregoing considerations that ADM has failed to establish that the Commission erred in its assessment of the attenuating circumstances.

E — *ADM's cooperation during the administrative procedure*

1. *Introduction*

303 So far as concerns its cooperation during the administrative procedure, ADM puts forward two pleas, alleging (i) errors of assessment and (ii) breach of the principle of equal treatment.

304 Before examining the merits of those pleas, it is necessary to summarise the Commission's assessment of the undertakings' cooperation, as apparent from recitals 411 to 427 of the Decision.

305 First of all, under Section B of the Leniency Notice (see paragraph 6 above), the Commission allowed Fujisawa a 'very substantial reduction' of 80% of the fine which would have been imposed if it had not cooperated. In that context, the Commission acknowledged that it was Fujisawa which, for the purpose of that provision, had informed the Commission about the cartel before the Commission had undertaken any investigation. The Commission also acknowledged that, at the time when Fujisawa supplied its statement of facts and the documents regarding the cartel on 12 May 1998, the Commission did not yet have sufficient information to establish the existence of the cartel. In particular, the Commission found that Fujisawa had been the first of the cartel members to adduce evidence of the cartel's existence for the whole of its duration by providing it with a list of cartel meetings and a summary of the actions of the main players and key facts between 1981 and 1995. According to the Commission, Fujisawa's submission enabled it to construct a picture of the basic principles of the cartel, i.e. the structure and functioning of the cartel, including the main agreements reached and the implementation mechanisms developed (recitals 412 to 418 of the Decision).

306 Next, in rejecting ADM's arguments to the effect that it met the conditions laid down in Section C of the Leniency Notice in order to qualify for a 'substantial reduction' of the amount of the fine, the Commission considered that at the time when ADM had started to cooperate with the Commission, there was already sufficient information, supplied by Fujisawa, to establish the existence of the cartel throughout the period (recitals 419 to 423 of the Decision).

307 Finally, under Section D of the Leniency Notice, the Commission allowed ADM and Roquette a 'significant reduction' of 40% of the fine, and allowed Akzo, Avebe and Jungbunzlauer a 20% reduction. In that respect, the Commission took into account

in particular that Roquette had been the only cartel member to provide documents that record the events and conclusions of the cartel meetings and that, in their statements, Roquette and ADM had described the cartel mechanics and the roles of the participants and had given details of some meetings. The Commission stated that Fujisawa's statements, Roquette's documents and Roquette's and ADM's statements had constituted its main source of evidence for preparing the Decision (recitals 424 to 427 of the Decision).

2. *Incorrect assessment of ADM's cooperation*

(a) Arguments of the parties

308 ADM submits that the 40% reduction in its fine, granted under Section D of the Leniency Notice, is insufficient. Contrary to the Commission's finding at recital 422 of the Decision, by sending the Commission an account of the 1991 to 1995 period, it was the first to provide decisive evidence of the cartel's existence in the post-1991 period. Therefore, the Commission was wrong in refusing to grant it a reduction under Section C of the Leniency Notice.

309 First, ADM submits that Fujisawa's evidence relating to the same period is limited.

310 Fujisawa had submitted a covering letter containing details relating to the pre-1990 period. By contrast, for the 1991 to 1995 period, Fujisawa mentioned only two meetings without giving any specific information about price or volume agreements.

Further, one of those meetings was the meeting of 6 June 1995, which, in ADM's submission, had taken place after the end of the infringement (see above). As regards the other meeting, in June 1994 in Atlanta, the description is vague.

311 Fujisawa submitted a table showing a list of meetings drawn up by the Fujisawa executives who attended them. However, because of the very limited involvement of those executives during that period, the testimony about what occurred between 1991 and 1995 contains only minimal or irrelevant information about the meetings. It identifies only 5 of the 13 meetings which took place in that period and which formed the subject-matter of the statement of objections. Furthermore, there is little description of what took place at those meetings: agreed prices, sales allocation or monitoring mechanisms are not listed for that period and the names of the representatives of the other undertakings attending are sometimes only partially recalled.

312 Second, ADM maintains that the documents obtained in the course of inspections of the premises of the other undertakings prior to ADM's collaboration provide very little evidence relating to the period after the summer of 1991. The documents inspected at Glucona's premises show meetings which generally coincide with exhibition meetings of the Institute of Food Technology (IFT) or of Food Ingredients Europe (FIE), which the participants were in any event likely to attend, but do not provide any detail as to the substance of the meetings. Furthermore, Glucona provided no other details about the content of the meetings and confined itself to stating that discussion had concerned 'markets and sales'.

313 By contrast, ADM produced (i) the testimony of a former employee who provided first hand witness evidence of the meetings, content and mechanics of the cartel, (ii) the first information about seven meetings not even referred to in the evidence of Fujisawa and Glucona, nor specified in the Commission's requests for information, (iii) details of the content of the meetings not described in either Glucona's or

Fujisawa's evidence and an explanation of the designation of certain participants in each region as 'price leaders', the target prices set by the cartel and the impact and content of the cartel and (iv) a description of the roles of the participants at the meetings.

314 Third, ADM submits that that evidence enabled the Commission to obtain admissions and cooperation from the other participants. Towards the end of 1998, it appeared that the Commission's evidence was very limited. Notwithstanding the information obtained from the United States authorities, requests for information and unannounced inspections of the parties' premises during 1997 and 1998, only Fujisawa had offered to cooperate with the Commission (recitals 54 to 56 of the Decision). Moreover, the evidence supplied by Fujisawa was deficient and was not appreciably strengthened by documents obtained at the other parties' premises (Avebe, Glucona, Jungbunzlauer and Roquette).

315 The Commission contends that the plea should be rejected.

(b) Findings of the Court

316 In the Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from a fine or be granted a reduction in the fine which would otherwise have been imposed on them (see Section A3 of the Leniency Notice).

317 Inasmuch as ADM submits essentially that the Commission is wrong to deny it the reduction referred to in Section C of the Leniency Notice, it is necessary to ascertain whether the Commission failed to have regard to the conditions for applying that section.

318 Section C of the Leniency Notice, entitled 'substantial reduction in a fine', provides:

'[Undertakings] which both satisfy the conditions set out in Section B ... (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine.'

319 The conditions of Section B(b) to (e), to which Section C refers, apply to an undertaking which:

'(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'.

320 In the present case, in order to show that the Commission should have granted it a 'substantial reduction in [the] fine' under Section C of the Leniency Notice, ADM asserts in essence that the evidence adduced by Fujisawa for the period between 1991 and 1995 was limited. However, that argument does not show that the Commission infringed the Leniency Notice in considering that, even for the period between 1991 and 1995 during which ADM took part in the cartel, ADM was not 'the first to adduce decisive evidence of the cartel's existence to the Commission' for the purposes of Section C, read in conjunction with Section B(b) of the Leniency Notice.

321 The Leniency Notice does not provide that, in order to satisfy that condition, an undertaking which informs the Commission about a secret cartel must provide it with all the decisive evidence for preparing the statement of objections or, still less, for adopting a decision establishing an infringement. By contrast, according to the Leniency Notice, that condition is already satisfied where the undertaking which provides information about the secret cartel is 'the first' to 'adduce decisive evidence of the cartel's existence'.

322 ADM itself does not seriously dispute that the evidence adduced by Fujisawa, including for the period between 1991 and 1995, was decisive evidence of the cartel's existence but merely argues that it was incomplete.

323 In any event, it should be noted that, as the Commission rightly pointed out at recital 415 of the Decision, in its letter of 12 May 1998 in which it disclosed the existence of the cartel, Fujisawa first of all revealed the identity of the cartel members. Next, it provided the Commission with a description of the main agreements reached between the cartel members between 1991 and 1995 and the mechanisms for implementing those agreements governing the manner in which the cartel functioned. Lastly, it submitted to the Commission a list, albeit incomplete, of the cartel meetings with a summary of the content of some of those meetings, including for the period from 1991 to 1995. The point relied on by ADM that Fujisawa did not supply any specific information regarding the content of the agreements for that period does not lead to the conclusion that the evidence adduced by that undertaking was not decisive evidence of the cartel's existence, since that cartel constituted a single continuing infringement (recital 254 of the Decision) the content and the mechanisms of which were not specifically modified following ADM's entry in the cartel (recitals 80 and 257 to 260).

324 The Commission was therefore entitled to take the view that Fujisawa was the first undertaking to adduce decisive evidence of the cartel's existence.

325 It also follows that ADM's arguments alleging, first, that the documents obtained in the course of inspections at the premises of the other cartel members provide only very little evidence relating to the period after the summer of 1991 and, second, that the evidence submitted by ADM enabled the Commission to obtain admissions and cooperation from the other participants cannot succeed either.

326 In the light of the cumulative nature of the conditions set out in Section B(b) to (e), as referred to in Section C of the Leniency Notice (see paragraphs 283 and 286 above), and since one of those conditions, namely that laid down in Section B(b), in conjunction with Section C of that notice, was not satisfied, it is not necessary to consider whether ADM satisfied the other conditions laid down in those provisions.

327 Consequently, the plea of illegality alleging incorrect assessment of ADM's cooperation must be rejected.

3. *Breach of the principle of equal treatment*

328 This plea is in three parts. First, ADM argues that its cooperation in the investigation was at least equivalent to that of a party which was the subject of an earlier Commission decision. Second, it submits that the Commission was not entitled to grant Fujisawa a larger reduction than it was granted. Third, it submits that the Commission was not entitled to reduce Roquette's fine by the same rate as its own.

329 It should be noted at the outset that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (see paragraph 107 above).

(a) ADM's cooperation in the investigation was at least equivalent to that of a party which was the subject of an earlier Commission decision

Arguments of the parties

330 ADM claims that its cooperation in the investigation was at least equivalent, as regards its material contribution to the Commission's case, to that of one of the

parties which was the subject of Decision 94/601 in which the Commission reduced the fine by two thirds. The Commission should therefore have granted it at least the maximum reduction laid down in Section D of the Leniency Notice, namely 50%.

331 The Commission contends that this part of the plea should be rejected.

Findings of the Court

332 It should be borne in mind that the mere fact that in its previous decisions the Commission granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same reduction when assessing similar conduct in a subsequent administrative procedure (see *Mo och Domsjö* v *Commission*, paragraph 293 above, paragraph 147, and *Lögstör Rör* v *Commission*, paragraph 33 above, paragraphs 326 and 352, and the case-law cited therein).

333 Moreover, ADM has not put forward any specific evidence to show that the facts in that case were comparable to those at issue here.

334 Consequently, the first part of this plea cannot be upheld.

(b) The Commission granted Fujisawa a larger reduction than that granted to ADM

Arguments of the parties

335 ADM criticises the Commission for granting Fujisawa a larger reduction than that which it was granted. ADM observes that in both cases, the undertakings offered to cooperate as soon as they were contacted by the Commission in relation to the investigation. The only difference was that Fujisawa was the first to have this opportunity since it was the first undertaking to be contacted by the Commission. In those circumstances, it submits that it made every effort to cooperate with the Commission as soon as it was afforded that opportunity.

336 The Court of First Instance held 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 *Krupp* judgment') 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.

337 The Commission contends that the plea should be rejected.

Findings of the Court

338 ADM's argument is based essentially on the principles outlined by the Court in paragraphs 138 to 248 of the *Krupp* judgment. 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.

339 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 the *Krupp* judgment, 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.

340 By contrast, in the present case, ADM seeks to show in essence that it was because of purely random factors that Fujisawa was the first to have had an incentive to cooperate with the Commission and that it was for that reason that Fujisawa was granted a reduction under Section B of the Leniency Notice, whereas if the Commission had chosen to contact ADM first, ADM would have obtained a more substantial reduction, at least under Section C of that notice, since it would have been able to be the first to provide the information communicated by Fujisawa. ADM does not rely on the two judgments referred to in paragraph 338 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 (see, in this regard, paragraphs 347 to 351 below).

341 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 the *Krupp* and *Acerinox* v *Commission* judgments (see paragraph 338 above) the Commission took account of that factor even though it was not expressly provided for in Section D of that notice.

342 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.

343 In this regard, it should be noted that, in the present case, it is apparent from the file and, in particular from recitals 53 to 64 of the Decision that after being informed during 1997 by the competent United States authorities that Akzo and Avebe (Glucona) had admitted to participating in an international sodium gluconate cartel the Commission sent, on 27 November 1997, those parties requests for information relating to the existence of any barriers to entry in respect of sodium gluconate imports in Europe. In particular, the Commission asked them to indicate the names of the largest sodium gluconate producers at worldwide level, the market shares of the undertakings active on that market at worldwide and European levels, and the worldwide production capacity for that product. In their response of 28 January 1998, Akzo and Glucona stated several times that the largest producers of sodium gluconate at worldwide and European level were, in addition to themselves, Roquette, Jungbunzlauer and Fujisawa. Although ADM's presence on the relevant market was mentioned at one point in that response, ADM was not however referred to as one of the largest sodium gluconate producers.

344 That was the context in which, on 18 February 1998, the Commission sent requests for information concerning the same points as those set out in the requests for information sent to Akzo and Avebe (Glucona) on 27 November 1997. As is apparent from recital 55 of the Decision, in response to those requests, Fujisawa informed the Commission about the cartel and communicated to it information in this regard.

345 It cannot be ruled out that, apart from the procedure before the United States authorities, which concerned all the cartel members, the requests for information that the Commission sent, inter alia, to Fujisawa on 18 February 1998 amounted to an additional indication for Fujisawa that the Commission was in the process of carrying out an investigation into the sodium gluconate market. However, the manner in which the administrative procedure progressed, as described in paragraphs 343 and 344 above, does not suggest that the Commission acted arbitrarily, and ADM has adduced no evidence to that effect.

346 Consequently, ADM cannot complain that the Commission treated it in a discriminatory manner in relation to Fujisawa.

(c) The Commission granted Roquette the same reduction as it did to ADM

Arguments of the parties

347 ADM objects to the fact that the Commission granted it the same reduction in the fine as it did to Roquette. Contrary to the Commission's statement, the evidence provided by Roquette did not have the same value as ADM's, given that ADM

cooperated earlier, provided key witness evidence and prompted the other defendants, including Roquette, to cooperate.

348 The Commission contends that this part of the plea should be rejected.

Findings of the Court

349 It should be observed that although ADM's and Roquette's fines were reduced by the same rate, the reduction was not based entirely on the same considerations. Although it is true that ADM provided evidence earlier than Roquette, the fact remains that ADM does not deny that, as is apparent from recital 426 of the Decision, it did not, unlike Roquette, supply contemporaneous documents recording the events and conclusions of the cartel meetings.

350 In any event, to the extent that ADM seeks to demonstrate that the Commission granted too high a reduction to Roquette, it must be borne in mind that the principle of equal treatment in relation to a particular act is limited by the principle that a person may not rely, in support of his claim and against a measure which complies with the relevant provisions, on an unlawful act committed in favour of a third party (see *Cascades* v *Commission*, paragraph 190 above, paragraph 259, and *SCA Holding* v *Commission*, paragraph 63 above, paragraph 160).

351 Consequently, that part of the plea and the plea in its entirety must be rejected.

F — *Defects in the administrative procedure*

(a) Arguments of the parties

352 ADM puts forward four complaints as part of this plea.

353 First, 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 2.5, which is not provided for in the Guidelines.

354 Second, ADM complains that the Commission failed to specify in the statement of objections that sodium gluconate was the relevant product market. In paragraphs 3 to 9 of the statement of objections the Commission merely explained that sodium gluconate was one of many chelating agents belonging specifically to a family of chelating agents and that it had a number of partial substitutes. Although it established that sodium gluconate was the 'reference product', it immediately followed that statement by saying that the 'closest alternative products are sodium glucoheptonate and EDTA'. Since the Commission stated in the statement of objections that there were substitutes, it should have clearly outlined its findings on the relevant product market, and why such alternatives did not form part of the relevant market, in such a way that the parties could have an opportunity to comment. Accordingly, the Commission did not examine the essential question of the definition of the relevant product market in the statement of objections.

355 Third, ADM submits that the Commission referred in the Decision (footnote 17) to a publication entitled *Chemical Economics Handbook* (SRI International, 1991), which was not disclosed to the parties.

356 Fourth, the Commission did not suggest in the statement of objections that implementation of the cartel must necessarily have an economic impact on the market.

357 The Commission contends that the four complaints put forward as part of this plea must be rejected.

(b) Findings of the Court

358 Observance of the rights of the defence, which constitutes a fundamental principle of Community law and which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure, requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (*Hoffmann-La Roche* v *Commission*, paragraph 216 above, paragraph 11, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39).

359 Similarly, 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, and *Mo och Domsjö* v *Commission*, paragraph 293 above, paragraph 63).

360 In its first and fourth complaints, ADM complains in essence that the Commission failed to inform it of the application of certain elements which were decisive for setting the fine, namely the multiplier of 2.5 (recitals 386 to 388), or the fact that the infringement had an actual effect on the market (recital 340 of the Decision).

361 In this regard, 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 undertakings 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 44 above, paragraph 21, and *LR AF 1998* v *Commission*, paragraph 38 above, paragraph 199).

362 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 65 above, paragraph 312).

363 As regards the present case, it should be noted that, in the statement of objections sent to ADM, the Commission clearly stated that it was planning to impose on it a fine which it would determine by reference in particular to the gravity and duration of the infringement. It also made explicit reference to the Guidelines, indicating clearly by that reference that ADM should expect an assessment of its situation by reference to those guidelines and therefore had to defend itself in this regard if it deemed it appropriate.

364 Moreover, the Commission stated at paragraph 345 of the statement of objections that it intended to set the fines at a level of sufficient deterrence. Similarly, at paragraphs 264 and 346 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, necessarily had a serious impact on competition.

365 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 of each of those factors when setting the level of the fine.

366 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).

367 The first and fourth complaints are therefore unfounded.

368 By its second complaint, ADM alleges that the Commission failed to specify in the statement of objections that sodium gluconate was the relevant product market.

369 It must be noted that at paragraphs 3 to 9 of the statement of objections, the Commission described the characteristics of sodium gluconate under the heading 'The product'. Whilst it is true, as ADM points out, that the Commission states there that certain substitutes exist, the fact remains that, contrary to what ADM submits, the wording used by the Commission leaves no room for doubt that, at the stage of the statement of objections, it took the view that those substitutes did not form part of the relevant product market.

370 First, at paragraph 9 of the statement of objections, the Commission stated inter alia that those products were only partial substitutes and that, unlike those other products, sodium gluconate was a 'reference product', the demand for which far outstripped that for the other products. Second, in analysing the relevant market (paragraphs 39 to 50 of the statement of objections), the Commission consistently referred to sodium gluconate without mentioning those substitutes.

371 The second complaint is therefore unfounded.

372 Finally, in so far as in its third argument ADM submits that in the Decision (footnote 17) the Commission referred to a publication entitled *Chemical Economics Handbook* (SRI International, 1991) which had not been disclosed to the parties, it is sufficient to observe that, at footnote 4 of the statement of objections, the Commission stated that it was relying on that publication when describing the relevant product, and, as the Commission argues without being contradicted on that point by ADM, the publication is available to the public, and in particular to operators active on the market concerned by that publication.

373 Consequently, the third complaint and therefore the plea in its entirety must be rejected.

G — *The request to consider a new plea*

374 In consequence of the Commission's adopting the 2006 Guidelines and making them available on the internet, ADM requested that the Court consider a new plea based on those guidelines. ADM argues that it is apparent from the 2006 Guidelines that in the Decision the Commission took insufficient account of the very small amount of ADM's sales in the relevant market and that it assessed the deterrent effect of the fine incorrectly. In particular, ADM submits that the maximum amount of the fine which would have been imposed on it under the 2006 Guidelines and prior to application of the Leniency Notice was EUR 3.8 million instead of EUR 16.88 million.

375 The Commission disputes ADM's request.

376 Given that ADM's request that the 2006 Guidelines be taken into account was lodged after the close of the oral procedure, it is first of all necessary to determine whether the oral procedure should be reopened in order to take into consideration ADM's new plea based on the 2006 Guidelines. In this respect, the Court recalls that it is required to accede to a request that the oral procedure be reopened in order to take into account alleged new facts only if the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it was unable to put forward before the close of the oral procedure (Case C-200/92 P *ICI* v *Commission* [1999] ECR I-4399, paragraphs 60 and 61, and Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraph 53).

377 In the present case, in so far as the applicant relies on the 2006 Guidelines in order to show that the Decision was illegal, it is sufficient to recall that, according to the case-law, the legality of a Community measure is assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted

(Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraphs 7 and 8; Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119). Consequently, elements of fact and law arising after the date of the adoption of the Community measure cannot be taken into account when assessing the legality of that measure (see, to that effect, *Deutsche Bahn* v *Commission*, paragraph 63 above, paragraph 102, and the case-law cited therein).

378 Accordingly, since the new element relied on by ADM manifestly post-dates the adoption of the Decision, that element cannot affect its validity (see, to that effect, Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, paragraph 37). The adoption of the 2006 Guidelines is not a new element capable of having a decisive influence on the legality of the Decision. There is, therefore, no need to reopen the oral procedure on that basis.

379 That conclusion is confirmed by the clarification in paragraph 38 of the 2006 Guidelines which states that those guidelines apply only in cases where the statement of objections has been notified after their date of publication in the Official Journal. Thus, those guidelines themselves explicitly preclude their application to cases such as the present one. Since those guidelines post-date the adoption of the Decision and, a fortiori, the statement of objections preceding it, they do not form part of the legal or factual framework relevant to it.

380 To the extent that the applicant relies on the 2006 Guidelines in support of its plea that the fine is disproportionate, in relation to which the Court of First Instance enjoys unlimited jurisdiction, the Court finds that the mere fact that the application of the new method for calculating fines set out in those guidelines, which are not applicable to the facts of the present case, is capable of leading to a fine lower than that imposed by the Decision does not show that that fine is disproportionate. That finding is merely the expression of the Commission's margin of assessment when

establishing, in compliance with the requirements set out in Regulation No 17, the method which it intends to apply for calculating the amount of fines and thus for guiding the competition policy for which it is responsible. The criteria to be taken into account by the Court in assessing whether the amount of fines imposed at a given point in time is proportionate may therefore include the circumstances of fact and law and also the objectives of competition defined by the Commission in accordance with the requirements of the EC Treaty at that time. Moreover, it should be borne in mind that in *Dansk Rørindustri and Others* v *Commission*, paragraph 38 above, paragraphs 234 to 295, the Court of Justice rejected the applicants' pleas and arguments seeking to dispute the calculation method resulting from the 1998 Guidelines to the extent that that method used as a starting point the basic amounts set out in those guidelines which are not determined according to relevant turnover. Lastly, it should be observed that the Court has held, at paragraphs 76 to 81, paragraphs 99 to 106, and paragraphs 139 to 149 above, that, in the present case, calculating the amount of the fine by reference to the 1998 Guidelines did not infringe the principle of proportionality.

381 In those circumstances, the Court finds that the adoption of the 2006 Guidelines does not have a decisive influence on the outcome of the case. There is therefore no need to reopen the oral procedure.

H — *Conclusion*

382 Since none of the pleas raised against the legality of the Decision has been upheld, the fine should not be reduced under the unlimited jurisdiction enjoyed by the Court of First Instance. The action must therefore be dismissed in its entirety.

Costs

383 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Archer Daniels Midland Co. to pay the costs.

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon — Registrar

J. Azizi — President

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