JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
20 March 2002 *

In Case T-9/99,

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG, established in Rosenheim (Germany),

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft, established in Rosenheim,

Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, established in Rosenheim,

Isoplus Fernwärmetechnik Gesellschaft mbH, established in Hohenberg (Austria),

Isoplus Fernwärmetechnik GmbH, established in Sondershausen (Germany),

represented by P. Krömer and F. Nusterer, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: German.

Commission of the European Communities, represented by W. Mölls and É. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for, primarily, annulment of Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1) or, in the alternative, reduction of the fine imposed on the applicants by that decision,

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2000,

gives the following

Judgment [1]

Background

1 The applicants are companies governed by German and Austrian law operating in the district heating sector and are regarded by the Commission as belonging to the 'Henss/Isoplus group'.

...

8 On 21 October 1998, the Commission adopted Decision 1999/60/EC relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691.E-4: — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1), corrected before publication by a decision of 6 November 1998 (C(1998) 3415 final) ('the Decision' or 'the contested decision') finding that various undertakings and, in particular, certain of the applicants had participated in a series of agreements and concerted practices within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC) (hereinafter 'the cartel').

1 — Only the grounds of the judgment which the Court considers it appropriate to publish are reproduced here. The factual and legal background to the present case are set out in the judgment of the Court of First Instance of 20 March 2002 in Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705.

9 According to the Decision, at the end of 1990 an agreement was reached between the four Danish producers of district heating pipes on the principle of general cooperation on their domestic market. The parties to the agreement were ABB IC Møller A/S, the Danish subsidiary of the Swiss/Swedish group ABB Asea Brown Boveri Ltd ('ABB'), Dansk Rørindustri A/S, also known as Starpipe ('Dansk Rørindustri'), Løgstør Rør A/S ('Løgstør') and Tarco Energi A/S ('Tarco') (the four together being hereinafter referred to as 'the Danish producers'). One of the first measures was to coordinate a price increase both for the Danish market and the export markets. For the purpose of sharing the Danish market, quotas were agreed upon and then implemented and monitored by a 'contact group' consisting of the sales managers of the undertakings concerned. For each commercial project ('project'), the undertaking to which the contact group had assigned the project informed the other participants of the price it intended to quote and they then submitted tenders at a higher price in order to protect the supplier designated by the cartel.

10 According to the Decision, two German producers, the Henss/Isoplus group and Pan-Isovit GmbH, joined in the regular meetings of the Danish producers from the autumn of 1991. In these meetings negotiations took place with a view to sharing the German market. In August 1993, these negotiations led to agreements fixing sales quotas for each participating undertaking.

11 Still according to the Decision, an agreement was reached between all these producers in 1994 to fix quotas for the whole of the European market. This European cartel involved a two-tier structure. The 'directors' club', consisting of the chairmen or managing directors of the undertakings participating in the cartel, allocated quotas to each of these undertakings both in the market as a whole and in each of the national markets, including Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden. For certain national markets, 'contact groups' consisting of local sales managers were set up and given the task of administering the agreements by assigning individual projects and coordinating tender bids.

12 With regard to the German market, the Decision states that following a meeting between the six main European producers (ABB, Dansk Rørindustri, the Henss/Isoplus group, Løgstør, Pan-Isovit and Tarco) and Brugg Rohrsysteme GmbH ('Brugg') on 18 August 1994, a first meeting of the contact group for Germany was held on 7 October 1994. Meetings of this group continued long after the Commission carried out its investigations at the end of June 1995 although, from that time on, they were held outside the European Union, in Zurich. The Zurich meetings continued until 25 March 1996, i.e. several days after some of the undertakings had received the requests for information sent by the Commission.

13 As a characteristic feature of the cartel, the Decision refers in particular to the adoption and implementation of concerted measures to eliminate Powerpipe, the only major undertaking which was not a member. The Commission states that certain members of the cartel recruited key employees of Powerpipe and gave Powerpipe to understand that it should withdraw from the German market. Following the award to Powerpipe of an important German project, a meeting is said to have taken place in Düsseldorf in March 1995, attended by the six abovementioned producers and Brugg. According to the Commission, it was decided at that meeting to organise a collective boycott of Powerpipe's customers and suppliers. The boycott was subsequently implemented.

14 In the Decision, the Commission sets out the reasons why not only the express market-sharing arrangements concluded between the Danish producers at the end of 1990 but also the arrangements made after October 1991, taken as a whole, can be considered to constitute an 'agreement' prohibited under Article 85(1) of the EC Treaty. Furthermore, the Commission stresses that the 'Danish' and 'European' cartels were merely the manifestation of a single cartel which originated in Denmark but which from the start had the long-term objective of extending the control of participants to the whole market. According to the Commission, the continuous agreement between the producers had an appreciable effect on trade between Member States.

15 On those grounds, the operative part of the Decision is as follows:

'*Article 1*

ABB Asea Brown Boveri Ltd, Brugg Rohrsysteme GmbH, Dansk Rørindustri A/S, Henss/Isoplus Group, Ke-Kelit Kunststoffwerk Ges mbH, Oy KWH Tech AB, Løgstør Rør A/S, Pan-Isovit GmbH, Sigma Tecnologie Di Rivestimento S.r.l. and Tarco Energie A/S have infringed Article 85(1) of the Treaty by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the pre-insulated pipes sector which originated in about November/December 1990 among the four Danish producers, was subsequently extended to other national markets and brought in Pan-Isovit and Henss/Isoplus, and by late 1994 consisted of a comprehensive cartel covering the whole of the common market.

The duration of the infringements was as follows:

...

— in the case of [the] Henss/Isoplus [group], from about October 1991 up to [at least March or April 1996],

...

The principal characteristics of the infringement consisted in:

— dividing national markets and eventually the whole European market amongst themselves on the basis of quotas,

— allocating national markets to particular producers and arranging the withdrawal of other producers,

— agreeing prices for the product and for individual projects,

— allocating individual projects to designated producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question,

— in order to protect the cartel from competition from the only substantial non-member, Powerpipe AB, agreeing and taking concerted measures to hinder its commercial activity, damage its business or drive it out of the market altogether.

...

Article 3

The following fines are hereby imposed on the undertakings named in Article 1 in respect of the infringements found therein:

...

(d) [the] Henss/Isoplus group, a fine of ECU 4 950 000, for which the following companies are jointly and severally liable:

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG,

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH Verwaltungsgesellschaft,

— Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH (formerly Dipl-Kfm Walter Henss GmbH Rosenheim),

— Isoplus Fernwärmetechnik GmbH, Sondershausen,

— Isoplus Fernwärmetechnik Gesellschaft mbH — stille Gesellschaft,

— Isoplus Fernwärmetechnik Ges. mbH, Hohenberg;

...

Article 5

This Decision is addressed to:

...

(d) [The] Henss/Isoplus group, represented by:

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG, Aisingerstrasse 12, D-83026 Rosenheim,

— HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft, Aisingerstrasse 12, D-83026 Rosenheim,

— Isoplus Fernwärmetechnik GmbH, Aisingerstrasse 12, D-83026 Rosenheim,

— Isoplus Fernwärmetechnik Ges. mbH, Furthoferstraße 1A, A-3192 Hohenberg,

— Isoplus Fernwärmetechnik Ges. mbH — stille Gesellschaft, Furthoferstraße 1A, A-3192 Hohenberg,

— Isoplus Fernwärmetechnik GmbH, Gluckaufstraße 34, D-99706 Sondershausen;

...'

16 to 24 ...

Relations between the undertakings regarded as belonging to the Henss/Isoplus group

25 Among the undertakings regarded by the Commission as belonging to the Henss/Isoplus group and involved in the present proceedings, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG ('HFB KG') is a limited partnership governed by German law, formed on 15 January 1997. The partner with unlimited personal liability for the partnership's debts is HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft ('HFB GmbH'), a limited liability company also formed on 15 January 1997. The limited partners of HFB KG, who are liable up to a

certain amount, are Mr and Mrs Henss and Mr and Mrs Papsdorf. Mr Henss is the major partner of HFB KG and also holds the majority of the shares in HFB GmbH.

26 The applicant Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH ('Isoplus Rosenheim'), formerly Dipl.-Kfm. Walter Henss GmbH ('Henss Rosenheim') until 1 January 1997, is a company governed by German law. Following the transfer to HFB KG of the shares which Mr and Mrs Henss held in Isoplus Rosenheim and of the shares which Mr and Mrs Papsdorf held in Dipl.-Kfm. Walter Henss Fernwärmerohrleitungsbau GmbH, Berlin ('Henss Berlin'), HFB KG held 100% of the shares in those two companies and Henss Berlin was taken over by Isoplus Rosenheim on 3 December 1997.

27 Isoplus Fernwärmetechnik Ges. mbH, Hohenberg ('Isoplus Hohenberg') is an Austrian company the majority of whose shares are owned, through a trustee, by Mr Henss.

28 Isoplus Fernwärmetechnik GmbH, Sondershausen ('Isoplus Sondershausen') is a German company all of whose shares are held, nominally, by Isoplus Hohenberg, which to a certain extent holds them as a trustee on behalf of third parties.

29 In the district heating market, Isoplus Rosenheim acts mainly as a distributor. Isoplus Hohenberg and Isoplus Sondershausen are production companies. HFB KG and HFB GmbH act only as shareholding companies.

30 In the Decision, the Commission regarded Isoplus Rosenheim, Henss Berlin, Isoplus Hohenberg and Isoplus Sondershausen as a *de facto* 'Henss/Isoplus' group. The Commission sent the statement of objections to those four undertakings, having established that they were all linked to Mr Henss, who had attended the meetings of the directors' club. According to the Decision, it was only after sending the statement of objections that the Commission learnt of the existence of a partnership agreement ('Einbringungsvertrag') of 15 January 1997 lodged at the commercial registry, which showed that Mr and Mrs Henss and Mr and Mrs Papsdorf had transferred their shareholdings to HFB KG in January 1997.

31 The Commission learnt from the same partnership agreement that Mr Henss was also the owner of a limited partnership, Isoplus Fernwärmetechnik Ges. mbH — stille Gesellschaft ('Isoplus stille Gesellschaft'), whose shares were held by a trustee.

32 As regards Isoplus Hohenberg, the Commission learnt from the partnership agreement that Mr Henss owned shares in that company through trustees, although the applicants' legal advisers denied that throughout the administrative procedure. During the present proceedings, the parties no longer disagree as to whether Mr Henss actually held the majority of the share capital in Isoplus Hohenberg.

33 As regards the shares in Isoplus Sondershausen held by Isoplus Hohenberg, the Commission learnt from the partnership agreement that one third of the capital of Isoplus Sondershausen, which was held by Isoplus Hohenberg as trustee for Mr and Mrs Papsdorf, was transferred to HFB KG. In the present proceedings, the applicants confirm that a further third of the capital of Isoplus Sondershausen was also held by Isoplus Hohenberg as trustee. The applicants accept that that information was not communicated to the Commission during the administrative procedure.

The applications for measures of inquiry

34 Pursuant to Article 68 of the Rules of Procedure of the Court of First Instance, the applicants have applied for Mr Boysen, Mr B. Hansen, Mr N. Hansen, Mr Hybschmann, Mr Jespersen and Mr Volandt to be called as witnesses 'in order to prove that neither the applicants nor the Henss/Isoplus group participated in an illegal practice or measure or in any other similar conduct for the purposes of Article 85(1) of the EC Treaty before October 1994'. On that point, the applicants have stated that they are prepared to lodge security for costs.

35 In addition, the applicants have requested the Court to order the Commission to lodge the entire case-file relating to the present case, including the annexes and also the report of the expert accountant relating to the present file.

36 First, the Court observes that, under Article 68(1) of its Rules of Procedure, it may, either of its own motion or on application by a party, and after hearing the Advocate General and the parties, order that certain facts be proved by witnesses. According to the final subparagraph of that provision, an application by a party for the examination of a witness is to state precisely about what facts and for what reasons the witness should be examined.

37 In the present case, although the applicants have referred in their pleadings, in particular in paragraphs 20, 40, 50, 66, 67, 68, 69, 70, 71, 94, 96, 125 and 142 of the application, to certain persons who could act as witnesses in relation to the facts set out in each of the paragraphs in question, the names of the six persons whom they expressly requested be called as witnesses before the Court are not to be found in those paragraphs. The Court therefore finds that, for those six persons, the applicants have failed to state the facts in respect of which proof by witnesses should be ordered.

38 Consequently, and without there being any need to consider whether it is appropriate to hear the six persons in question, the Court holds that the application for witnesses to be heard should not be granted.

39 Second, as regards the lodging of the case-file, the Court observes that during the litigation procedure, the Commission, of its own initiative, by letter of 26 July 1997 lodged the administrative files relating to all the cases concerned. The applicants were informed that the Commission had done so and that the files could be consulted at the Registry. In those circumstances, there is no longer any need to grant the applicants' application for the lodging of the case-file.

40 In so far as the applicants have applied for the expert accountant's report to be lodged, that report is in any event a purely internal Commission document, which is solely in the nature of an opinion for the Commission, and its purpose is not to set forth fresh objections or adduce fresh evidence against the undertakings; accordingly, it does not constitute a decisive factor which must be taken into account by the Community judicature when exercising its power of review (Order in Case 212/86 R *ICI* v *Commission*, not published in the Reports of Cases before the Court, paragraphs 5 to 8; Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraphs 53 and 54; and Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 86 and 87). It is settled case-law that during the proceedings before the Community Courts internal Commission documents are not to be communicated to the applicants, unless the circumstances of the case are exceptional and the applicants make out a plausible case for the need to do so (order of the Court of Justice of 18 June 1986 in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11; judgment in Case T-35/92 *Deere* v *Commission* [1994] ECR II-957, paragraph 31; and order of the Court of First Instance of 10 December 1997 in Joined Cases T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293, paragraph 35). That restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution concerned when dealing with infringements of the Treaty competition rules (order in *NMH Stahlwerke and Others* v *Commission*, cited above, paragraph 36). Since the

applicants have not shown how production of the expert accountant's report might be relevant to the principle of respect for the rights of the defence, the application must also be dismissed in so far as it relates to the lodging of that report.

41 For those reasons, the Court is not minded to grant the applicants' application for measures of inquiry.

The application for annulment of the Decision

42 The pleas in law put forward by the applicants may be arranged according to their subject-matter: first, the pleas relating to the Henss/Isoplus group; second, the pleas relating to HFB KG and HFB GmbH; third, the pleas relating to Isoplus stille Gesellschaft; and, fourth, the pleas which concern all the applicants.

I — *The pleas in law relating to the Henss/Isoplus group*

43 As regards the Henss/Isoplus group, the applicants put forward three pleas in law alleging, first, misapplication of Article 85(1) of the Treaty, second, infringement of essential procedural forms and, third, breach of the obligation to state reasons.

A — *First plea in law, alleging misapplication of Article 85(1) of the Treaty in identifying the applicants as 'belonging to the Henss/Isoplus group'*

1. Arguments of the parties

44 The applicants claim that the Commission misapplied Article 85(1) of the Treaty, in so far as it regarded them as belonging to the Henss/Isoplus group, which, for having participated in an anti-competitive practice, has been ordered to pay a fine for which all the applicants are jointly and severally liable.

45 The applicants submit that an undertaking within the meaning of Article 85 of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) can be formed only by natural or legal persons or by companies which must be treated as though they had their own legal personality (persons said to be 'quasi-legal'). However, what the Commission presumes to be the Henss/Isoplus group does not have its own legal or quasi-legal personality.

46 In the absence of a parent company or a financing company with legal personality, the applicants can no longer be regarded as a group within the meaning of company law, or as a '*de facto* group', as the Commission presumes in points 15 and 157 of the Decision, in the sense of legally autonomous undertakings whose economic conduct may be determined by another undertaking.

47 As regards the financing companies HFB GmbH and HFB KG, the applicants state, first, that the former acts exclusively as a sleeping partner to the latter. As regards the latter, although at the time of adoption of the Decision it held 100%

of the share capital of Isoplus Rosenheim, it held only one third of the share capital of Isoplus Sondershausen. Furthermore, it has never been associated, even through a trustee, with Isoplus Hohenberg, contrary to what is stated in point 159 of the Decision, and it was not a secret associate, even through a trustee, of a silent partnership of which Isoplus Hohenberg was the 'operating owner'.

48 In asserting that these undertakings regarded as belonging to the Henss/Isoplus group were all subject to the same uniform control, exercised by Mr Henss, the Commission disregarded the fact that, although Mr Henss had been the majority shareholder in Henss Rosenheim (now Isoplus Rosenheim) and, through trust companies, the majority shareholder in Isoplus Hohenberg, he had not been a partner in Henss Berlin or in Isoplus Sondershausen. Nor could Mr Henss, as a shareholder, be classified as an undertaking within the meaning of Article 85 of the Treaty.

49 As regards Isoplus Sondershausen, it is inconceivable that it was controlled by Isoplus Hohenberg, since the latter was a trustee. Until 21 October 1998, Isoplus Hohenberg held only one third of the shares in Isoplus Sondershausen on its own behalf, having held a further third as trustee. It was for reasons to do with business secrecy that Isoplus Hohenberg and Isoplus Sondershausen did not inform the Commission that Isoplus Hohenberg was a trustee. Furthermore, Isoplus Hohenberg and Isoplus Sondershausen supplied the same markets, in part, which is not generally the case within a group.

50 Nor can the nature of a 'group' be inferred, as the Commission claims, from the reference to 'the Henss GmbH firm, Isoplus group' in a memorandum of 21 April 1995 from Mr Henss (additional document No 17 to the statement of objections), since this was a statement on behalf of Henss Rosenheim in which

the comma before the words 'Isoplus group' merely meant that the undertaking Henss Rosenheim belonged to the spontaneous group in which the other parties to the cartel had placed the applicants owing to the commercial agency contracts between them. The existence of an agent or spokesman for such a spontaneous group does not suffice to make them into a group within the meaning of company law.

51 Furthermore, the Decision does not refer to any evidence on the basis of which the applicants, in the absence of at the very least a *de facto* group, are mutually liable for the anti-competitive practices of each of them.

52 The defendant observes that 'group' designates the economic entity formed by the four undertakings participating in the cartel, namely Henss Rosenheim (now Isoplus Rosenheim), Henss Berlin, Isoplus Hohenberg and Isoplus Sondershausen, which were subject to the same uniform control, in particular as regards participation in the cartel. Mr Henss was Managing Director of Henss Berlin and Henss Rosenheim and controlled the latter company as well as Isoplus Hohenberg and Isoplus Sondershausen through direct or indirect shareholding. Furthermore, at the meetings of the directors' club, where the undertakings in the group received a single quota, Mr Henss defined and at the same time represented the interests of each of the undertakings in the group.

53 Since all the personal, tangible and intangible elements which, from a technical point of view, were connected with the undertakings belonging to the Henss/Isoplus group formed part of a larger entity whose economic objectives were determined in one and the same way, there was, for the purposes of competition law, a single undertaking in the form of a 'group'. That conclusion cannot be called into question by the fact that that entity was not directed by a financing company. Nor is it relevant whether the natural or legal person directing the group also acted as an undertaking on its own behalf.

2. Findings of the Court

54 In prohibiting undertakings *inter alia* from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 87).

55 In the present case, at the time of the infringement, Henss Berlin and Henss Rosenheim (hereinafter also referred to as 'the Henss companies') and Isoplus Hohenberg and Isoplus Sondershausen (hereinafter also referred to as 'the Isoplus companies') were, in one form or another, controlled by Mr Henss.

56 It is common ground that Mr Henss always held 90% of the shares in Henss Rosenheim (the remainder being held by his wife) and was Managing Director of that company until it changed its name to Isoplus Rosenheim on 1 January 1997. At that time, Mr Henss and his wife transferred their shares to HFB KG, of which Mr Henss none the less remains the majority shareholder and which itself acts as the parent of Isoplus Rosenheim since it holds all the latter's capital.

57 As regards Henss Berlin, it is common ground that, when it was formed in August 1990, Mr Henss acquired 90% of its capital. When all the shares in Henss Berlin were transferred to HFB KG, on 1 January 1997, they were owned by

Mr Papsdorf, the Managing Director of Isoplus Rosenheim, and his wife. Although the file does not reveal when Mr and Mrs Papsdorf acquired the shares from Mr Henss, it is common ground that Mr Henss was himself the Director of Isoplus Rosenheim from February 1994. Furthermore, it is clear that in December 1990, when Henss Berlin entered into a commercial agency contract with Isoplus Hohenberg, Mr Henss already represented Henss Berlin as 'sole Director'.

58 As regards Isoplus Hohenberg, the applicants no longer dispute in the application that, at least from October 1991, the majority of its shares were owned by Mr Henss, through a trustee.

59 As regards Isoplus Sondershausen, it is clear that all its shares are nominally held by Isoplus Hohenberg. Although Isoplus Hohenberg only owns one third of the shares on its own behalf, it is common ground that a further third of the shares were held on behalf of Mr Papsdorf, then Managing Director of Isoplus Rosenheim, and his wife, their shares having been transferred under the partnership agreement of 15 January 1997 to HFB KG.

60 Next, Mr Henss represented the Henss companies and the Isoplus companies at the meetings of the directors' club. It follows from the notes taken by certain participants in the discussions on the sharing of the German market that market shares were envisaged for the entity called either 'Isoplus' (see annexes 39, 40, 44, 45 and 49 to the statement of objections) or 'Isoplus/Henss' (see annexes 48 and 53 to the statement of objections) or both 'Isoplus' and 'Henze' (see annex 37 to the statement of objections). Furthermore, it is expressly stated in the invitation to the meeting of 11 August 1992 sent by ABB as president of the trade association 'European District Heating Pipe Manufacturers Association' ('EuHP') (annex 38 to the statement of objections) that Mr Henss represented 'Isoplus' at that meeting. Last, it is common ground that when quotas were allocated by the cartel at European level, the Henss companies and the Isoplus companies were allocated a single quota.

61 In those circumstances, the Commission was entitled to regard the activities within the cartel consisting of the distribution companies Henss Berlin and Henss Rosenheim (now Isoplus Rosenheim) and the production companies Isoplus Hohenberg and Isoplus Sondershausen as being the conduct of a single economic entity, under single control and pursuing a common long-term economic aim.

62 Furthermore, the existence of a single economic entity pursuing common interests is confirmed by internal documents of the companies in question. Thus, the minutes of a meeting of the supervisory board of the Isoplus companies of 3 February 1994 (additional document No 21 to the statement of objections) refers to an 'Isoplus group', whose turnover consists, in particular, of the turnover of 'Hohenberg' and 'Sondershausen' together with the turnover of 'Henss'. Similarly, it is apparent from Mr Henss's note of 21 April 1995 that he agreed to participate in a plan to purchase Powerpipe on behalf of 'Firma Henss GmbH, Isoplus group' (additional document No 17 to the statement of objections).

63 Nor can the Court accept the applicants' submission that the association of the Henss companies with the Isoplus companies may be explained by the fact that the former are the latter's trade representatives. Henss Rosenheim also acted throughout the relevant period as trade representative of the German subsidiary of ABB, i.e. ABB Isolrohr GmbH ('ABB Isolrohr'). Since a single quota was allocated at European level for the Henss companies and the Isoplus companies, and having regard to the role played by Mr Henss, both as representative of all those companies at the meetings of the directors and as director of or shareholder in those companies, it is clear that the Henss companies and the Isoplus companies acted together on the market as a single economic entity.

64 As concerns the fact that the interests of Henss Berlin were looked after by Mr Henss in the same way as those of Henss Rosenheim, the Court further observes that, as regards the Leipzig-Lippendorf project, it is apparent from the

minutes of a meeting of the cartel on 10 January 1995 at which Mr Henss was present (annex 70 to the statement of objections) that it was decided to allocate the project to ABB Isolrohr, Pan-Isovit and 'Henz', without its being specified whether the reference was to Henss Berlin or to Henss Rosenheim. It is common ground that the tender relating to that project was subsequently submitted by Henss Berlin and not by Henss Rosenheim, although Mr Henss was not nominally a shareholder in the former, whereas he was in the latter. What is more, in a list of projects drawn up by ABB on 22 March 1995, the three undertakings designated as favourites for the Leipzig-Lippendorf project were ABB, Pan-Isovit and 'Isoplus' (annex 71 to the statement of objections), providing further confirmation that the Henss companies and the Isoplus companies were regarded as belonging to the same economic entity.

65 The fact that Isoplus Hohenberg and Isoplus Sondershausen were active in the same market does not mean that they cannot have belonged to the same economic group. Furthermore, during the administrative procedure before the Commission, Isoplus Sondershausen still represented itself as a wholly-owned subsidiary of Isoplus Hohenberg.

66 Contrary to the applicant's contention, there is no need for the economic entity identified as a 'group' to have legal personality. In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11). In the absence of a person at its head to which, as the person responsible for coordinating the group's activities, responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the component companies jointly and severally responsible for all the acts of the group, in order to ensure that the formal separation between those companies, resulting from their separate legal personality, could not prevent a finding that they had acted jointly on the market for the purposes of applying the rules on competition (see, on that point, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 140).

67 Since the Commission regarded the Henss/Isoplus group as the undertaking that committed the infringement in respect of which the component companies of the group were held liable, it is irrelevant whether, in the present case, Mr Henss may be personally regarded as an undertaking within the meaning of Article 85(1) of the Treaty.

68 It follows from all the foregoing that the plea in law must be rejected.

B — *Second plea in law, alleging infringement of essential procedural forms when referring to the Henss/Isoplus group in the operative part of the Decision*

1. Arguments of the parties

69 The applicants claim that the Commission infringed essential procedural forms, laid down, in particular, in Regulation No 17, by stating that the 'Henss/Isoplus group' was an addressee of the Decision. In the absence of legal or quasi-legal personality, the Henss/Isoplus group did not have *locus standi* in proceedings brought under Article 85 of the Treaty governed by Regulation No 17, in particular before the Court of First Instance.

70 In that regard, the applicants claim that the Commission states in Article 1 of the operative part of the Decision that the 'Henss/Isoplus group' infringed Article 85(1) of the Treaty. In Article 2 of the Decision, the Commission goes on to state that the undertakings named in Article 1 are to bring the said infringement to an end forthwith, if they have not already done so. Furthermore,

in Article 3 of the Decision it is stated that the fines are 'imposed on the undertakings named in Article 1 in respect of the infringements found therein' and, in subparagraph (d): '[the] Henss/Isoplus group, a fine of ECU 4 950 000, for which the following companies are jointly and severally liable:...': Last, in Article 5(d) of the Decision it is stated that the Decision is addressed to '[the] Henss/Isoplus group, represented by:...'. From a procedural point of view, the Commission therefore regarded the Henss/Isoplus group as an addressee of the Decision, and not the undertakings identified in Article 5 of the Decision, which are identified only in connection with their joint obligation to pay the fine imposed on the Henss/Isoplus group.

71 The applicants observe that the present action cannot amount to recognition on their part that the Decision is to be taken in the desired sense on this point, since they have brought the present court proceedings. On the contrary, in doing so each intends to rely on its own rights and, in the interests of precaution, on the rights of what the Commission regards as the Henss/Isoplus group. Their applications are therefore submitted on their own behalf and also on behalf of the Henss/Isoplus group in which the Commission has placed them.

72 The defendant confirms that the addressees of the Decision are, for present purposes, the undertakings clearly identified in Article 5 of the operative part of the Decision. The applicants understood the Decision in that sense, moreover, since they brought their action on their own behalf and designated themselves as addressees of the Decision.

73 As regards the use of the names 'Henss/Isoplus' or 'Henss/Isoplus group' in the Decision, it is necessary to differentiate the identification of the undertaking, possibly taking the form of a group, which committed an infringement, from the identification of the natural or legal person, capable of enjoying rights and being subject to duties, which is technically responsible for that infringement. Although the term 'Henss/Isoplus group, represented by...' in Article 5(d) of the Decision is not particularly felicitous, it cannot be inferred that the Henss/Isoplus group as

such is the person liable for the fine, since the provision in question refers to the very companies identified in Article 3(d) of the Decision as jointly and severally liable for the fine.

74 Last, the Decision was notified by letter addressed separately to each of the five applicants and not to the 'Henss/Isoplus group'.

2. Findings of the Court

75 It was stated at paragraph 66 above that, in the absence of a person at the head of the Henss/Isoplus group to which, as the person responsible for coordinating the group's activities, responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the component companies jointly and severally responsible for all the acts of the group.

76 In that regard, Article 1 of the Decision identifies the 'Henss/Isoplus group' among the undertakings which committed the infringement described in that provision. Similarly, Article 2 of the Decision refers to the 'undertakings named in Article 1' in order to identify the undertakings which are to bring the infringement to an end, if they have not already done so.

77 Next, in Articles 3 and 5 of the Decision, the Commission identified the legal persons that must answer for the infringement committed by the 'Henss/Isoplus group' and which are therefore jointly and severally required to pay the fine imposed on the group.

78 Since the Henss/Isoplus group lacks legal personality, Articles 3 and 5 of the Decision cannot be understood otherwise than as designating the applicants as addressees of the Decision as components of the Henss/Isoplus group. The fact that the Henss/Isoplus group is identified through its components means that it cannot be unable to protect its interests in court proceedings. It is able to defend its interests, if necessary, via its components.

79 Nor can there be any doubt that the applicants were the addressees of the Decision as components of the Henss/Isoplus group, since the Decision was notified individually to each of the applicants and not to the Henss/Isoplus group, which alone was named as having committed the infringement in Article 1 of the Decision.

80 Having regard to their capacity as addressees of the Decision as components of the Henss/Isoplus group, the plea in law put forward by the applicants alleging infringement of Regulation No 17 must be rejected.

C — *Third plea in law, alleging infringement of the obligation to state reasons*

1. Arguments of the parties

81 According to the applicants, the Commission infringed the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC), since the Decision gives no reasons why the 'Henss/Isoplus group' should be a party in proceedings pursuant to Regulation No 17 and thus the addressee of a decision under that regulation. The Commission's assertion in point 160 of the Decision that the statement of objections was addressed to the Henss/Isoplus group and

that, in the absence of a single holding company, the four named operating companies were the representatives of the group for the purposes of service and of enforcement, is insufficient in the light of its statement in point 15 of the Decision that the Henss/Isoplus group was a '*de facto* group' without its own legal personality and without capacity to bring or defend court proceedings.

82 The defendant states that it was shown in points 157 to 160 of the Decision that the undertakings brought together under the title 'Henss/Isoplus group' acted as a *de facto* group, so that the applicants must be held jointly and severally liable to pay the fine. As the Henss/Isoplus group was not a party to the proceedings, no justification in that regard was necessary.

2. Findings of the Court

83 The applicants' argument relies on the Decision being interpreted as meaning that the Henss/Isoplus group was regarded as the person involved in the administrative procedure. That interpretation has been rejected as incorrect, since in the Decision, the companies jointly and severally liable for the fine imposed in respect of the infringement committed by the Henss/Isoplus group and thus addressees of the Decision as components of the group were identified in Articles 3 and 5 of the operative part (see paragraphs 75 to 80 above).

84 As regards the infringement committed by the Henss/Isoplus group and the fact that the applicants were regarded as responsible for implementing the Decision, as components of the Henss/Isoplus group, reference should be made to points 157 to 160 of the Decision.

85 First, the Commission stated in point 157 of the Decision that '[t]he Henss/Isoplus undertakings acted as a *de facto* group'. In order to support that assertion, it stated that Mr Henss was the majority shareholder of Isoplus Hohenberg, which itself held all the shares in Isoplus Sondershausen, and that he was the majority shareholder and Managing Director of Henss Rosenheim and Managing Director (but not a shareholder) of Henss Berlin, undertakings which acted as Isoplus's commercial agents in Germany. In the same point of the Decision, the Commission observes that '[i]t is apparent from the fact that it was [Mr] Henss who always attended the directors' club meetings that he was the person who exercised management and control over Isoplus and that the Henss and Isoplus undertakings together formed a *de facto* group'. Still according to the Commission, '[i]t was common knowledge in the industry that Henss was the power behind Isoplus'.

86 In point 158 of the Decision, the Commission states that since at the time when the statement of objections was sent there was to its knowledge no holding company to which the statement of objections could be addressed, it addressed it to the Henss/Isoplus group, represented by all four of its principal undertakings in the Community, namely Isoplus Hohenberg, Isoplus Sondershausen, Henss Rosenheim, and Henss Berlin. According to the Decision, it was made clear in the statement of objections 'that the proceedings were being addressed to the Henss/Isoplus Group and that in the absence of a... holding company the four named operating companies were the representatives of the group for the purposes of service and of enforcement' (fourth paragraph of point 160).

87 Last, the Commission states that, after learning from a partnership agreement of 15 January 1997 that holding companies, HFB GmbH and HFB KG, had been formed, to which the shares held in Isoplus Rosenheim and Isoplus Hohenberg had been transferred and that, in addition, a limited partnership, Isoplus stille Gesellschaft, had been set up, it addressed the present Decision not only to Isoplus Hohenberg, Isoplus Sondershausen and Isoplus Rosenheim, but also to HFB GmbH and HFB KG and to Isoplus stille Gesellschaft (point 160 of the Decision).

88 It follows from the foregoing that the Commission stated its reasons for regarding the Henss and Isoplus undertakings as constituting a *de facto* group. It also stated that, in the absence of a holding company representing the group, the group must be identified via its component companies for the purposes of service and of payment of the fine.

89 The present plea in law must therefore be rejected.

II — *The pleas in law relating to HFB GmbH and to HFB KG*

90 As regards HFB GmbH and HFB KG, the applicants put forward three pleas in law, alleging, first, misapplication of Article 85(1) of the Treaty, second, infringement of the rights of defence and, third, infringement of the obligation to state reasons.

A — Arguments of the parties

91 The applicants claim that the Commission was wrong to order HFB GmbH and HFB KG jointly and severally with the other applicants to pay the fine imposed on the Henss/Isoplus group.

92 The applicants observe that, according to the Decision, the infringement came to an end no later than March or April 1996. Since HFB GmbH and HFB KG were

only formed on 15 January 1997 and have existed in law only since they were entered on the commercial register, namely on 10 and 27 February 1997 respectively, they were not able to take part in the infringement. Nor, in the absence of legal existence before 1997, can they be held responsible for any anti-competitive conduct on the part of other undertakings in the Henss/Isoplus group. According to the presumption of innocence, an undertaking can be fined in a proceeding under Article 85 of the Treaty, governed by Regulation No 17, only where it has participated culpably or at least negligently in an infringement.

93 It is only where an undertaking has been changed or merged into another undertaking that the latter undertaking, as universal successor in title to the former undertaking, can be held responsible for the infringement committed by the former undertaking, provided that the economic identity of the undertaking has not changed. In that regard, the applicants observe that HFB KG acquired its shares in Isoplus Rosenheim and Isoplus Sondershausen from natural persons, namely Mr and Mrs Henss, in the case of Isoplus Rosenheim, and Mr and Mrs Papsdorf in the case of Isoplus Sondershausen. An undertaking cannot be held responsible, as a successor in title to natural persons who held shares in the company which committed the infringement and who, as mere shareholders, did not themselves constitute undertakings within the meaning of Articles 85 and 86 of the Treaty.

94 Contrary to the Commission's approach, it is impossible to invoke the existence of numerous manifestations of the Henss/Isoplus group directed by Mr Henss. The reason why HFB GmbH and thus HFB KG were formed was to facilitate a sale of various shareholdings in district heating undertakings as a whole. A number of increases in share capital and various measures to introduce capital were implemented for exclusively accounting reasons. Those changes in capital and those measures were implemented after the infringement came to an end and even, in certain cases, after the Decision had been adopted.

95 The defendant observes that HFB GmbH and HFB KG can be held jointly liable for infringements committed by the Henss/Isoplus group independently of the fact

that those undertakings had not themselves infringed the competition rules and had not assumed all the rights and obligations of undertakings that committed the infringements.

96 A legal person may be made liable for infringements committed by a company of which it has taken control even if the infringements were committed before it took control (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925). As the Commission could make HFB GmbH and HFB KG jointly responsible for the infringements in question, it could also include them among the undertakings required to pay the fine (Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727).

97 In imputing responsibility for the infringements to HFB GmbH and to HFB KG, the Commission did not in any way undermine the presumption of innocence. In the present case, the restructuring whereby HFB GmbH and HFB KG acquired certain of Mr Henss's shareholdings and thus direct control over Isoplus Rosenheim constitutes changes within a single undertaking and controlled by the unitary management of that undertaking.

98 In that regard, it is immaterial that the shareholders as such were not undertakings. According to the Commission, undertakings may be constituted of various components, some of which have an operational role and others a management role. In the present case, the latter role was and continues to be played by Mr Henss, who had none the less delegated part of that role to HFB KG, which he himself controls.

99 In that context, the Commission states that it was able to hold Mr Henss personally responsible for the infringements committed by Isoplus Rosenheim, since during the period of the infringements that company's policy could not be

defined independently of Mr Henss, especially since other companies belonging to the Henss/Isoplus group also participated in the infringement. Since Mr Henss controls HFB GmbH by virtue of his shareholding in its capital and is still Managing Director of that company, both it and HFB KG must accept that the fact that Mr Henss was aware of the infringements committed by the transferred company is imputed to them. Furthermore, the value of the shares acquired could have been altered by the infringement.

100 Last, it is necessary to take account, first, of the Commission's legitimate interest in being able, in any enforcement proceedings, to make use of the assets of the group, independently of any restructuring such as that in the present case, and, second, of the difficulties which the Commission may encounter in the event of enforcement against individuals. A restructuring such as that brought about by the formation of HFB GmbH and of HFB KG, where Mr Henss was both seller and purchaser, must not have the effect that the Commission is no longer able to take action against the new holder of the shares in question.

B — Findings of the Court

101 The Commission brought the Henss companies and the Isoplus companies together within a *de facto* group which was regarded as the undertaking which had participated in the infringement. Owing to the absence of a parent company representing the Henss/Isoplus group or a company responsible for coordinating the actions of the group, the Commission imputed responsibility for the infringement to the companies of which the group was composed on the date of adoption of the Decision, including HFB GmbH and HFB KG.

102 Since HFB GmbH and HFB KG did not yet exist at the time when the infringement was committed, responsibility for the infringement cannot therefore be imputed to them on the basis of any stimulating and coordinating role, in

relation to the impugned activities, *vis-à-vis* the other companies belonging to the Henss/Isoplus group (see, in that regard, *Shell* v *Commission*, cited above, paragraph 312).

103 Similarly, responsibility for the infringement cannot be imputed to HFB GmbH and to HFB KG solely because they belonged to the Henss/Isoplus group at the time when the Decision was adopted. It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78, and Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27). In the present case, on the assumption that HFB GmbH and HFB KG operate as holding companies responsible in whole or in part for the Henss/Isoplus group, and that that situation came about after the infringement had taken place, they cannot be imputed with the unlawful conduct of the Henss/Isoplus group prior to the acquisition, in whole or in part, of that group (*Cascades* v *Commission*, cited above, paragraph 77).

104 The situation would be different only where the legal person or persons responsible for running the undertaking have ceased to exist in law after the infringement has been committed (Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 145). It is common ground that the companies concerned at the time when the infringement was committed still exist.

105 It is clear from the case-file that the Commission holds HFB GmbH and HFB KG jointly and severally liable for the infringement committed by the Henss/Isoplus group owing, *inter alia*, to the fact that they obtained from Mr Henss the control which he exercised over the undertakings in the group, in particular direct control over Isoplus Rosenheim. In that regard, it is sufficient to observe that, in so far as the Commission, in the Decision, did not hold Mr Henss personally liable for the

infringement committed by the Henss/Isoplus group, HFB GmbH and HFB KG cannot be imputed, on the basis of economic succession, with liability which was intentionally not established previously.

106 It is true that in certain circumstances an infringement of the rules on competition may be imputed to the economic successor of the legal person responsible, even where the latter has not ceased to exist on the date of adoption of the decision finding the infringement, so that the effectiveness of those rules will not be compromised owing to the changes to, *inter alia*, the legal form of the undertakings concerned (see Case T-134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II-239, paragraph 127). However, *NMH Stahlwerke* v *Commission* may be distinguished, since in the present case the natural and legal persons involved in the infringement continued their commercial activities in full, while HFB GmbH and HFB KG did not yet exist at the time of the infringement.

107 Furthermore, it is impossible, on the basis of the information provided to the Court during the written procedure and subsequently at the hearing, to conclude that there existed strategies adopted for the specific purpose of avoiding penalties for infringement of the competition rules (see *Commission* v *Anic*, cited above, paragraph 146).

108 Consequently, it must be held that the Commission erred in law in holding HFB KG and HFB GmbH jointly and severally liable for the fine imposed in respect of the participation of the Henss/Isoplus group in the infringement. Accordingly, there is no need to adjudicate on the second and third pleas in law relating to HFB GmbH and HFB KG, alleging infringement of the rights of defence and of the obligation to state reasons.

109 Articles 3(d) and 5(d) of the Decision must therefore be annulled in so far as they concern HFB KG and HFB GmbH.

III — *Pleas in law relating to Isoplus stille Gesellschaft*

A — Arguments of the parties

110 The applicants, and Isoplus Hohenberg in particular, criticise the Commission for having also addressed the Decision to Isoplus stille Gesellschaft, in its capacity as an undertaking in the Henss/Isoplus group. Under Austrian law, Isoplus stille Gesellschaft, as a limited partnership, was neither a legal person nor a commercial company, but merely an internal company which, as such, cannot have rights or obligations, which only the owner of the business can have. Furthermore, in September 1997, Isoplus stille Gesellschaft was dissolved without being liquidated, its assets being transferred to the founding company, Isoplus Hohenberg, in the form of an increase in capital.

111 In that context, Isoplus Hohenberg puts forward, first of all, a plea in law alleging infringement of Article 85 of the Treaty, in so far as the Decision is addressed to a limited partnership, which, not having legal or quasi-legal personality, is not an undertaking within the meaning of Articles 85 and 86 of the Treaty and, accordingly, cannot be the addressee of a Commission decision in a proceeding under Article 85 of the Treaty.

112 Isoplus Hohenberg also alleges breach of essential procedural requirements in so far as the Commission, in the Decision, imposed a fine on an undertaking which, as a limited partnership, did not have capacity to defend its interest in court proceedings for the purposes of Austrian law and could not therefore bring an action before the Court of First Instance. Nor could such a decision be addressed to an undertaking which, independently of its legal classification, did not exist when the Decision was adopted because it had been dissolved.

113 Isoplus Hohenberg further observes that no statement of objections was sent to Isoplus stille Gesellschaft. It states in that regard that at the hearing on 24 and 25 November 1997 it was not possible to consider whether, under Austrian law, a limited partnership has legal or quasi-legal personality and thus has capacity to bring legal proceedings, or the fact that the limited partnership had been dissolved, since, in spite of an application to that effect by its counsel, the Hearing Officer did not hold a separate hearing on those points. In its reply of 30 March 1998 to the request for information of 24 February 1998 (hereinafter 'the letter of 30 March 1998'), the applicant therefore did not comment on the problem of that limited partnership. It was only by letter of 22 October 1998 to the Commission that the problem was raised.

114 Last, the Commission infringed its obligation to state reasons, since the Decision does not explain how a limited partnership governed by Austrian law may be the addressee of a Commission decision in a proceeding under Article 85 of the Treaty.

115 The defendant observes that Isoplus stille Gesellschaft, as Isoplus Hohenberg itself states, had already ceased to exist when the Decision was adopted. The Decision is therefore inoperative *vis-à-vis* that company. None the less, no plea in law directed against the Decision can be inferred from that fact. Furthermore, it would be possible to reach the same finding if the limited partnership had still existed when the Decision was adopted. As Isoplus Hohenberg itself recognises, the company had no legal personality, so that the Decision could not have any legal effect with regard to it or, consequently, adversely affect it.

B — Findings of the Court

116 Having regard to the fact that Isoplus stille Gesellschaft had been dissolved when the Decision was adopted, the Decision could not produce legal effects *vis-à-vis*

that company. Consequently, the Decision produced no legal effects in so far as it was addressed to Isoplus stille Gesellschaft.

117 Nor, since Isoplus Hohenberg, which was still the person vested with all the rights and obligations capable of existing for Isoplus stille Gesellschaft, is itself an addressee of the Decision, can the fact that Isoplus stille Gesellschaft was included among the addressees of the Decision have any legal effect *vis-à-vis* Isoplus Hohenberg other than that resulting from the fact that the Decision was addressed to Isoplus Hohenberg and that the latter was held jointly and severally liable for the fine imposed on the Henss/Isoplus group.

118 As the Decision is inoperative in so far as it is addressed to and refers to Isoplus stille Gesellschaft, the action is devoid of purpose in so far as it concerns the latter and there is therefore no need to adjudicate in that regard.

IV — *The pleas in law put forward in relation to all the applicants*

119 The applicants together put forward five pleas in law. The first plea in law alleges errors of fact and of law in applying Article 85(1) of the Treaty. The second plea alleges infringement of the rights of defence. The third plea alleges that 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, hereinafter 'the new guidelines' or 'the guidelines') are unlawful. The fourth plea alleges infringement of the rules relating to fines in competition matters and of

general principles and errors of assessment in determining the amount of the fine. The fifth plea alleges breach of the obligation to state reasons.

A — *First plea in law, alleging errors of fact and of law in applying Article 85(1) of the Treaty*

1. Participation in the infringement prior to October 1994

120 to 181 ...

(b) Legal assessment

182 As regards the Commission's legal assessment of the facts established before October 1994, the applicants essentially put forward six objections. First, the applicants criticise the classification of 'all agreements and concerted practices' as an infringement. Second, the applicants claim that the conduct found should not have been classified as an agreement. Third, the applicants dispute the concept of concerted practices employed by the Commission. Fourth, the applicants claim that the Commission incorrectly assessed the legal consequences of participation in a meeting having an anti-competitive purpose. Fifth, the applicants maintain that the Commission erred in relation to the burden of proof as regards participation in an overall cartel. Sixth, the applicants accuse the Commission of having failed to assess the individual responsibility of the companies regarded as belonging to the Henss/Isoplus group.

(i) The classification of 'all agreements and concerted practices' as an infringement

Arguments of the parties

183 The applicants dispute the Commission's assertion in points 131 and 132 of the Decision that in a complex cartel of long duration, where the various concerted practices followed and agreements concluded form part of a course of conduct adopted by the undertakings in pursuit of a common objective of preventing or distorting competition, it is entitled to find that they constitute a single continuous infringement. The Commission is incorrect to maintain that it is not necessary, in such a case, for it to categorise the infringement as exclusively an agreement or a concerted practice.

184 The applicants observe that it is not necessary, either in the case of an agreement within the meaning of Article 85(1) of the Treaty or in that of a 'gentlemen's agreement' intended to restrict competition, to demonstrate the existence of an actual restriction of competition. In the case of concerted practices, on the other hand, in the absence of the deliberate coordination of conduct with the object of restricting competition, it is for the Commission to prove that the concerted practices actually had the effect of restricting competition. Having regard to the distinction between the concepts of agreement and concerted practices, it is not possible for the Commission to find only a single infringement of Article 85(1) of the Treaty where the infringements of that provision assume different forms. Observance of the principle of the presumption of innocence requires that all the material elements of an infringement of Article 85(1) of the Treaty be specified in a decision adopted pursuant to Regulation No 17.

185 The defendant observes that in the present case the agreements and concerted practices implemented during the relevant period formed part of a system of

regular meetings designed to regulate the market by setting prices and quotas. Since that conduct manifested itself partly in agreements and partly in concerted practices, the Commission was justified in finding, in Article 1 of the Decision, that there was an agreement and a concerted practice. Thus it neither misconstrued the concepts of agreement and of concerted practice nor infringed general principles of law.

Findings of the Court

186 It is settled case-law that, in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as an agreement or a concerted practice, as in any event both those forms of infringement are covered by Article 85 of the Treaty. The Commission is therefore entitled to classify such a single infringement as 'an agreement and a concerted practice' or as an agreement 'and/or' a concerted practice, since the infringement includes elements which are to be classified as an 'agreement' and elements which are to be classified as a 'concerted practice' (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 264). It would be artificial to split up continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements (*Hercules Chemicals* v *Commission*, cited above, paragraph 263).

187 In such a situation, the dual characterisation must be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 85(1) of the Treaty, which lays down no specific category for a complex infringement of this type (*Hercules Chemicals* v *Commission*, cited above, paragraph 263).

188 Although Article 85 of the Treaty distinguishes between 'concerted practices', 'agreements between undertakings' and 'decisions by associations of undertakings', the object is to bring within the prohibitions in that article different forms of coordination and collusion between undertakings (*ICI* v *Commission*, cited above, paragraph 64). It does not, however, follow that patterns of conduct having the same anti-competitive object, each of which, taken in isolation, would fall within the meaning of 'agreement', 'concerted practice' or 'decision by an association of undertakings', cannot constitute different manifestations of a single infringement of Article 85(1) of the Treaty. A pattern of conduct by several undertakings may therefore be the expression of a single and complex infringement, corresponding partly to an agreement and partly to a concerted practice (*Commission* v *Anic*, cited above, paragraphs 112 to 114).

189 Contrary to what the applicants claim, the Commission was correct to state that, in such a case, there is no need to categorise the infringement as exclusively an agreement or a concerted practice.

190 A comparison between the concepts of agreement and concerted practice within the meaning of Article 85(1) of the Treaty shows that, from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves. It follows that, whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible. The Commission is therefore not required to categorise either as an agreement or as a concerted practice each form of conduct found but may characterise some of those forms of conduct as principally 'agreements' and others as 'concerted practices' (*Commission* v *Anic*, cited above, paragraphs 131 and 132).

191 Such an interpretation does not have an unacceptable effect on the question of proof. On the one hand, the Commission must still establish that each form of conduct found falls under the prohibition laid down in Article 85(1) of the Treaty

as an agreement, a concerted practice or a decision by an association of undertakings. On the other hand, the undertakings charged with having participated in the infringement have the opportunity of disputing, for each form of conduct, the characterisation or the characterisations applied by the Commission by contending that the Commission has not adduced proof of the constituent elements of the various forms of infringement alleged (*Commission* v *Anic*, cited above, paragraphs 134 to 136).

192 It follows that the Commission did not err in law by characterising the infringement in question, in Article 1 of the operative part of the Decision, as a 'complex of agreements and concerted practices', without placing it in just one of those two categories.

(ii) The characterisation as an agreement of the forms of conduct found

Arguments of the parties

193 The applicants claim, as regards the concept of agreement within the meaning of Article 85(1) of the Treaty, that it follows from the provision in Article 85(2) of the Treaty that such an agreement is automatically void that any such agreement must be legally binding. Accordingly, what is known as a gentlemen's agreement is not an agreement. Provided that the undertakings are not agreed among themselves, their conduct can be characterised only as an attempted agreement, which is not punishable by a fine in competition law.

194 According to the applicants, there was no agreement during the relevant period, since it was only in the autumn of 1994 that an agreement was reached on prices and quotas.

195 As regards the system of quotas which, according to the Commission, was adopted in August or September 1993, the Commission even stated, in point 51 of the Decision, concerning the agreed targets for the German market for 1994, that a general consensus 'seem[ed]' to have emerged, which indicates that such a consensus did not exist. According to the same point of the Decision, Tarco was said to have had reservations about the quotas. In point 52 of the Decision, the Commission further states that such an agreement never actually saw the light of day. Irrespective of the fact that the applicants never entered into such an agreement or that they never collaborated in one, the facts put forward by the Commission could at the most be characterised as an attempted agreement.

196 The Commission is incorrect to state, in point 137 of the Decision, that the 'inchoate, loose and often fragmentary' arrangements outside Denmark before 1994 in any event amounted to infringements of Article 85(1) of the Treaty. Inchoate agreements are agreements that do not yet exist: *consensus ad idem* has not been reached between the undertakings concerned. Consequently, such fragmentary, inchoate arrangements are merely attempted agreements, which are not punishable by fines.

197 In any event, not only did Henss Rosenheim and thus the Henss/Isoplus group not abide by the outcome of the meetings referred to in the Decision, they even openly withdrew their support for those results. The fact that the undertaking's legal representative took action and that Henss Rosenheim lodged a complaint against ABB Isolrohr before an arbitration tribunal can be interpreted only as meaning that it openly distanced itself from what was agreed at the meetings within the meaning of the case-law.

198 The defendant observes that, according to the case-law, it is sufficient, in order to accept the existence of an agreement, that the undertakings concerned expressed their joint intention to adopt specific conduct on the market. It is in no way necessary for the parties to have established a legal link. In that context, the price

increase decided upon in October or December 1991, the system of quotas adopted in August or September 1993 and the price list adopted in May and August 1994 are by nature agreements.

Findings of the Court

199 It is settled case-law that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86, and Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 120).

200 That is the case where there is a gentlemen's agreement between a number of undertakings representing the faithful expression of such a joint intention concerning a restriction of competition (*ACF Chemiefarma* v *Commission*, cited above, paragraph 112, and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 96). In those circumstances, the question whether the undertakings in question considered themselves bound — in law, in fact or morally — to adopt the agreed conduct is therefore irrelevant (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 65).

201 Contrary to what the applicants allege, the opposite conclusion cannot be inferred from the provision in Article 85(2) of the Treaty that any agreement referred to in Article 85(1) is automatically void, which is intended for cases where a legal obligation is actually in issue. The fact that only binding agreements can, by their nature, be rendered void does not mean that non-binding agreements must escape the prohibition laid down in Article 85(1) of the Treaty.

202 In the present case, the Commission considered in point 137 of the Decision that, as regards the arrangements outside the Danish market before 1994, express agreement was reached at the latest, on the price increase for Germany, on 1 January 1992, and, for pricing and project sharing in Italy and the market-quota scheme, in August 1993. As regards the applicants' participation in the cartel before October 1994, it is common ground that the Commission found that there was an agreement, first, as to the price increase for the German market for 1992, decided in October and December 1991, second, as to the quota scheme adopted in August or September 1993 and, third, as to the price list adopted in May and August 1994.

203 In that regard, reference should be made to paragraphs 137 to 181 above, where it was held that the Commission, on the basis of all the evidence it had gathered, was entitled to consider that the Henss/Isoplus group was a party to the agreement reached, at the latest, on 19 December 1991 on the increase of gross prices in Germany, an agreement to share the German market reached, at the latest, in September 1993, and an agreement on a price list, adopted at the meetings of May and August 1994.

204 On that question, Henss Rosenheim's objection to the agency price increases imposed by ABB Isolrohr cannot be regarded as distancing itself from the other participants in the cartel, since its objection related only to the agency prices used in the commercial representation of Henss Rosenheim and not to the selling prices fixed by the undertakings concerned for the German market.

205 As regards the agreement on sharing the German market, reached in August 1993, it cannot be maintained that the Commission found the absence of joint intention in stating, in point 51 of the Decision, that a consensus 'seem[ed]' to have emerged on the quota scheme. At that place, the verb 'seem' cannot be understood other than as expressing the Commission's conviction that it could be inferred from the circumstances of the case that a general consensus had been established on a quota scheme at that time. Similarly, the fact that Tarco had

expressed reservations about its market share could not prevent the Commission from finding that an agreement in principle had emerged. It is clear from ABB's reply that, during the negotiations, in April and May 1993, to reach an agreement on prices, Tarco 'refused to participate in any agreement on prices without a parallel agreement on market-share quotas', owing to the fact that 'Tarco did not obtain orders when it did not engage in aggressive price competition'. As stated in paragraph 153 above, Tarco's position was expressed in a request for a higher quota than the 17% envisaged on the basis of the audit, which led, in a subsequent proposal, to its being allocated a higher market share. It cannot be inferred from the fact that Tarco adopted such a position that it was opposed to the principle of sharing the German market.

206 Contrary to what the applicants claim, the facts relied on by the Commission cannot be characterised as merely an attempted agreement. It is apparent from the series of meetings at which market-sharing was discussed that, at least at a certain time, the undertakings in question expressed their joint intention to conduct themselves on the market in a specific manner. As observed in paragraphs 151 to 157 above, it must be held that, even if there was not an agreement on all the matters forming the subject-matter of the negotiations, a joint intention to restrict competition on the German market by means of fixed market shares for each operator governed the negotiations during a certain period in 1993.

207 In that context, the Commission's assertion in point 137 of the Decision that 'it may well be true that [the arrangements] were inchoate, loose and often fragmentary' cannot be taken to mean that, in respect of the facts characterised as an agreement by the Commission, there was not yet a joint intention on the part of the undertakings concerned to conduct themselves on the market in a specific way. The Commission's assertion, although it states that the arrangements were not always concluded for all the matters forming the subject-matter of the negotiations or for all the foreseeable details and that they were sporadic and non-continuous, does not in any way mean that the undertakings concerned did not reach agreement on one or more matters intended to restrict competition on the market in question.

208 It follows that the applicants' objection must be rejected.

(iii) The concept of concerted practices

Arguments of the parties

209 The applicants submit that, as regards the concerted practices, in the absence of deliberate coordination of conduct intended to restrict competition, it is for the Commission to prove that the concerted practices actually had the effect of restricting competition. In the present case, however, the Commission itself recognised that, as regards the period before October 1994, outside the Danish market, prices had fallen continually since October 1990, especially in the German market.

210 The defendant contends that it relied on the definition of concerted practices laid down in the case-law. In that context, it established, in point 138 of the Decision, that in the present case the exchange of normally sensitive commercial information constituted concerted practices. The fact that prices had fallen in Germany at the material time does not contradict, in legal terms, the existence of concerted practices; at the most, it suggests that the cartel was not a success. Furthermore, the Commission adduced direct evidence of the collusive contacts between the parties.

Findings of the Court

211 According to settled case-law, a concerted practice refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see 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 26, and *Hüls* v *Commission*, cited above, paragraph 158).

212 It follows from that case-law that the criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to follow in the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators capable of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (*Suiker Unie and Others* v *Commission*, cited above, paragraphs 173 and 174, *Hüls* v *Commission*, cited above, paragraphs 159 and 160, and *Rhône-Poulenc* v *Commission*, cited above, paragraph 121).

213 Furthermore, it follows from the actual terms of Article 85(1) of the Treaty, that a concerted practice implies, besides undertakings concerting with each other, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two (see *Commission* v *Anic*, cited above, paragraph 118, and *Hüls* v *Commission*, cited above, paragraph 161).

214 In that context, it is necessary to assess the Commission's observations, in the second paragraph of point 138 of the Decision, that 'even if the concept of "agreement" does not apply to steps in the bargaining process leading up to comprehensive agreement, the conduct in question still falls under the prohibition of Article 85 as a concerted practice'. On that point, the Commission described the regular meetings as 'a forum for... the exchange of normally sensitive commercial information... [which] must have meant reaching a certain level of understanding, reciprocity and conditional or partial agreement as to [the] conduct [of the participants]' and stated that 'the participants could not, in any event, have failed to take into account, directly or indirectly, the information obtained in the course of those regular meetings'.

215 In that regard, it should be observed that, for the period before October 1994, a number of documents show that, in 1992 and 1993, the Henss/Isoplus group participated, on numerous occasions, in an exchange of information on market share. As stated in paragraphs 146, 148 and 149 above, that applies to the documents in annexes 37, 44, 49 and 53 to the statement of objections.

216 However, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (*Commission* v *Anic*, cited above, paragraph 121, and *Hüls* v *Commission*, cited above, paragraph 162). That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here (*Commission* v *Anic*, cited above, paragraph 121, and *Hüls* v *Commission*, cited above, paragraph 162).

217 Furthermore, it follows from the case-law that a concerted practice is caught by Article 85(1) of the Treaty, even in the absence of anti-competitive effects on the

market. First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily imply that that conduct should produce the specific effect of restricting, preventing or distorting competition (see *Commission* v *Anic*, paragraphs 122 to 124, and *Hüls* v *Commission*, paragraphs 123 to 125).

218 It follows from the foregoing that, as regards the period before October 1994, in so far as the Commission complained that the Henss/Isoplus group participated in a 'complex of agreements and concerted practices', it did not err in law when, in the alternative, it characterised an exchange of commercial information as a concerted practice.

219 On this point, the applicants' objection must also be rejected.

(iv) The legal consequences of participation in a meeting having an anti-competitive purpose

Arguments of the parties

220 According to the applicants, the judge-made rule that an undertaking which does not conform with what is decided at meetings having an anti-competitive purpose may be held liable for an infringement of the competition rules where it has not publicly distanced itself from what was discussed at those meetings should be

given a restrictive interpretation, having regard to the judgments of the Court of First Instance in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389 and of the Court of Justice in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, which held that the Commission had been correct to be reluctant to reveal certain letters from customers of the undertaking in a dominant position which were in the file.

221 In the case of cartels in which undertakings in a dominant position on the market or, at the very least, in a superior economic position, participate, the fact that other economically weaker undertakings do not publicly distance themselves from the anti-competitive outcome of a meeting does not mean that those undertakings must, in spite of everything, be held responsible for what was decided at the meeting from the point of view of competition law. It is often easier for smaller undertakings to say nothing during the meetings to which they have been summoned by the economically dominant market leader and then to refrain from acting in accordance with what was decided.

222 The defendant contends that the legal assessment of a cartel is not affected by the fact that an undertaking participated in it intentionally or under constraint, since it is always open to the undertaking to report the cartel. Furthermore, the judgments referred to above rely on the concept that the Commission must, as much as possible, avoid provoking infringements of the competition rules and do not alter the principle that an undertaking which does not abide by what was decided at meetings having an anti-competitive purpose may be held liable in so far as it did not publicly distance itself from what was discussed at those meetings.

Findings of the Court

223 As observed at paragraph 137 above, where an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object

and does not publicly distance itself from what was discussed at them, thus giving the impression to the other participants that it subscribes to the outcome of the meetings and will act in conformity with it, it may be concluded that it is participating in the cartel resulting from those meetings.

224 Contrary to what the applicants claim, it is irrelevant, in that regard, whether the undertaking in question attends meetings with undertakings having a dominant position or, at least, an economically superior position on the market.

225 First, the case-law cited by the applicants relates to the Commission's obligation, in an administrative procedure concerning competition law, to observe the confidentiality of certain documents in the administrative file. In that context, it has been held that the Commission could lawfully refuse to make accessible to undertakings accused of having abused their dominant position certain correspondence with third-party undertakings by reason of their confidential nature, since an undertaking to which a statement of objections is addressed, and which occupies a dominant position in the market, may, for that very reason, adopt retaliatory measures against a competing undertaking, a supplier or a customer who has collaborated in the investigation carried out by the Commission (judgment of the Court of First Instance in *BPB Industries and British Gypsum* v *Commission*, cited above, paragraph 33, upheld on appeal by the judgment of the Court of Justice in *BPB Industries and British Gypsum* v *Commission*, cited above, paragraphs 26 and 27). Since that principle was laid down in a completely different context, relating to the Commission's obligation to provide access to the file, it casts no light on the question of the imputation of the outcome of anti-competitive meetings to the undertakings which participated in such meetings.

226 Second, an undertaking which participates in meetings with an anti-competitive object, even under constraint from other participants with greater economic power, can always report the anti-competitive activities in question to the

Commission rather than continue to participate in the meetings (see paragraph 178 above).

227 It follows that the Commission did not err in law in so far as it relied, in the present case, on the interpretation of Article 85(1) of the Treaty that an undertaking which participates in meetings with an anti-competitive object and does not publicly distance itself from what was discussed at them may be regarded as having participated in the cartel resulting from those meetings.

(v) The burden of proof in relation to participation in an overall cartel

Arguments of the parties

228 The applicants dispute the Commission's assertion in point 134 of the Decision that 'it is not necessary, for the existence of an agreement, that every alleged participant participated in, gave its express consent to or was even aware of each and every individual aspect or manifestation of the cartel throughout its adherence to the common scheme...'. They claim that that legal concept is not laid down in the case-law and is, in particular, contrary to Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') and to the principle of culpability as a general principle of law. Last, such a concept has the effect of reversing the burden of proof.

229 In that regard, the applicants observe that an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is

shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel (Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 140). Although that principle refers essentially to agreements within the meaning of Article 85(1) of the Treaty and is not therefore readily applicable to concerted practices within the meaning of that provision, it none the less shows that the Commission decision must state precisely what the nature of the agreement was and what the undertaking concerned knew or must have known. In particular, an undertaking cannot be imputed with having participated in an overall cartel either during a period prior to that during which it took part in the infringement or in respect of a market in which it has never operated.

230 The defendant observes that point 134 of the Decision concerns the single nature of the cartel and not the scope of the accusation concerning each of the undertakings. It is quite clear from the Decision that the Commission drew a distinction between the question relating to the single and continuous infringement and the question as to the extent to which each undertaking is held responsible for the infringement.

Findings of the Court

231 According to the case-law, an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel (see Case

T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 121, and *Gruber + Weber* v *Commission*, cited above, paragraph 140). Similarly, an undertaking which has participated in a single complex infringement by its own conduct, which was intended to play a part in bringing about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved (*Commission* v *Anic*, cited above, paragraph 203).

232 According to the applicants, it follows from the sixth paragraph of point 134 of the Decision that the Commission did not observe the principles laid down in that case-law.

233 However, that argument is based on an incorrect reading of point 134 of the Decision.

234 The passage in question forms part of the grounds set out under the heading 'Agreements and concerted practices' in which the Commission first set out its interpretation of the terms 'agreements' and 'concerted practices' (points 129 and 130 of the Decision) and then stated its reasons for considering that it was entitled to conclude that there had been a single continuous infringement, without its being necessary to categorise the infringement as exclusively one or other of those forms, namely as an agreement or as a concerted practice

(points 131 to 133 of the Decision). The Commission then observed, in point 134 of the Decision, that there may not have been consensus on all the elements of the cartel, that formal agreement may never be reached on all matters and that the participants may also show varying degrees of commitment to the cartel, but that none of these elements will prevent such an arrangement from constituting an agreement or a concerted practice for the purposes of Article 85(1) of the Treaty where there is a combination of parties with a single common and continuing objective. After the final passage cited, the Commission further observes that members may join or leave the cartel from time to time without its having to be treated as a new agreement with each change in participation.

235 It follows that the passage cited by the applicants cannot be understood otherwise than as clarifying the circumstances in which a cartel may in the Commission's view be regarded as a single continuous infringement, although the Commission does not deal with the issue of the imputation of responsibility for such an infringement to the undertakings that participated in it.

236 That interpretation of the Decision is also confirmed by point 148(b) thereof, where it is expressly stated that '[i]t is not alleged that each addressee of this Decision participated in each and every aspect of the anti-competitive arrangements set out or did so for the whole duration of the infringement' and that '[t]he role of each participant and the extent of its involvement is fully set out in this Decision'.

237 As regards the participation of the Henss/Isoplus group in the infringement found by the Commission, the applicants have not stated, in connection with that objection, to what degree the Commission imputed to them participation in an overall cartel either during a period prior to that during which they took part in

the infringement or in respect of a market in which they never operated. In that regard, it has been stated above, first, that the Commission, in the Decision, properly accused the Henss/Isoplus group of participating in the infringement from October 1991 and, second, that such participation had been taken into account, for the period before October 1994, only in respect of its membership of the cartel between the Danish producers in relation to the German market.

238 The objection put forward by the applicants must therefore be rejected.

(vi) The individual responsibility of the companies regarded as belonging to the Henss/Isoplus group

Arguments of the parties

239 The applicants dispute the Commission's assertion that it is not required to prove the involvement of each of the undertakings brought together in the Henss/Isoplus group as regards their conduct in the market before October 1994. In so far as, in that regard, the applicants must be regarded as legally independent of one another, since there was no Henss/Isoplus group, the Decision says nothing about why each applicant is held responsible for the participation in the illegal cartel. Nor is it clear from the Commission's use of the name 'Henss' in the Decision whether it was referring to Mr Henss in person, to the Henss/Isoplus group or to a Henss company, such as Henss Rosenheim or Henss Berlin.

240 As regards Isoplus Hohenberg, the applicants observe that it is a company governed by Austrian law, that Austria has been a member of the European Community only since 1 January 1995 and that the competition rules laid down in Article 53 of the EEA Agreement have been applicable only since 1 July 1994. Even when the problem of the principle of territoriality in competition law is taken into account, the Decision contains no finding of fact as regards the responsibility of Isoplus Hohenberg, under Article 85 of the Treaty or Article 53 of the EEA Agreement, for anti-competitive conduct before October 1994.

241 The defendant states that the four operating companies were presented as a single entity represented by Mr Henss. Their participation satisfied a manifest interest, as they were present in the German market in which prices remained low. For those reasons, the plea alleging that the Commission did not sufficiently prove that Isoplus Hohenberg, which had its registered office in Austria, participated in the cartel must be rejected.

Findings of the Court

242 As stated at paragraphs 54 to 66 above, the Commission correctly established that the Henss companies and the Isoplus companies participated in the cartel as a single economic entity, called in the Decision 'the Henss/Isoplus group' or 'Henss/Isoplus'. Consequently, it was not always relevant to state, in the Decision, whether the reference to 'Henss' was to a Henss company or to the Henss/Isoplus group. Similarly, in so far as the Decision refers to Mr Henss, it is also in his capacity as representative of the Henss companies and the Isoplus companies as a whole, which he controlled and represented within the cartel.

243 As regards the period before 1994, even though Mr Henss may have acted on behalf of Henss Rosenheim and Henss Berlin at meetings of the directors' club in connection with their commercial agency contracts in the German market, it none the less remains that at the same time he protected those two companies' own interests and the interests of Isoplus Hohenberg and Isoplus Sondershausen. As stated at paragraph 60 above, it follows from the notes taken by other participants that all the Henss companies and the Isoplus companies were brought together, in the discussions on the sharing of the German market, in a single entity called 'Isoplus' or 'Isoplus/Henss'.

244 Consequently, the Commission established to the requisite legal standard that each of the Henss companies and the Isoplus companies was a component of the Henss/Isoplus group and, for that reason, must be held responsible for the infringement committed by the group.

245 Isoplus Hohenberg was already a component of the Henss/Isoplus group before 1994. Since the Commission imputed to Isoplus Hohenberg, in that capacity, the infringement committed by the Henss/Isoplus group, consisting in a cartel covering, as regards the group, the German market, it cannot be accepted that the Commission imputed to it activities which, because of their geographical situation, fell outside the scope *ratione territoriae* of Article 85 of the Treaty.

246 It follows that the present objection must also be rejected.

247 to 286 ...

B — *Second plea in law, alleging breach of the rights of defence*

287 to 322 ...

3. Infringement of the right to be heard in connection with the translation of certain documents

Arguments of the parties

323 The applicants maintain that their right to be heard was infringed since the Commission did not make all the documents available to them in German. Thus, they did not receive translations of certain documents in the annexes to the statement of objections, to the further statement of objections and to the replies of other undertakings following the Commission's requests for information.

324 According to the applicants, the reflections of the Court of Justice in its judgment in Case C-274/96 *Bickel and Franz* [1998] ECR I-7367, concerning the right of citizens of the European Union to require that criminal proceedings be conducted in the mother tongue of the person concerned, apply to a proceeding before the Commission under Regulation No 17, which must be classified as criminal proceedings for the purpose of Articles 5 and 6 of the Convention. Proceedings before the Commission are subject to the general principle of equality of arms, which requires that not only the statement of objections and the decision but also all the annexes thereto be notified in the official language of the place in which the undertaking concerned has its registered office or in any other language of procedure which it may choose. In any event, the Commission must be under an obligation to translate the documents annexed to correspondence from other undertakings and from the complainant, since the Commission itself is required to have those documents translated into the various official languages of the Community.

325 The defendant observes that the procedural documents within the meaning of Regulation No 17, namely the statement of objections and the Decision, were sent to the undertakings concerned in German, pursuant to Article 3 of Regulation No 1 of the Council determining the languages to be used by the European Economic Community (OJ English Special Edition 1952-1958, p. 59). On the other hand, documents not from the Commission, which must provide information to the applicants and assist their defence, must be sent in the original version. Accordingly, there is no legal basis for the applicants' assertion that the Commission must translate those documents into the various official languages of the Community.

Findings of the Court

326 The applicants maintain that they should have received a translation not only of the documents annexed to the statement of objections but also of the annexes to the replies of the other undertakings to the Commission's requests for information.

327 First of all, it is settled case-law that the annexes to the statement of objections which do not emanate from the Commission are not 'documents' for the purposes of Article 3 of Regulation No 1, but must be regarded as supporting documentation on which the Commission relies and must therefore be brought to the attention of the addressee of the Decision as they are, so that the addressee can apprise himself of the interpretation of them which the Commission has adopted and on which it has based both its statement of objections and its Decision (Case T-141/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 21, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 53). It follows that the Commission, in communicating those annexes in their original language, did not infringe the right to be heard of the undertakings concerned.

328 Next, the body of the statement of objections which was sent to the applicants in German contains relevant extracts from the annexes thereto. That presentation therefore enabled them to determine precisely on what facts and legal reasoning the Commission had relied. The applicants were therefore capable of properly defending their rights (see also *Tréfilunion* v *Commission*, cited above, paragraph 21).

329 Last, the same considerations apply to the documents annexed by other undertakings to their replies to the Commission's requests for information. There is no provision of Community law that obliges the Commission to provide a translation of such documents which do not emanate from it; and since those documents must provide information to the undertakings concerned and assist their defence, they must also be brought to their attention as they are, so that the undertakings concerned can themselves evaluate the interpretation of them which the Commission has adopted and on which it has based its Decision.

330 Such a situation does not infringe the principle of equality of arms, since, as the Commission asserts, the original of the documents constitutes the only relevant evidence, both for the Commission and for the undertakings concerned.

331 It does not avail the applicants to seek a different interpretation from the foregoing of *Bickel and Franz*. In that judgment, the Court of Justice ruled in favour of the non-discriminatory application of a language system which conferred the right to require that criminal proceedings be conducted in the mother tongue of the persons concerned. However, the question as to whether, on grounds relating to the rights of defence, the written evidence must be translated into the language of the case was not addressed.

332 For those reasons, the objection alleging infringement of the right to be heard, in relation to the absence of a translation of those documents must be rejected.

4. Infringement of the right to be heard in relation to the deadlines for submitting observations

Arguments of the parties

333 The applicants maintain that their rights of defence have been prejudiced in so far as the Commission did not allow them sufficient time to submit their views on the entire file.

334 In that regard, they observe that, following the statement of objections, the Commission, by letter of 22 May 1997, sent numerous further documents with annexes which were not in German, while the deadline by which the addressees of the statement of objections were to submit their views was 30 June 1997. The Commission did not reply to a request from the applicants for further time and the observations on the statement of objections were submitted within the prescribed period. Then, the applicants received, by letter from the Commission of 19 September 1997, the replies to the statement of objections of other undertakings concerned and annexes, containing documents which were not translated into German, on which the Commission requested them to submit their observations by 10 October 1997. The applicants received further letters from the Commission, dated 24 September and 9 October 1997, containing documents which were also not translated. The applicants submitted their observations on 12 and 17 November 1997, while objecting to the course of action taken by the Commission. In spite of the applicants' objections at the hearing on 24 and 25 November 1997, the Hearing Officer admitted all the

evidence thus communicated. Furthermore, the final written observations submitted by the other undertakings were not brought to the applicants' knowledge.

335 The applicants observe that, if the Commission's notion that the annexes to the statement of objections and the further objections must not be served in the language of the place in which the undertaking has its registered office is accepted, the numerous documents in foreign languages must first, as far as the applicants are concerned, be translated into German, which takes some time.

336 As regards the Commission's assertion that the applicants were none the less in a position to submit observations in respect of the documents sent subsequently, the applicants observe that in order to protect their rights they were required to submit, within the short period allowed, brief observations which could not be elaborated with the desired care and detail. Each time, none the less, they expressly criticised the inadequacy of the period allowed.

337 Last, at the hearing the Commission's Agent handed counsel for Isoplus Hohenberg and Isoplus Sondershausen the partnership agreement of 15 January 1997, of which he was not aware at the time, and asked for various explanations in that regard. The applicants objected to the admission of this evidence by the Hearing Officer, when they had been given no time to comment on it.

338 The defendant contends that the various deadlines were adequate. Thus, the letter of 22 May 1997 had been accompanied only by a very small number of documents and it had been perfectly possible to adopt a position in regard to

them before the deadline. The same also applies to the observations on the documents not used by the Commission, which the undertakings exchanged among themselves. In so far as other undertakings submitted comments on the documents sent by the Commission, the Commission was not required to provide access to those comments to the applicants, since the Decision did not rely on them.

339 In the present case, the applicants acknowledge that they returned their observations within the prescribed periods. The applicants had sufficient time to reply to the statement of objections and to examine the Commission's letters of 19 and 24 September and 9 October 1997 and also the documents referred to in those letters. During the administrative procedure, which only ended with the hearing, the applicants no longer insisted on submitting further explanations in writing. Furthermore, the hearing was postponed from 21 and 22 October 1997 to 24 and 25 November 1997, so that sufficient time was available to submit a written reply.

340 As regards the partnership agreement of 15 January 1997, the applicants cannot claim that they were unable to comment adequately on that document. The Decision relies on that document only in so far as it helps to show that the applicants formed a group, managed by Mr Henss. The then operating companies were expressly questioned on that point during the written procedure and expressed their views in that regard, denying that any such group existed and, in particular, that Mr Henss held any shares in Isoplus Hohenberg or Isoplus Sondershausen. The question as to whether Mr Henss controlled those companies and, in particular, as to whether the partnership agreement dealt with that point could easily have been answered at the hearing.

341 Furthermore, the passages in which the applicants dealt with the partnership agreement in their letters of 8 and 9 December 1997 only criticised the Commission for disclosing that document at the hearing and did not deal with

the problem of control by Mr Henss. Consequently, even if the procedure in question had not been sufficient for the applicants to submit proper observations on the latter point, the rights of defence were protected in spite of everything.

Findings of the Court

342 The applicants claim that they did not have sufficient time to submit their views, first, on the documents sent before expiry of the period prescribed for submitting observations on the statement of objections, second, on the documents subsequently sent, on which the Commission requested comments by 10 October 1997, and, third, on the partnership agreement produced at the hearing, without the applicants being given time to prepare their comments.

343 First, as regards the documents sent on 22 May 1997 with a letter from the Commission, these were documents which, according to that letter, could have some relevance to the facts discussed in the statement of objections of 20 March 1997. Since the Commission had set a period of 14 weeks, ie until 1 July 1997, to submit comments on the statement of objections, the applicants still had more than a month when they received the letter of 22 May 1997 to prepare their views on the additional documents in question.

344 In that regard, Article 11(1) of Regulation No 99/63, which is intended to ensure that an addressee of a statement of objections has a sufficient period for the effective exercise of its rights of defence, provides that in fixing that period, which

is to be at least two weeks, the Commission is to have regard both to the time required for preparation of comments and to the urgency of the case. The period set must be assessed specifically in relation to the difficulty of the particular case. Thus, the Community Courts have held, in a number of cases involving voluminous documentation, that a period of two months was sufficient for submission of observations on the statement of objections (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 272 and 273, and *Suiker Unie and Others* v *Commission*, cited above, paragraphs 94 to 99).

345 A period of more than one month must therefore have been sufficient to submit observations on the documents sent on 22 May 1997, since the number of documents was small (annexes X1 to X9) and, moreover, their relevance was explained in the covering letter. As regards Powerpipe's complaint, which, together with the annexes thereto, was also enclosed with the letter of 22 May 1997, the most incriminating passages were likewise quoted in the statement of objections.

346 Second, as regards the documents subsequently sent, the applicants had a reasonable time up to the dates of the hearing. In its letter of 19 September 1997 accompanying the replies of other undertakings to the statement of objections, the Commission stated that any observations on those replies which the undertakings might wish to submit should be submitted by 10 October 1997 and that they would in any event have the opportunity to express their views at the hearing. On the other hand, when the Commission, by letter of 24 September 1997, sent certain documents found at the premises of Dansk Rørindustri, in order to provide full access to the file, it did not refer to the possibility of submitting observations or, consequently, provide a deadline for doing so. Nor, in the letter of 9 October 1997 accompanying a series of further documents to the statement of objections (Nos 1 to 28) and the replies of Løgstør, Powerpipe and DSD to the Commission's requests for information, was there any question of the possibility of submitting observations.

347 Since, in any event, the applicants had the opportunity to submit their observations on the documents sent by the Commission on 19 and 24 September and 9 October 1997 by 24 and 25 November 1997, the dates of the hearing, at the latest, they had between five weeks and two months to submit their views on those documents. The Court finds that in the circumstances of the present case, such a period was sufficient for the proper exercise of the rights of defence.

348 The relevance of all the documents sent on 9 October 1997 in relation to the statement of objections was clearly stated in the accompanying tables and, moreover, most of the additional documents to the statement of objections in question had, as stated in the accompanying letter, been covered in the exchange of documents between the undertakings.

349 Nor can the applicants rely on the fact that when they received the documents sent on 19 and 24 September and 9 October 1997 they did not yet know that they would have until 24 and 25 November 1997 to prepare their observations. Even if the applicants prepared their observations on those documents on the assumption that they had less time, they eventually had sufficient time to prepare them more thoroughly and to make any necessary adjustments, which Isoplus Hohenberg and Isoplus Sondershausen did, moreover, by supplementing their observations of 14 October 1997 by further observations on 12 November 1997.

350 Third, the applicants cannot claim that they were not in a position properly to make known their views on the partnership agreement of 15 January 1997, which was produced by the Commission at the hearing.

351 It is clear from the minutes of the hearing, and also from points 159 and 160 of the Decision, that the Commission relied on that partnership agreement when Isoplus Hohenberg and Isoplus Sondershausen were being heard in order to demonstrate that Mr Henss held shares in Isoplus Hohenberg and Isoplus stille Gesellschaft and to prove that there was a parent company, HFB KG, holding shares, following the transfer of the shares held by Mr and Mrs Henss and by Mr and Mrs Papsdorf, in Isoplus Rosenheim, Isoplus Sondershausen, Isoplus Hohenberg and Isoplus stille Gesellschaft.

352 Even if the applicants did not have the opportunity to prepare their observations on the partnership agreement before it was produced by the Commission at the hearing, they had already had the opportunity during the administrative procedure to submit their views on the conclusions that the Commission might draw from the information in that document. The Commission had stated in the statement of objections, when it had not yet discovered the partnership agreement, first, as regards Isoplus Hohenberg, that it appeared to be controlled by Mr Henss but that he was not mentioned as a shareholder in the local business register and, second, that there was no holding company that could be regarded as representing the Isoplus group. The applicants could therefore infer from the statement of objections, first, that the formation of HFB KG and the shareholdings in that company must be of interest to the Commission, since they would confirm its theory that the Henss companies and the Isoplus companies belonged to a single group, and, second, that the Commission was not yet aware of its formation. None the less, in their observations of 30 June 1997 on the statement of objections, Isoplus Hohenberg and Isoplus Sondershausen continued to provide the Commission with inaccurate information on that point, particularly as regards the shares which Mr Henss held in Isoplus Hohenberg.

353 In any event, after the hearing, in letters of 8 and 9 December 1997 and 13 February 1998, the applicants made known their observations on that document and on the circumstances in which it was presented to them. It follows that the Commission did not prevent the applicants from properly disclosing their views on the document in question.

354 It follows from all the foregoing that the applicants had the necessary time to submit their views on the facts, objections and circumstances alleged by the Commission.

355 Consequently, the objection cannot be upheld as regards the time-limits for submitting observations.

5. Breach of professional and business secrets

Arguments of the parties

356 The applicants maintain that the Commission and the Hearing Officer did not ensure that professional and business secrets were respected within the meaning of Article 20 of Regulation No 17, which covers, *inter alia*, details on relations between companies and the economic and legal reasons for which such relations were formed.

357 At the hearing, the Hearing Officer did not give the applicants the opportunity to explain, in confidence, the legal relations between, on the one hand, Isoplus Hohenberg and Isoplus Sondershausen and, on the other hand, Isoplus Rosenheim (then Henss Rosenheim and Henss Berlin). The partnership agreement of 15 January 1997 was presented in the presence of all the undertakings to which the statement of objections was addressed and of the complainant. In the absence of confidentiality, counsel for Isoplus Hohenberg and Isoplus Sondershausen and, in particular, Mr Henss, as director of Isoplus Rosenheim, had to refrain from disclosing details in that regard. The absence of confidentiality was challenged by counsel for Isoplus Hohenberg and Isoplus Sondershausen and by counsel for Isoplus Rosenheim in their letters of 8 and 9 December 1997.

358 As regards the partnership agreement of 15 January 1997, the applicants state that it is a document which illegally, and following an error, reached the commercial registry of the Amtsgericht Charlottenburg and that it has since been removed from the records of that registry. It contains details of shareholdings which are covered by Article 20 of Regulation No 17. That document sets out relations of trust ('Treuhandverhältnisse') which, mainly for reasons to do with competition, should not have been made public and which should always be treated confidentially as business secrets, since the owner or the real partner must not be disclosed. The applicants contend that they have shown, in their application, the precise circumstances which justify a legitimate interest in having those trust relations kept secret.

359 Furthermore, the secrecy or confidentiality which must be provided during proceedings in competition matters before the Commission, including at the hearing, were not ensured in the present case, since extracts from the hearing were published in the Danish newspapers in 1998. Confidential parts of the present proceedings had appeared in the press as early as the spring of 1996, which, at the time, prompted protests on the part of the applicants, in the reply of the Henss companies and in the reply of 24 April 1996 of Isoplus Hohenberg to the request for information of 13 March 1996 ('Isoplus Hohenberg's reply').

360 The defendant contends that it did not infringe Article 20 of Regulation No 17 when discussing the partnership agreement of 15 January 1997, since that agreement was lodged at the commercial registry and, consequently, was available to everyone. Furthermore, Mr Henss confirmed that assessment at the hearing and also stated that only the strategies implemented to assist the structure of the group were covered by business secrecy.

361 The applicants have also failed to show how the information in the partnership agreement was in the nature of business secrets. In that regard, the Commission emphasises that the interest in the non-disclosure of information which, if

communicated to third parties, might harm the interests of the person who has provided it is protected only in so far as it is a legitimate interest.

362 Even if the Commission had been in breach of its obligation to respect business secrecy at the hearing, that would not make the Decision illegal in itself. The alleged breach, namely the fact that other undertakings became aware of the actual structure of the shareholdings in the Henss/Isoplus group, did not have any impact on the contents of the Decision. The defendant emphasises that its officers did not allow anything to be revealed outside the hearings.

Findings of the Court

363 Article 214 of the Treaty (now Article 287 EC) requires officials and other servants of the institutions of the Community not to disclose information in their possession of the kind covered by the obligation of professional secrecy. Article 20 of Regulation No 17, which implements that provision in regard to the rules applicable to undertakings, contains in paragraph (2) a special provision worded as follows: 'Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy'.

364 The provisions of Articles 19 and 21 of Regulation No 17, the application of which is thus reserved, deal with the Commission's obligations in regard to hearings and the publication of decisions. It follows that the obligation of professional secrecy laid down in Article 20(2) is mitigated in regard to third parties on whom Article 19(2) confers the right to be heard, that is to say in regard, in particular, to a third party who has made a complaint. The Commission may communicate to such a party certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the

proper conduct of the investigation. However, that power does not apply to all documents of the kind covered by the obligation of professional secrecy. Article 21, which provides for the publication of certain decisions, requires the Commission to have regard to the legitimate interest of undertakings in the protection of their business secrets. Although they deal with particular situations, those provisions must be regarded as the expression of a general principle which applies during the course of the administrative procedure (Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraphs 27 and 28).

365 As regards the conduct of the hearing, Article 9(3) of Regulation No 99/63 provides that hearings are not to be public, that persons are to be heard separately or in the presence of other persons summoned to attend and that, in the latter case, regard must be had to the legitimate interest of the undertakings in the protection of their business secrets.

366 The applicants have failed to show to what extent the Commission disclosed business secrets at the hearing of Isoplus Hohenberg and Isoplus Sondershausen, in the presence of the undertaking which had submitted a complaint and of other undertakings to which the statement of objections had been addressed.

367 As regards the partnership agreement of 15 January 1997, it should be observed, first, that the applicants merely claim that that document was placed on the business register following an error, without specifying to whom that error is attributable, and that its entry on the register was illegal, without adducing the slightest evidence in that regard. In those circumstances, the Commission is not to be criticised for having used such evidence. Second, as regards the public nature of the information in that agreement, at the hearing Mr Henss, who attended in his capacity as director of Isoplus Rosenheim, confirmed that it was a public document, stating that only the reasons for the operations described therein, which were connected to the strategy of the undertakings concerned, were business secrets. Neither the director of Isoplus Hohenberg and Isoplus Sondershausen nor their counsel disputed that point of view.

368 Second, as regards the failure to conduct the hearing of Isoplus Hohenberg and Isoplus Sondershausen in private, the applicants have not adduced the slightest evidence that any information covered by business secrecy was communicated to third parties by the Commission at that hearing. In that regard, the Commission is not to be criticised for having passed on information which the applicants had communicated to it in confidence. It is clear from the minutes of the hearing that in its questions to Isoplus Hohenberg and Isoplus Sondershausen about their connections with the Henss companies, the Commission did not disclose any information other than the position regarding those companies which had just been described by their counsel in his opening speech at the hearing and, following the hearing, information from public registers.

369 Third, as regards the disclosure in the press of confidential information used during the administrative procedure, the applicants have provided no details of the confidential information which they alleged to have been revealed in those press articles during the administrative procedure.

370 Furthermore, even on the assumption that Commission officials were responsible for leaks reported in the press, which is not, however, admitted by the Commission or proved by the applicant, that would in any event not affect the legality of the Decision, since it has not been proved that the Decision would not in fact have been adopted or would have been different had the disputed statements not been made (*United Brands* v *Commission*, cited above, paragraph 286). In the present case, the applicants have adduced no evidence to support such a conclusion.

371 It follows that the objection relating to breach of professional and business secrecy must be rejected.

6. Infringement of the provisions relating to the hearing of witnesses

Arguments of the parties

372 The applicants accuse the Commission of infringing Article 3(3) of Regulation No 99/63 and Article 19 of Regulation No 17 by not hearing the witnesses proposed by the applicants.

373 The applicants observe that, pursuant to Article 3 of Regulation No 99/63, the undertakings concerned may propose that the Commission hear persons who may corroborate the facts on which they rely. In their observations on the statement of objections, Isoplus Hohenberg and Isoplus Sondershausen proposed, by letter of 30 June 1997, that the Commission should hear a number of persons, including Mr Henss. Isoplus Rosenheim, by letter of the same date, also proposed that certain persons be heard as witnesses. By letter of 16 September 1997, however, the Commission replied that, pursuant to Article 3(3) of Regulation No 99/63, it was for the undertakings themselves to ensure that the persons concerned attended the hearing and to call them as witnesses, pointing out that it was not a tribunal, that it had no powers to compel witnesses to attend a hearing and that it was also unable to administer an oath. In that regard, Isoplus Hohenberg or Isoplus Sondershausen again stated, by letter of 30 September 1997, that the designated witnesses were not connected to their companies but to competitors and that therefore it had not been possible to compel those witnesses to appear. Similarly, all the witnesses whom Isoplus Rosenheim had requested to be heard were not connected with the applicants' undertakings but with Powerpipe and other competitors. However, neither the officials responsible for competition within the Commission nor the Hearing Officer summoned the persons concerned as witnesses. In the absence of a summons, those persons did not appear and could not therefore be heard as witnesses by the Commission in order to establish the facts in respect of which the applicants had requested their evidence.

374 As regards Mr Henss, although he had been present at the hearing, in his capacity as director of Isoplus Rosenheim, he was not heard officially, since he had not been called by the Hearing Officer. The applicants accept that a formal hearing of Mr Henss would have been rendered superfluous in part by the observations made at the hearing by counsel for Isoplus Rosenheim. None the less, in the absence of a confidential hearing, Mr Henss, in his capacity as director of Isoplus Rosenheim, had to refrain from disclosing certain details.

375 The applicants observe that, if the witnesses had been summoned by the Commission and if they had then been questioned or heard, their evidence would have led the Commission to conclude that Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen or the Henss/Isoplus group had not participated in an infringement of Article 85 of the Treaty before the end of 1994 or taken part in measures to boycott Powerpipe. One witness was also requested for the purpose of confirming the fact that the 1994 European price list had not been drawn up by Mr Henss or Henss Rosenheim.

376 According to the applicants, Article 3(3) of Regulation No 99/63 is connected to the general principle of the right to be heard and to the principle laid down in Article 6 of the Convention and, in particular, paragraph (3)(d), concerning a person's right to obtain the attendance and examination of witnesses on his behalf and the right to examine witnesses against him. If, in a proceeding pursuant to Regulation No 17, some of the undertakings concerned request that certain persons be called and heard within the meaning of Article 3(3) of Regulation No 99/63, the Commission is required as a matter of principle to call and hear those persons, even if it is unable to impose penalties in the event of non-appearance. Only in certain cases, where there are grounds for doing so, can the Commission refuse such requests by individual decision.

377 Although it is true that the Commission is not a 'tribunal' within the meaning of Article 6 of the Convention, that does not mean that the other guarantees laid down in that article do not apply to proceedings before it. Proceedings conducted

by the Commission for the two-fold purpose of bringing an end to an infringement of the competition rules and of imposing a fine are criminal proceedings for the purposes of Article 6 of the Convention. The Commission is therefore required to observe that article in its entirety and, accordingly, paragraph (3)(d) thereof.

378 The defendant states that Regulation No 99/63 does not authorise the hearing of 'witnesses' within the legal meaning of the word. Article 3(3) of Regulation No 99/63 does not refer to witnesses, but is merely based on the right of the persons concerned in relation to the use of certain evidence. The Commission has no power and, *a fortiori*, is under no obligation to call any witnesses to give evidence on an undertaking's behalf whom the undertaking cannot itself persuade to give evidence. Furthermore, contrary to the applicants' submission, the Commission did not refuse to hear the persons proposed.

379 As regards Article 6 of the Convention, the Commission is not a 'tribunal' for the purpose of that provision. The Commission was carrying out the supervisory task entrusted to it by the Community competition rules, subject to review by the Court of First Instance and the Court of Justice. In any event, the fact that the relevant procedural rules, notably those laid down in Regulation No 17, make no provision for compelling witnesses to appear on the undertaking's behalf is not contrary to the concept of equality of arms expressed in Article 6(3)(d) of the Convention. Nor does the procedure before the Commission involve any witnesses 'against' the undertaking concerned, since the essential evidence on which the Commission can base its objections consists of the documents and information it can request from the competent authorities of the Member States and from the undertakings and associations of undertakings pursuant to Article 11 of Regulation No 17.

380 Furthermore, the Court of First Instance, in reviewing the Commission's performance of its task, is able to compel witnesses to appear, including witnesses on behalf of the undertaking concerned. Before the Court of First

Instance, 'inequality' of arms prevails, since the undertakings can rely on witness statements in order to refute the accusations made by the Commission in its decision, whereas the Commission cannot rely on testimony to support accusations that are not already proved by evidence in the decision and the statement of objections.

Findings of the Court

381 Article 19(2) of Regulation No 17 provides that, if natural or legal persons showing a sufficient interest apply to be heard, their application must be granted. According to Article 5 of Regulation No 99/63, the Commission is to afford them the opportunity of making known their views in writing within such time limit as it shall fix. Similarly, Article 7(1) of Regulation No 99/63 provides that the Commission is under an obligation to afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment. Under Article 7(2), the Commission may likewise afford to any other person the opportunity of expressing his views orally.

382 According to Article 19(2) of Regulation No 17 and Articles 5 and 7 of Regulation No 99/63, the Commission is required to hear natural or legal persons who have a sufficient legal interest only in so far as such persons actually apply to be heard (Case 43/85 *Ancides* v *Commission* [1987] ECR 3131, paragraph 8). In the present case, the persons proposed as witnesses by the applicants did not at any time indicate a desire to be heard.

383 Next, Article 3(3) of Regulation No 99/63 provides that undertakings and associations of undertakings forming the subject of a proceeding pursuant to Regulation No 17 'may also propose that the Commission hear persons who may corroborate [the] facts [on which they rely]'. In such a case, it appears from Article 7 of Regulation No 99/63 that the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 18). The guarantee of the rights of the defence does not require the Commission to hear witnesses put forward by the parties concerned, where it considers that the preliminary investigation of the case has been sufficient (Case 9/83 *Eisen und Metall Aktiengesellschaft* v *Commission* [1984] ECR 2071, paragraph 32).

384 In the present case, the applicants have adduced no evidence to show that, in not hearing the persons proposed, the Commission unduly restricted the inquiry into the matter and thus limited the applicants' opportunity to provide explanations of the various aspects of the problems raised by the Commission's objections (*VBVB and VBBB* v *Commission*, paragraph 18).

385 The applicants did not state in their application to what extent the testimony of the witnesses referred to would have been able to show that the Henss/Isoplus group or the applicants had not participated in a cartel at European level since 10 October 1991, but only from the end of 1994. In that regard, even if the testimony requested had confirmed that neither Mr Henss nor Isoplus Hohenberg obtained internal EuHP information from that body before being admitted to it, that would not have made it possible to refute the Commission's objections in regard to the applicants. The same applies to the question as to whether Mr Henss or Henss Rosenheim participated in drawing up the price list used within the European cartel. Furthermore, in the light of the evidence set out at paragraphs 264 to 277 above, the Commission was entitled to consider that

there was no need to hear the requested testimony that Powerpipe had suggested to Isoplus Hohenberg and Isoplus Sondershausen that they should participate in an illegal cartel.

386 In so far as the proposal to hear witnesses concerns Mr Henss, moreover, the latter was present at the hearing, in his capacity as director of Isoplus Rosenheim, but neither counsel for that undertaking nor counsel for Isoplus Hohenberg and Isoplus Sondershausen requested that he give evidence. It follows from the minutes of the hearing that Mr Henss spoke only during the hearing of Isoplus Hohenberg and Isoplus Sondershausen, following a question put by the Hearing Officer about the partnership agreement.

387 It also follows from those minutes that at the hearing the applicants did not request that Mr Bech, connected with Løgstør, whose testimony had also been requested, be heard, in spite of the fact that he was also present at the hearing.

388 It follows from all the foregoing that in not acceding to the proposals to hear witnesses the Commission correctly applied Article 19 of Regulation No 17 and the provisions of Regulation No 99/63.

389 Last, the applicants rely on Article 6(3)(d) of the Convention, which provides that '[e]veryone charged with a criminal offence has the following minimum rights:... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

390 In that regard, it is settled case-law that the Commission is not a 'tribunal' within the meaning of Article 6 of the Convention (*Van Landewyck and Others* v *Commission*, cited above, paragraph 81, Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 7, and *Shell* v *Commission*, cited above, paragraph 39). Moreover, Article 15(4) of Regulation No 17 specifically provides that decisions of the Commission to impose fines for infringement of competition law are not of a criminal law nature (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235).

391 However, even though the Commission is not a 'tribunal' within the meaning of Article 6 of the Convention, and even though the fines imposed by the Commission are not of a criminal law nature, the Commission must nevertheless observe the general principles of Community law during the administrative procedure (*Musique diffusion française and Others* v *Commission*, paragraph 8, and *Shell* v *Commission*, paragraph 39).

392 In that regard, the fact that the provisions of Community competition law do not place the Commission under an obligation to call witnesses whom the undertaking concerned wishes to give evidence on its behalf is not contrary to those principles. Although the Commission may hear natural or legal persons where it deems it necessary to do so, it is not entitled to call witnesses to testify against the undertaking concerned without their agreement.

393 For all those reasons, the objection relating to the failure to hear witnesses must be rejected.

7. Infringement of the provisions relating to the terms of reference of Hearing Officers

Arguments of the parties

394 The applicants accuse the Commission of having infringed Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of Hearing Officers in competition procedures before the Commission (OJ 1994 L 330, p. 67), since, in the present proceedings, the Hearing Officer drew up a report even though he had not been present during the greater part of the hearing.

395 In that regard, the applicants state that the Hearing Officer who had prepared and directed the hearing, Mr Gilchrist, retired on 31 December 1997. Mr Daout, who took over as Hearing Officer from 1 January 1998, was present at the hearing on 24 November 1997 but did not take part in the hearing on 25 November 1997. It follows that Mr Daout only partly attended the hearing of Isoplus Rosenheim and Henss Berlin, which took place on the evening of 24 November 1997 and continued on 25 November 1997. He took no part at all in the hearing of Isoplus Hohenberg and Isoplus Sondershausen, which took place exclusively on 25 November 1997. The draft minutes of the hearing were sent by letter from the Hearing Officer, Mr Daout, of 3 April 1998. Following approval of the minutes, the Hearing Officer drew up the report of the hearing, in accordance with Article 8 of Decision 94/810.

396 The applicants maintain that that course of conduct infringed their rights of defence. Although the new Hearing Officer made a report, pursuant to Article 8 of Decision 94/810, following approval of the minutes, he did so without having attended the greater part of the hearing and, more particularly, the part involving

Isoplus Hohenberg and Isoplus Sondershausen. In the latter case, the Hearing Officer cannot have obtained a personal impression of the Henss/Isoplus group or of all the applicants; nor was he able, in particular, to put questions. In the absence of an objective report from the Hearing Officer, pursuant to Article 8 of Decision 94/810, the Commission's decision-making process which culminated in the adoption of the contested decision cannot have had an objective basis.

397 If the retired Hearing Officer drew up the report in question, as the Commission claims, the applicants also rely, in the alternative, on breach of the essential procedural forms defined in Decision 94/810 and Regulation No 99/63, since the report was drawn up before approval of the minutes of the hearing and without the Hearing Officer having been aware of and considered the other direct observations of Isoplus Hohenberg, Isoplus Sondershausen and Isoplus Rosenheim. Nor, in those circumstances, was there a complete, accurate report, something which prevented the decision-making procedure from being objective.

398 Notwithstanding the fact that the Hearing Officer's report on the hearing or on the stages of the procedure followed pursuant to Regulation No 17 does not have to be transmitted to the undertakings concerned to enable them to study it or comment on it, the report of the independent Hearing Officer is none the less of decisive importance in proceedings to establish infringements in competition matters, as acknowledged by the Commission, which recognises that the report, although not binding on it, none the less constitutes advice.

399 The defendant observes that it was Mr Gilchrist who drew up the report provided for in Article 8 of Decision 94/810. The fact that the Hearing Officer did not have the approved version of the minutes of the hearing is irrelevant, since those minutes are for the information of persons who are not present at the hearing, namely the members of the Advisory Committee and of the Commission. Since, owing to his function, the Hearing Officer was required to attend the entire hearing, the minutes were not intended for his information. The Commission

maintains that the Hearing Officer's report reflects the state of the discussions at the time of the hearing. Last, the report is in the nature of an opinion, which the Commission is not bound to follow.

400 In that regard, the Commission further observes that the hearing is normally preceded by the submission of written observations concerning the objections and therefore constitutes an advanced stage in the procedure. Since the hearing comes to an end immediately the sitting is closed, the minutes merely set out what occurred at the sitting. The opportunity given to the parties to check the accuracy of the minutes does not in any way constitute an extension of the hearing.

401 As regards the Hearing Officer's report, it is not precluded that the Commission should take account of observations submitted after the hearing. Article 8 of Decision 94/810 expressly provides that the Hearing Officer may suggest that further information be obtained if the evidence subsequently adduced makes a new hearing necessary. In the present case, that did not occur.

402 As regards Mr Daout's temporary absence from the hearing, that cannot have impinged on the validity of the Decision, since at the material time he did not yet occupy the post of Hearing Officer.

Findings of the Court

403 Article 2(1) of Decision 94/810 provides that the Hearing Officer is to ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. In that context, the Hearing

Officer is to ensure, in particular, that in the preparation of draft Commission decisions in competition cases, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

404 Article 8 of Decision 94/810 provides that the Hearing Officer is to report to the Director-General for Competition on the hearing and the conclusions he draws from it and that he may make observations on the further progress of the proceedings; such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

405 Furthermore, it follows from Article 9(4) of Regulation No 99/63 and from Article 7(4) of Decision 94/810 that the essential content of the statement made by each person heard is to be recorded in minutes which are to be read and approved by that person. Under Article 7(4) of Decision 94/810, the Hearing Officer is responsible for ensuring that that is done.

406 In the present case, the report provided for in Article 8 of Decision 94/810 was drawn up by Mr Gilchrist, who submitted it to the Commission on 26 November 1997. Consequently, the applicants' complaint must be understood as meaning that they object to the fact that the Hearing Officer drew up the report before the minutes of the meeting had been approved and without being apprised of the applicants' observations on those minutes.

407 First of all, neither Regulation No 99/63 nor Decision 94/810 precludes the Hearing Officer from submitting the report provided for in Article 8 of Decision 94/810 before the minutes of the hearing have been approved, pursuant to Article 9(4) of Regulation No 99/63 and Article 7(4) of Decision 94/810, by each person heard. The Hearing Officer's report constitutes a purely internal

Commission document, which is not intended to supplement or correct the undertakings' arguments and which therefore does not constitute a decisive factor which the Community judicature must take into account when exercising its power of review (see paragraph 40 above).

408 The purpose of Article 9(4) of Regulation No 99/63 is to assure the persons heard that the minutes contain a true record of the substance of what they have said (*ICI* v *Commission*, paragraph 29, and Case 51/69 *Bayer* v *Commission* [1972] ECR 745, paragraph 17). The minutes are therefore submitted to the parties for their approval in order to enable them to check what they said at the hearing, not for the purpose of adducing fresh evidence which the Hearing Officer would be obliged to take into account.

409 The applicants do not show to what extent the provisional nature of the minutes available to the Hearing Officer when drawing up his report prevented him from reporting to the Director-General for competition in circumstances conducive to the objectivity of the procedure.

410 It is settled case-law that the provisional nature of the minutes of the hearing submitted to the Advisory Committee and the Commission could only amount to a defect in the administrative procedure capable of vitiating the decision which results therefrom if the document in question was drawn up in such a way as to be misleading in a material respect (Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 17). In any event, since the Commission had in its possession, in addition to the provisional minutes, the undertakings' remarks and observations on those minutes, it must be concluded that the members of the Commission were informed of all the relevant facts before adopting the decision (see *Petrofina* v *Commission*, paragraph 44). It cannot be contended that the various bodies involved in drawing up the final decision were not properly informed of the arguments put forward by the undertakings in response to the objections notified to them by the Commission and to the evidence presented by

the Commission in support of those objections (see *Petrofina* v *Commission*, paragraph 53, and *Hüls* v *Commission*, paragraph 86).

411 The Court of Justice has held, moreover, that an irregularity at the time the minutes were drawn up could affect the legality of the decision only if the record of statements made at the hearing were inaccurate (*ICI* v *Commission*, cited above, paragraph 31, and *Bayer* v *Commission*, cited above, paragraph 17). In the present case, the applicants have not shown how the minutes did not constitute a fair and accurate report of the hearing (see *Petrofina* v *Commission*, cited above, paragraph 45). On the other hand, it is not disputed that the corrections to the draft minutes proposed by the applicants, in particular as regards the presence of Mr Daout at the hearing, were included in the final version of the minutes.

412 It follows from all the foregoing that the fact that, in the present case, the Hearing Officer drafted his report before the minutes of the hearing had been approved did not affect the lawfulness of the subsequent decision.

413 Accordingly, the objection alleging infringement of the provisions on the terms of reference of Hearing Officers must be rejected.

414 It follows that the plea in law alleging infringement of the rights of defence must be rejected in its entirety.

415 to 496 ...

D — *Fourth plea in law, alleging errors of law and of assessment in setting the amount of the fine*

497 to 518 ...

2. Infringement of Article 15(2) of Regulation No 17 as regards the joint and several liability of the five applicants

Arguments of the parties

519 The applicants submit that the Commission was wrong to impose a joint fine on them. In that regard, they observe, first of all, that if the Henss/Isoplus group is not recognised as having the capacity of a group, quasi-group or '*de facto* group', a fine should be imposed on each individual applicant. The applicants claim that their situation cannot be compared with that in *Metsä-Serla and Others* v *Commission*, where the companies were held responsible for the anti-competitive conduct of the association of undertakings Finnboard in such a way that each of them was found to have deliberately infringed Article 85 of the Treaty.

520 Next, the applicants claim that it follows from Article 15(2) of Regulation No 17 that where a number of undertakings are held responsible, joint and several liability for the fine must be limited, for each of the jointly liable undertakings, to the maximum amount of 10% of its turnover during the last financial year. In the present case, the applicants were ordered, jointly and severally, to pay a sum which, for each of them, exceeds the maximum amount of 10% of its turnover. Accordingly, if one of them became insolvent, the others would necessarily have to pay a fine greater than 10% of their turnover, which would be contrary to the

spirit and the letter of Article 15(2) of Regulation No 17. In that regard, the applicants observe that in *Metsä-Serla and Others* v *Commission* the amount of their joint and several liability was determined individually, with a different amount for each undertaking, so that the maximum amount of the fine was observed for each of them.

521 The defendant observes that the four Henss and Isoplus companies had to be treated as a single undertaking for the purposes of Article 15 of Regulation No 17, since they participated in the infringement, during the infringement period, under a single direction, and it was impossible to ascertain the extent to which each of them participated. The Commission was therefore correct to apply the maximum amount laid down in Article 15 of Regulation No 17 to the cumulative turnover of the three operating companies remaining at the time when the decision was adopted and to impose a joint fine on them. As regards, HFB KG and HFB GmbH, the Commission considers that their liability follows from that of the operating companies, so that they, as parties to the same undertaking, could be included among the joint and several debtors.

Findings of the Court

522 The applicants criticise the Commission for having held them jointly and severally liable for the infringement committed by the Henss/Isoplus group.

523 Since it has been held that the Decision contains, in any event, an error of law in so far as HFB KG and HFB GmbH were held jointly and severally liable for the fine imposed on the Henss/Isoplus group (see paragraphs 101 to 108 above), there is no need to consider the present plea in so far as it concerns those two companies.

524 As regards Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen, it should be observed that, as held in paragraphs 54 to 68 above, the activities within the cartel of Henss Berlin and Henss Rosenheim, now Isoplus Rosenheim, and of Isoplus Hohenberg and Isoplus Sondershausen must be regarded as the conduct of a single economic entity, under single control and pursuing a long-term economic objective common to its various components.

525 Since Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen must, as regards their activities in the cartel, be deemed a single economic unit, they are jointly and severally responsible for the conduct complained of (Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41).

526 There is even more reason for holding those companies jointly and severally responsible in the present case since, at the time of the infringement, there was no person at the head of all the companies belonging to the Henss/Isoplus group to which, as the person responsible for the acts of the group, responsibility for the infringement could have been imputed. In that regard, the Court of First Instance has held that, in a situation in which, owing to the family composition of the group and the dispersal of its shareholders, it may be impossible or exceedingly difficult to identify the person at its head to which, as the person responsible for coordinating the group's activities, responsibility for the infringements committed by its various component companies may be imputed, the Commission is entitled, to hold the subsidiaries jointly and severally responsible for all the acts of the group in order to ensure that the formal separation between those companies, resulting from their separate legal personality, cannot prevent a finding that they have acted jointly on the market for the purposes of applying the competition rules. Clearly, that analysis, relating to a situation in which it was impossible or excessively difficult to identify the person at the head of a group to which the infringements committed by the various component companies might be imputed, applies *a fortiori* to a situation in which no such person exists.

527 Furthermore, it follows from the case-law that Article 15(2) of Regulation No 17 must be interpreted as meaning that an undertaking may be declared jointly and severally liable with another undertaking for payment of a fine imposed on the latter undertaking which has committed an infringement intentionally or negligently, provided that the Commission demonstrates, in the same decision, that the infringement could also have been found to have been committed by the undertaking held jointly and severally liable for the fine (*Metsä-Serla and Others* v *Commission*, paragraphs 42 to 45, and *Finnboard* v *Commission*, paragraphs 27 to 28 and 34 to 38). The case in which those judgments were delivered involved an association of undertakings, Finnboard, on which the Commission had imposed a fine for which the member companies of the association were held jointly and severally liable. In that regard, the Community judicature considered that the Commission was correct to find each of the applicants jointly and severally liable with Finnboard, since the economic and legal links between the undertakings concerned were such that Finnboard had merely acted as an auxiliary organ of each of those companies and that it was bound to follow the instructions issued by each of the applicants and could not adopt conduct on the market independently of any of them, so that Finnboard in practice formed an economic unit with each of its member companies (*Metsä-Serla and Others* v *Commission*, paragraphs 58 to 59). In the present case, the situation was such that Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen acted as auxiliary organs of the *de facto* Henss/Isoplus group and were bound to follow the instructions issued by their single directorate and could not adopt conduct on the market independently. It is self-evident that in such circumstances each of the companies may be held jointly and severally responsible for the infringement found to have been committed by the Henss/Isoplus group which itself constitutes the undertaking that committed the infringement for the purposes of Article 85 of the Treaty.

528 Contrary to the applicants' assertion, the fact that several companies are held jointly and severally liable for a fine does not mean, as regards the application of the maximum amount of 10% of turnover laid down by Article 15(2) of Regulation No 17, that the amount of the fine is limited, for the companies held jointly and severally responsible, to 10% of the turnover achieved by each of those companies during the last financial year. The maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the economic entity acting as an 'undertaking' for the purposes of Article 85 of the Treaty.

529 In that regard, it is appropriate to affirm the settled case-law relating to infringements by associations of undertakings for which the maximum amount of 10% of turnover laid down in Article 15(2) of Regulation No 17 must be calculated, where appropriate, by reference to the turnover achieved by all the members of the associations of undertakings, at least where, by virtue of its internal rules, the association is able to bind its members (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 136, and Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385). The Court of First Instance held that such an interpretation is justified by the fact that, in setting fines, regard may be had, *inter alia*, to the influence which an association of undertakings has been able to exert on the market, which does not depend on its own 'turnover', which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power (*CB and Europay* v *Commission*, paragraphs 136 and 137, and *SPO and Others* v *Commission*, paragraph 385). Similarly, in the case of an 'undertaking' constituted by a group of companies acting as a single economic unit, only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question.

530 Thus, the Court of First Instance approved a Commission decision in so far as the Commission had imposed a fine in respect of an infringement for which the sister companies were held jointly and severally responsible and had taken specific account of their total turnover.

531 In that regard, the applicants are incorrect to claim that the solution adopted in *Metsä-Serla and Others* v *Commission*, where each applicant was held jointly and severally responsible, up to a certain amount, for the fine imposed on the association of undertakings, should be applied to them. That solution may be explained by the fact that in that situation the association Finnboard formed an economic entity with each of its member companies, taken individually. In the present case, on the other hand, there was only one single economic entity to which Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen belonged.

532 For those reasons, the objection relating to the joint and several responsibility of Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen must be rejected.

3. Incorrect assessment of the turnover of the undertakings concerned

Arguments of the parties

533 The applicants claim that the Commission, in adjusting the fine in order not to exceed the maximum amount of 10% of turnover laid down in Article 15(2) of Regulation No 17, could not begin with an overall turnover figure for the Henss/Isoplus group, for 1997, of ECU 49 500 000. According to the applicants, the maximum amount must be ECU 49 055 000, corresponding to the overall turnover as adjusted by deducting internal sales between Isoplus Hohenberg, Isoplus Sondershausen and Isoplus Rosenheim. It follows that the Commission was only entitled to impose a fine of ECU 4 905 000.

534 In that regard, the applicants state that they are selecting the conversion rate as definitively defined by the European Central Bank in May 1998 for the ecu and the euro from 1 January 1999.

535 The applicants further claim that the Commission cannot justify setting the fine at ECU 4 950 000 on the ground that, in calculating the overall turnover of the Henss/Isoplus group, it also had to take sales of steel pipes into consideration. Under Article 15(2) of Regulation No 17, the turnover achieved on a different product destined for a different market from that in which the infringement was committed cannot enter in this instance into the calculation of the overall turnover of the Henss/Isoplus group.

536 The defendant observes that the applicants' argument that the fine is too high by ECU 45 000 is unfounded. First, the applicants do not apply the appropriate conversion rate, namely the average conversion rate between the national currency and the ECU for the reference year 1997; and, second, the applicants should have taken into account, for Isoplus Rosenheim, not only the turnover in respect of plastic pipes but also the overall business turnover referred to in Article 15(2) of Regulation No 17, without distinction by product category.

Findings of the Court

537 When reducing the amount of the fine imposed in the Henss/Isoplus group in order to take account of the maximum amount laid down in Article 15(2) of Regulation No 17, the Commission relied on a turnover of approximately ECU 49 500 000.

538 The Commission stated in its defence that in doing so it relied on all the turnover figures achieved by Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen in 1997, after deducting their internal sales, as communicated by those companies during the administrative procedure. At the same place, the Commission stated that those figures, being expressed in national currencies, were converted into ecu using the average conversion rate between the national currency and the ecu for the reference year 1997.

539 It must be held that the amount taken in the Decision as the overall turnover of those three companies corresponds to the figure resulting, according to the method explained by the Commission, from the figures communicated by the applicants.

540 In that regard, the applicants cannot criticise the Commission, as concerns Isoplus Rosenheim, for having relied on the latter's overall turnover, without confining itself to sales of pre-insulated pipes destined for the district heating market.

541 It has consistently been held that the turnover referred to in Article 15(2) of Regulation No 17 as the upper limit of a fine must be understood as referring to the total turnover of the undertaking concerned, which alone gives an approximate indication of its size and influence on the market (*Musique diffusion française and Others* v *Commission*, paragraph 119, Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 376, and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 160). Provided it remains within the limit laid down by Article 15(2), the Commission may choose which turnover to take in terms of territory and products in order to determine the fine.

542 Next, as regards the conversion into ecu of the figures expressed in national currencies, the Commission was correct to apply the average conversion rate between the national currency and the ecu for the reference year 1997.

543 As the Court of First Instance has held, in calculating the fine on the basis of turnover in a given reference year, expressed in national currency, the Commission is correct to convert that turnover into ecu on the basis of the average exchange rate for that reference year, and not on the basis of the exchange rate in force on the date of adoption of the Decision (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraphs 336 to 341).

544 For those reasons, the objection alleging incorrect assessment of the turnover figure must be rejected.

4. Infringement of the rights of defence in assessing the aggravating circumstances

Arguments of the parties

545 The applicants claim, as regards the aggravating circumstances referred to in point 179 of the Decision, that the Commission infringed their fundamental right to defend themselves in so far as it concluded that the Henss/Isoplus group had engaged in 'a systematic attempt to mislead the Commission as to the true relationship between the companies of the group', which constituted 'a deliberate obstruction of the Commission's investigations'.

546 In that regard, the applicants observe that, in a procedure capable of leading to the imposition of fines, in which the question of the existence of a group, a quasi-group or a *de facto* group arises, the right of defence entails the right to challenge certain relationships between natural or legal persons from the perspective of company law and not to disclose certain fiduciary relationships. The very essence of a trust means that the identity of the principal is revealed only to certain authorities, such as the financial authorities and the central bank, to the exclusion of third parties to a dispute and other authorities and courts, since the reason for establishing fiduciary relationships is in most cases specifically the desire to keep a secret from third parties. Accordingly, the applicants had to require that their legal advisers observed the professional secrecy by which they are bound under the rules of the legal profession. The fact that that approach was regarded as an aggravating circumstance for the purpose of calculating the fine therefore infringed the applicants' fundamental right to defend themselves.

547 Contrary to the Commission's argument, there is indeed a legitimate interest in fiduciary relationships and, thus, the identity of the majority shareholder being kept secret, particularly as regards Isoplus Hohenberg, but in part also as regards

Isoplus Sondershausen. For the reasons already given to the Commission by Mr Henss at a confidential interview on 3 March 1998, and confirmed in a letter of 4 March 1998, the applicants' conduct merely constituted the exercise of the rights of defence.

548 As regards the Commission's assertion that, if the deliberate obstruction had succeeded, '[it] might well have allowed the undertaking to evade the appropriate penalty and/or rendered its recovery more difficult', the applicants state, first, that if the fiduciary relationships had been disclosed, various questions of law would also have had to be resolved in the course of an administrative procedure concerning the capacity of the Henss/Isoplus group as a group, quasi-group or *de facto* group and, accordingly, as an undertaking within the meaning of Article 85 of the Treaty. In that regard, it cannot be denied that the fact of adopting a different legal position from that adopted by the Commission forms part of the right of defence.

549 Next, the Commission is incorrect to state that if the applicants' argument had been accepted that would have enabled them to obtain a significant reduction in the fine. According to the Commission's theory that the Henss/Isoplus group constitutes a group or a *de facto* group, the internal sales between the members of the group would have been ignored in calculating the turnover as a basis for setting the fine. In that regard, the applicants observe that the consolidated turnover for Henss/Isoplus for the reference year 1997 should be ECU 49 055 000. On the other hand, if it is accepted that the Henss/Isoplus group did not exist as such, it would be necessary to take into account the turnover of each of the undertakings concerned and to consider the sales between the applicants, in particular the sales by Isoplus Rosenheim as a distribution undertaking or commercial agent. In that situation, the basis for calculating the fine would not have finally been very different. In the latter case, it would have been necessary to add to the turnover figures of Isoplus Hohenberg and Isoplus Sondershausen the provisions and guarantee amounts set aside by Isoplus, as commercial agent, which would have resulted in an overall turnover of approximately ECU 46 000 000.

550 Last, if the existence of a group is not admitted, but if it is considered, contrary to the applicants' opinion, that the legal relationships between Isoplus Hohenberg and Isoplus Sondershausen, on the one hand and Isoplus Rosenheim, on the other hand, did not constitute pure commercial agency relationships, Isoplus Rosenheim's turnover should have been added to the overall turnover used as the basis for calculating the fine. In that case, the total turnover figures of Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen, unconsolidated and with the internal business figures deleted, would have amounted to ECU 68 000 000.

551 Those considerations show that the fact that the fiduciary relations were kept secret and the fact that the applicants dispute the classification of the Henss and Isoplus companies as a group, quasi-group or *de facto* group do not in any way constitute deceitful manœuvres designed to secure a reduction in the fine.

552 The defendant states, first, that it was deliberately misled, both by the lawyer representing the Henss companies and by the lawyer representing the Isoplus companies, on the important point as to whether Mr Henss also controlled the Isoplus companies. It maintains that the applicants' deceitful manœuvres had no connection with the exercise of the rights of the defence. Furthermore, the obligation to respond to a request for information, laid down in Regulation No 17, does not undermine the rights of the defence. That is all the more so because the deceitful manœuvres were aimed not so much at the existence of the infringement as at the basis for setting the fine.

553 As regards the confidentiality of fiduciary relationships, the Commission contends that it does not follow from the circumstances on which the applicants rely that there was a legitimate interest in not disclosing the information it requested. In any event, the Commission is required, pursuant to Article 20 of Regulation No 17, to observe the interest in legitimate secrecy, in particular business secrecy.

554 As to whether the applicant's aim in deceiving the Commission was to secure a significant reduction in the fine, the Commission states that, even taking into account certain sales between the applicants, the amount of the fine would have been lower than that actually imposed.

Findings of the Court

555 The Commission relied on the Henss/Isoplus group's 'systematic attempt to mislead the Commission as to the true relationship between the companies of the group' as an aggravating circumstance which, together with the group's deliberate continuation of the cartel after the investigation and its leading role in enforcing the cartel, meant that the fine imposed on the components of the group was increased by 30% (third paragraph of point 179 of the Decision).

556 In that regard, some of the information communicated by the applicants concerning the shareholders in the companies which the Commission combined in the Henss/Isoplus group and concerning the links of ownership between those companies proved to be inaccurate.

557 First, following the request for information of 13 March 1996, in which the Commission asked Isoplus Hohenberg to provide full details of the meetings held with the competing companies and, in particular, as regards the participants in those meetings, their names, undertakings and positions, Isoplus Hohenberg stated, concerning the presence at those meetings of Mr Henss, that he represented the Isoplus companies only on their instructions (further reply of Isoplus Hohenberg of 10 October 1996, 'further reply of Isoplus Hohenberg').

Next, in their observations of 30 June 1997 on the statement of objections, Isoplus Hohenberg and Isoplus Sondershausen expressly denied that the Henss companies and the Isoplus companies formed a single group or companies linked under the direction or control of Mr Henss and stated that there was no evidence in the file that Mr Henss controlled, even through an agent, Isoplus Hohenberg or the companies connected with it. As the applicants acknowledged before the Court, Mr Henss actually owned the majority of shares in Isoplus Hohenberg, at least from October 1991, until his shares were transferred to HFB KG by the partnership agreement of 15 January 1997. He therefore held, at that period, an indirect shareholding in Isoplus Sondershausen and so he also attended the meetings of the cartel as owner of Isoplus Hohenberg and, indirectly, Isoplus Sondershausen.

558 Second, Isoplus Hohenberg maintained in its further reply that it held 100% of the capital of Isoplus Sondershausen, which was confirmed by the observations of Isoplus Hohenberg and Isoplus Sondershausen on the statement of objections. That information was inaccurate, since, on the one hand, the Commission learnt from the partnership agreement that one third of the share capital of Isoplus Sondershausen was held by Isoplus Hohenberg as agent for Mr and Mrs Papsdorf, who transferred it by the partnership agreement to HFB KG, and since, on the other hand, the applicants assert in their pleadings before the Court that a further third of the share capital was also held by Isoplus Hohenberg as agent.

559 Contrary to the applicants' contention, their conduct during the administrative procedure cannot be regarded as merely the exercise of the right to challenge the Commission's classification of the Henss companies and Isoplus companies as a 'group'.

560 First, during the administrative procedure the applicants did not confine themselves to challenging the assessment of the facts and the legal position by the Commission, but provided the Commission, in their replies to the requests for information and also in their observations on the statement of objections, with incomplete and partly inaccurate information.

561 Regulation No 17 places the undertaking being investigated under a duty of active cooperation, which means that it must be prepared to make any information relating to the object of the inquiry available to the Commission (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 27, and Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 72). Even though the undertakings are free to reply or not to reply to questions put to them under Article 11(1) of Regulation No 17, it follows from the penalty provided for in the first part of the sentence in Article 15(1)(b) of Regulation No 17 that, having agreed to reply, the undertakings are required to provide accurate information.

562 Nor can the applicants rely on the confidential nature of the fiduciary relationships among the shareholders of Isoplus Hohenberg and Isoplus Sondershausen, since, pursuant to Article 20(2) of Regulation No 17, the Commission is required not to disclose information acquired by it as a result of the application of that regulation and of the kind covered by the obligation of professional secrecy. Similarly, Article 20(1) of Regulation No 17 states that information acquired as a result of the application of Articles 11, 12, 13 and 14 is to be used only for the purpose for which it was requested. Having regard to the obligation imposed on the Commission to protect the confidentiality of information covered by professional secrecy, the confidentiality of the identity of the principals in fiduciary relationships was therefore not such as to justify the applicants' conduct. Nor is it precluded that the true nature of the control exercised by Mr Henss over the Isoplus companies and the links between those companies

could have been disclosed to the Commission without there having been any need to disclose the identity of third parties acting as principals in the fiduciary relationships.

563 Since Isoplus Hohenberg and Isoplus Sondershausen must have known that the information hidden from the Commission was necessary for the purpose of assessing the true situation regarding the relationships between the companies which the Commission had combined, from the time of its request for information of 13 March 1996, in a single group 'the (Henss group'), the Commission was correct to classify the applicants' conduct as a 'systematic attempt to mislead the Commission as to the true relationship between the companies of the group', which constituted 'a deliberate obstruction of the Commission's investigations'. The deliberate nature of that conduct is confirmed by the fact that the lawyer acting for Isoplus Hohenberg and Isoplus Sondershausen was aware that the information provided during the administrative procedure was inaccurate, given the role as agent which he himself had played, as the applicants acknowledge, in the fiduciary relationships.

564 As regards the conclusion that the deliberate obstruction, 'had it succeeded, might well have allowed the undertaking to evade the appropriate penalty and/or rendered its recovery more difficult', it is sufficient to observe that the control exercised by Mr Henss over the Henss companies and the Isoplus companies is a factor which, in the circumstances of the case, suggests that the activities of those companies must be regarded as the acts of a *de facto* 'Henss/Isoplus' group, for which Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen may be held jointly and severally responsible. Consequently, and without its being necessary to ascertain whether such a hypothesis led to a higher fine, the possibility remains that the Commission would not have been able to arrive at the amount of the fine actually imposed had it not been demonstrated that Mr Henss controlled Isoplus Hohenberg and, consequently, in part controlled Isoplus Sondershausen, which the applicants had specifically denied during the administrative procedure.

565 It follows that the objection alleging that the rights of defence were infringed in the assessment of the aggravating circumstances must be rejected.

5. The aggravating circumstance based on the applicants' role in the cartel

Arguments of the parties

566 The applicants dispute the fact that the Commission takes as an aggravating circumstance on the part of Henss/Isoplus the 'leading role played by this undertaking in the enforcement of the cartel'. In that context, they dispute the Commission's assertions in points 75, 121 and 144 of the Decision.

567 In that regard, the applicants observe that the activities of Henss Rosenheim, or of Mr Henss, *vis-à-vis* ABB, must, especially between October 1991 and October 1994, be considered in light of the fact that they were ABB Isolrohr's commercial representative, with the contractual obligations that implies.

568 As regards the assertion that Henss had 'consistently been one of the most zealous enforcers of the market-sharing and bid-rigging arrangements', the applicants state that they sometimes succeeded, for certain projects, in obtaining the contract instead of a favourite undertaking. Where they did so as against Tarco, for example, Tarco severely criticised the applicants and, principally, Mr Henss. Therefore it is normal that, on the contrary, when Tarco obtained contracts for which the applicants had been favourites, it was criticised by the applicants. In that context, the Commission acknowledges that it follows from the comparative tables of December 1995 on the market shares of the participants in the cartel that Tarco and Løgstør had obtained a significantly higher market share than that fixed within the cartel, to the detriment of ABB, the Henss/Isoplus group and KWH. That shows that the Henss/Isoplus group or the applicants certainly did not play a leading role.

569 Nor did the applicants play a leading role in the enforcement of the cartel in relation to the measures taken against Powerpipe. They did not participate in the long-term strategy drawn up by ABB in 1992 to control the market and aimed at eliminating Powerpipe, in which Løgstør participated by collaborating in poaching members of the staff of that company. The applicants were never present on the Swedish market and first appeared on the Danish market only at the beginning of 1993, whereas Powerpipe did not extend its activities to Germany before 1994. As regards the Leipzig-Lippendorf project, neither Isoplus Rosenheim nor Mr Henss ever demanded that measures be taken to boycott Powerpipe.

570 Furthermore, the applicants did not participate in sanctions in the event of non-compliance with the agreements adopted within the European cartel. It follows from annex 7 to Løgstør's observations on the statement of objections and from the plan presented by ABB in that respect that the idea of sanctions within the European cartel did not originate with either the applicants or Mr Henss.

571 As regards the joint price lists known as the 'EU list', the 'Euro Price List' or the 'Europa-Preisliste', although, following finalisation of the European cartel, those price lists were also used by the applicants, they were not conceived either by them or by Mr Henss. Løgstør's statements in that regard are unreliable.

572 Furthermore, the Commission makes clear in the Decision that ABB was the leader and main instigator of the cartel and that Løgstør played an active role in planning and implementing the strategy of the cartel, since it and ABB actively participated in boycotting Powerpipe by bringing pressure to bear on their suppliers not to make deliveries to Powerpipe.

573 The European rank of the Henss/Isoplus group by reference to shares of the relevant market and the fact that the group was admitted to the EuHP only in August 1995 also militate against the idea that the group played a leading role. As regards the position of Henss/Isoplus on the market, the figures set out in points 10 to 15 of the Decision show that during the period in question the Henss/Isoplus group was, at the most, the fifth largest group, in terms of market share, after ABB, Løgstør, Tarco and Pan-Isovit, and that depends on the applicants being regarded as one economic unit.

574 The defendant observes that the leading role of the Henss/Isoplus group is evident, *inter alia*, from its activities designed to implement the project-sharing agreement and also in drawing up collusive price lists and a scheme of sanctions and also in taking action against Powerpipe. According to the Commission, the arguments which the applicants put forward on this point essentially reiterate submissions already advanced.

575 The Commission disputes the notion that a commercial agent cannot play a leading role in a cartel between producers. The leading role fell to the Henss/Isoplus group as a whole, which none the less obtained 10% of the European market in the context of the market-sharing agreements within the European cartel, the highest share after ABB's and Løgstør's. It is also necessary to take into consideration, in that regard, the agreements on quotas for the German market. In any event, the Commission inferred that the Henss/Isoplus group played a leading role not from its position on the market but from its conduct in the cartel. Last, the Commission did not conclude that the Henss/Isoplus group played a leading role from what occurred during the boycotting relating to the Leipzig-Lippendorf project, although that role was evident in connection with other measures taken against Powerpipe, described in points 94 to 97 and 106 of the Decision. Points 121 and 179 of the Decision concern the enforcement of the cartel, in particular the measures taken against Powerpipe.

Findings of the Court

576 According to point 179 of the Decision, the leading role played by the Henss/Isoplus group in enforcing the cartel was among the aggravating circumstances on the basis of which the fine imposed on the Henss/Isoplus group was increased by 30%.

577 In that regard, the case-file shows that, independently of the market share held by the Henss/Isoplus group, the latter actively ensured compliance with the agreements concluded within the cartel, as may be seen from annexes 86, 87, 88, 89, 92 and 93 to the statement of objections, described in point 75 of the Decision and confirmed by the statements of Tarco (replies of 26 April 1996 and 31 May 1996 to the request for information of 13 March 1996) and of Løgstør (observations on the statement of objections). As regards the allegation that Tarco acted at the time in the same way as the Henss/Isoplus group where the latter obtained a project intended for Tarco, it is sufficient to state that the applicants have adduced no evidence of this.

578 Furthermore, even though the Henss/Isoplus group did not conceive the price lists, its role as initiator, with ABB, in concluding agreements on prices for the German market is confirmed not only by Løgstør, in its observations on the statement of objections, but also by Tarco (reply of 26 April 1996) and corroborated by the fax from the Executive Vice-President of ABB of 28 June 1994 (annex X 8 to the statement of objections) referring to the latter's approaches to the coordinator of the cartel and to Mr Henss to persuade them to follow the directions of the director of ABB IC Møller. In addition, according to Brugg, it was Mr Henss who invited it to participate in the cartel (Brugg's reply). As regards the measures taken against Powerpipe, it has already been found, at paragraphs 261 to 286 above, that the Commission correctly established that the Henss/Isoplus group played an active role, from the time when Powerpipe commenced its activities on the German market, in particular when tendering for the Neubrandenburg and Leipzig-Lippendorf projects.

579 As observed at paragraphs 168 to 172 and 179 above, neither the role of commercial representative played by Henss Rosenheim nor the fact that none of the companies in the Henss/Isoplus group belonged to the EuHP before the summer of 1995 is such as to cast a different light on the Henss/Isoplus group's role in the cartel as depicted by the Commission.

580 Last, the fact that both ABB and Løgstør were the instigators of the cartel is not such as to invalidate the Commission's conclusions, since in any event ABB's fine was increased by 50% because of its role in the cartel and Løgstør's fine was also increased by 30%, although it was not accused of attempting to obstruct the Commission's investigation.

581 The Court considers that, in those circumstances, the Commission was correct to regard the leading role played by the Henss/Isoplus group in enforcing the cartel as an aggravating circumstance.

582 This limb of the fourth plea in law must therefore be rejected.

6. The failure to take mitigating circumstances into account

Arguments of the parties

583 The applicants put forward certain circumstances which should have been taken into account by the Commission or which, in any event, should be taken into

consideration by the Court, in order to reduce the fine, even if the pleas in law also relating to those circumstances at other points in the application were to be rejected.

584 First, it is necessary to take account, in assessing the effects of the cartel, of the fact that from 1990 to 1994 the price of pre-insulated pipes fell continuously on the European markets with the exception of the Danish market. For a number of undertakings, these low prices entailed significant losses. The increase in prices following the instigation of the European cartel was not dramatic, so that, from the point of view of customers using the products in question, the cartel caused no real harm. In addition, the applicants were active in markets in which, before 1994, there had been no price rises. Even during 1995 and the beginning of 1996, the prices obtained by the customers of the producers and distributors of pre-insulated pipes were always genuine and fair and never excessive.

585 Second, it is necessary to take into consideration the fact that the applicants' appearance on the Danish market at the beginning of 1993, as well as other circumstances, gave rise to the dissolution of the Danish cartel and to the partial suspension of the anti-competitive agreements from 1993 until the beginning of 1994.

586 Third, the applicants observe that, at the time, Henss Rosenheim (now Isoplus Rosenheim) acted as ABB Isolrohr's commercial representative. Between October 1991 and October 1994, the conduct of Henss Rosenheim should therefore be imputed, at least in part, to the ABB group. In that regard, the applicants state that the ABB group has also been fined and that, in order to comply with the principle that a penalty may not be imposed twice, that factor should be taken

into consideration as leading to a reduction in the fine imposed on Isoplus Rosenheim and thus the Henss/Isoplus group. Certain sales by Henss Rosenheim were taken into account in calculating the turnover of both the Henss/Isoplus group and ABB. In setting the fine, it is in any event the principal that should be penalised, not the commercial representative. As regards the period before October 1994, the applicants state that their participation in the European cartel was provoked by the massive fall in prices, caused in particular by ABB IC Møller and by the pressure brought to bear by ABB and Løgstør.

587 Fourth, to the extent to which the applicants were to be found responsible for the measures taken against Powerpipe, they always played a quite secondary role. The applicants observe that, as regards the Neubrandenburg project, the conduct of Mr Henss or Henss Rosenheim amounted to no more than an attempt, since the measures in question failed and Powerpipe obtained the project in question.

588 Fifth, the applicants state that the fine imposed on them is capable of rendering them insolvent. It is necessary, as a matter of principle, to consider whether the level at which a fine is set is capable of rendering the undertaking concerned insolvent. Otherwise, imposing a fine carries the risk of eliminating the undertaking in question from the market concerned and may result in an oligopolistic situation or to a dominant position on the market. Since Pan-Isovit and Tarco have been bought by Løgstør and since KWH has also decided, more or less in the short term, to leave the pre-insulated pipes market, the elimination of the applicants would give rise to an oligopolistic situation in the pre-insulated pipes market, which would be in the hands of the two 'ringleaders' of the present cartel, ABB and Løgstør.

589 In that regard, the applicants further observe that they have already stated, in their letters of 27 and 30 March 1998 to the Commission and also at the hearing before the Commission, that setting a high fine was likely to bring about the insolvency of Isoplus Rosenheim, Isoplus Hohenberg and Isoplus Sondershausen, the consequence of which would be job losses and also the elimination of two production undertakings and a large distributor from the market. The insolvency of the applicants would have the same consequences as regards HFB GmbH and HFB KG. Their liquidity problems prompted the applicants to submit an application for interim measures to the Court on 10 February 1999, in which they explained the risk of insolvency. In that regard, the applicants rely on the report of a firm of accountants of 4 February 1999 ('the report'), lodged before the Court during the interim proceedings. With reference to Article 48(2) of the Rules of Procedure of the Court of First Instance, the applicants seek to admit as additional evidence the report and the annexes thereto, attached to the reply, since it constitutes fresh evidence which did not yet exist when the present application was lodged on 18 January 1999.

590 To all those considerations, the applicants add that the Commission cannot claim to have taken into consideration, when it set the fine, either circumstance as a mitigating circumstance. In any event, the illegal application of the guidelines rendered such consideration impossible, since the amount of the fine imposed on the applicants constitutes the maximum amount within the meaning of Article 15(2) of Regulation No 17.

591 The defendant observes, first, that it took due account of the development in prices on the relevant market between 1990 and 1996. Second, as regards the argument that the Henss/Isoplus group gave rise to the dissolution of the Danish cartel or joined the cartel owing to the pressure brought to bear by ABB and Løgstør, the Commission refers to the arguments developed elsewhere. Third, the Commission contends that the commercial relations between ABB Isolrohr and Henss Rosenheim do not mean that ABB Isolrohr and Henss/Isoplus constituted

an economic unit. Fourth, the Commission reiterates that the measures taken against Powerpipe cannot be examined in isolation from the cartel. Fifth, the Commission states that the fact that an undertaking is in financial difficulties cannot be admitted as a mitigating circumstance for the purpose of setting the fine. Furthermore, the order in *HFB and Others* v *Commission*, cited above, shows that the documents submitted on that occasion, including the report, are not sufficient to establish the difficulty of the applicants' financial situation. According to the Commission, the evidence that supposedly describes that situation at the time when the Decision was adopted is irrelevant and submitted out of time. Sixth, the guidelines do not allow the precise amount of a fine to be calculated and, in any event, the limit of 10% of turnover refers to the final result of the calculation of the fine.

Findings of the Court

592 In determining the amount of the fine to be imposed on the Henss/Isoplus group, the Commission, after assessing the gravity and the duration of the infringement and also the aggravating circumstances, took no mitigating circumstance into account.

593 The Commission was not obliged to take the development of prices on the relevant market during the period in question into account as a mitigating circumstance leading to a reduction in the fine. First, it follows from the seventh paragraph of point 166 of the Decision that, in the present case, the fines were set at a level that reflected that fact that the agreements on the German market between late 1991 and 1993 were of limited practical effect. Second, for the period between the end of 1991 and 1993, the fall in prices outside Denmark and

the lower prices in the German market by comparison with the Danish market cannot give rise to a reduction in the amount of the fine imposed on the applicants, since the high prices on the Danish market were the result of collusion between the Danish producers of which the applicants were perfectly well aware. The level of prices is even less capable of constituting a mitigating circumstance when the Commission established that there had been significant price increases in the German market from the end of 1994.

594 Next, it has already been stated, at paragraphs 176 and 177 above, that the applicants cannot rely on their role in the dissolution of the Danish cartel in 1993, since that was not solely due to the entry of the Henss/Isoplus group into that market. The same applies to the commercial representation of ABB IC Møller, since the participation in the cartel of the Henss/Isoplus group went far beyond its activities as ABB's distributor. In any event, an undertaking which participates with others in activities having an anti-competitive objective cannot rely on the fact that it did so under duress from the other participants, since it could have reported the pressure brought to bear on it (see paragraph 178 above).

595 Similarly, the applicants' argument that their contribution to the measures taken against Powerpipe amounted to no more than attempted collusion has been refuted (see paragraphs 283 to 285 above).

596 Last, without there being any need to consider the allegation that the amount of the fine imposed on the applicants is capable of rendering them insolvent or the belated production of evidence in relation to that question, it is settled case-law that the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking concerned, since recognition of such an obligation would be tantamount to giving an unjustified

competitive advantage to undertakings least well adapted to market conditions (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55; Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraphs 75 and 76; and *Enso Española* v *Commission*, paragraph 316).

597 In the absence of circumstances which should have been taken into account as mitigating circumstances, the applicants cannot claim that in the present case the application of the guidelines prevented consideration of mitigating circumstances from leading to a reduction in the amount of the fine, *a fortiori* because the guidelines provide for the reduction of the fine in order to take account of mitigating circumstances (second paragraph and point 3 of the guidelines).

598 For all those reasons, the applicants' present objection must be rejected.

599 to 638 ...

V — Conclusions

639 It follows from all the foregoing that Articles 3(d) and 5(d) of the Decision must be annulled in so far as they relate to HFB GmbH and HFB KG. The remainder of the application must be dismissed.

Costs

640 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that each party bears its own costs. As the action has been successful only in part, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear its own costs, including those relating to the interlocutory proceedings, and to pay 80% of the costs incurred by the Commission, including those relating to the interlocutory proceedings and to order the Commission to bear 20% of its own costs, including those relating to the interlocutory proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls Articles 3(d) and 5(d) of Commission Decision 1999/60/EC of 21 October 1999 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691.E-4: — Pre-Insulated Pipe Cartel) in so far as it relates to HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH, Verwaltungsgesellschaft;**

2. Dismisses the remainder of the application;

3. Orders the applicants jointly and severally to bear their own costs, including those relating to the interlocutory proceedings, and to pay 80% of the costs incurred by the Commission, including those relating to the interlocutory proceedings;

4. Orders the Commission to bear 20% of its own costs, including those relating to the interlocutory proceedings.

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung
Registrar

P. Mengozzi
President