JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

15 March 2006 *

In Case T-15/02,

BASF AG, established in Ludwigshafen (Germany), represented by N. Levy, J. Temple-Lang, Solicitors, R. O' Donoghue, Barrister, and C. Feddersen, lawyer,

applicant,

v

Commission of the European Communities, represented by R. Wainwright and L. Pignataro-Nolin, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment or reduction of the fines imposed on the applicant by Article 3(b) of Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1),

* Language of the case: English.

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

composed of H. Legal, President, P. Mengozzi and I. Wiszniewska-Białecka, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2005,

gives the following

Judgment

Background to the dispute

1 By Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1; 'the Decision'), the Commission found, in Article 1, that a number of undertakings had infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) by participating in a series of separate agreements affecting 12 different markets for vitamin products, namely vitamins A, E, B1, B2, B5, B6, folic acid, vitamins C, D3 and H, beta-carotene and carotinoids. In particular, it is clear from recital 2 of the Decision that, as part of those agreements, the undertakings concerned had fixed prices for the different

products, allocated sales quotas, agreed on and implemented price increases, issued price announcements in accordance with their agreements, sold the products at the agreed prices, set up a machinery to monitor and enforce adherence to the agreements, and participated in a structure of regular meetings to implement their plans.

2 Those undertakings include BASF AG ('BASF' or 'the applicant'), which was held responsible for infringements in the Community and EEA markets for vitamins A, E, B1, B2, B5, C, D3 and H, beta-carotene and carotinoids (Article 1(1)(b) of the Decision).

3 By Article 2 of the Decision the undertakings held responsible for the infringements found were ordered to bring them to an end immediately, in so far as they had not already done so, and to refrain from repeating any offending act or conduct established on their part and from adopting any measure having the same or equivalent object or effect.

4 Whilst the Commission imposed fines for the infringements found in the markets for vitamins A, E, B2, B5, C, D3, beta-carotene and carotinoids, it imposed no fines for the infringements found in the markets for vitamins B1, B6, H and folic acid (Article 3 of the Decision).

5 It is apparent from recitals 645 to 649 of the Decision that the infringements found in the latter markets ceased more than five years before the Commission started its investigation and that, consequently, Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) applied to those infringements.

6 Thus, BASF, in particular, was not fined for its participation in the infringements relating to vitamins B1 and H.

7 On the other hand, for its participation in the infringements relating to vitamins A, E, B2, B5, C and D3, beta-carotene and carotinoids, BASF was fined in respect of each infringement (Article 3(b) of the Decision).

8 The Commission determined those fines by applying its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines'), and its Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

9 At recitals 657 and 658 of the Decision, the Commission set out the general criteria on the basis of which it fixed the amount of the fines. It stated that it must have regard to all relevant circumstances and particularly the gravity and duration of an infringement — which are the two criteria explicitly referred to in Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) —, assess on an individual basis the role played by each undertaking party to the infringements, take particular account, in setting the fine, of any aggravating or attenuating circumstances and apply, as appropriate, the Leniency Notice.

10 As regards the gravity of the infringements, the Commission found, in view of their nature, their impact on the various relevant vitamin product markets and the fact that each one covered the whole of the common market and, following its creation, the whole of the EEA, that the undertakings to which the Decision was addressed

had committed very serious infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement, for each of which the likely fine would be at least EUR 20 million (recitals 662 to 674 of the Decision).

11 For the purpose of determining the starting amount of the fines, the Commission, after noting that it was taking into consideration the size of the different vitamin product markets concerned, observed that '[w]ithin the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures it has sufficient deterrent effect'. The Commission stated that 'this exercise seems particularly necessary where, as in the present case, there is considerable disparity in the size of the undertakings participating in an infringement'. It then stated that '[i]n the circumstances of this case, which involves several undertakings, it is necessary in setting the basic amount of the fines to take account of the specific weight and therefore the impact of each undertaking's offending conduct on competition' (recitals 675, 678 and 679 of the Decision).

12 For that purpose, the Commission considered that the undertakings concerned could be divided into different categories 'according to their relative importance in each of the relevant vitamin product markets concerned', while adding that '[t]he placement of an undertaking in a particular grouping is subject to adjustment, where appropriate, to take into account in particular the need to ensure effective deterrence'. In order to appraise the relative importance of the different undertakings in each of the vitamin product markets concerned, the Commission considered it appropriate to take as a basis the worldwide turnover for the relevant product. The Commission observed that 'each cartel was global in nature, the object of each was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market' and that 'the worldwide turnover of any given party to a particular cartel also gives an indication of its contribution to the effectiveness of that cartel as a whole or, conversely, of the instability which would have affected that cartel had it not participated'. The Commission also stated that in order to determine the turnover in question it used 'the last complete calendar year of the infringement' (recitals 680 and 681 of the Decision).

13 Nevertheless, it is clear from recitals 695 and 696 of the Decision that the Commission found that, given the characteristics of the beta-carotene and carotinoids market, it was not appropriate to use the method of dividing the companies into categories with regard to the infringements concerning those products, so that the same starting amounts were set for the fines imposed on the two undertakings involved in those infringements, F. Hoffmann-La Roche AG ('Roche') and BASF.

14 Accordingly, the Commission set the following starting amounts, totalling EUR 128.5 million, for the applicant: EUR 18 million for vitamin A; EUR 35 million for vitamin E; EUR 10 million for vitamin B2; EUR 14 million for vitamin B5; EUR 7.5 million for vitamin C; EUR 4 million for vitamin D3; EUR 20 million for beta-carotene; and EUR 20 million for carotinoids (recitals 683 to 696 of the Decision).

15 In order to ensure that the fines had a sufficient deterrent effect, the Commission increased the starting amounts of the fines calculated for BASF, Roche and Aventis SA by 100% to take account of their size and their overall resources (recitals 697 to 699 of the Decision).

16 The starting amount of the fine for each undertaking, as adjusted, where appropriate, by application of the factor of 100% referred to in the preceding paragraph, was then increased by the Commission in accordance with the duration of its participation in each infringement. The basic amounts of the applicant's fines, totalling EUR 438.75 million, were thus set at: EUR 68.4 million for vitamin A; EUR 133 million for vitamin E; EUR 28 million for vitamin B2; EUR 50.4 million for vitamin B5; EUR 21.75 million for vitamin C; EUR 11.2 million for vitamin D3; EUR 64 million for beta-carotene; and EUR 62 million for carotinoids (recitals 701 to 711 of the Decision).

17 Roche and BASF were found to be joint leaders and instigators of the different cartels and therefore their roles were considered to be an aggravating circumstance. The basic amounts of their fines were consequently increased by 50% and 35% respectively (recitals 712 to 718 of the Decision). This brought the fines for BASF to a total of almost EUR 592.32 million.

18 Finally, in application of the Leniency Notice, the Commission, pursuant to Section B of the Notice, granted Aventis exemption from fines in relation to the infringements relating to vitamins A and E. In that regard, the Commission observed that, as a result of statements made on 19 and 25 May 1999, Aventis was the first undertaking to adduce decisive evidence of the existence of those infringements, in accordance with the condition set out in Section B(b) of the Leniency Notice (recitals 741 and 742 of the Decision).

19 The Commission also considered that Roche and BASF, through the documents submitted to the Commission between 2 June and 30 July 1999, had been the first to provide the Commission with decisive evidence of the existence of the cartel arrangements relating to the vitamin B2, B5, C and D3, beta-carotene and carotinoids markets. Nevertheless, since Roche and BASF had been the instigators or played a determining role in the illegal activities concerning vitamins A, E, B2, B5, C and D3, beta-carotene and carotinoids, they did not in the Commission's view satisfy the condition set out in Section B(e) of the Leniency Notice. Therefore, neither of those two companies was granted a reduction in its fines on the basis of Section B or C of the Leniency Notice (recitals 743 to 745 of the Decision).

20 However, each of them was granted a reduction in its fines under Section D of the Leniency Notice. In particular, the Commission observed that as Roche and BASF had provided detailed evidence of the organisation structure of the cartel arrangements affecting the vitamin A, E, B2, B5, C and D3, beta-carotene and carotinoids markets, they had contributed decisively to establishing and/or

confirming essential aspects of those infringements. The Commission therefore concluded that Roche and BASF satisfied the conditions set out in Section D 2, first indent, of the Leniency Notice and granted them, for all of those infringements, a reduction of 50% of the fines that would have been imposed if they had not cooperated with the Commission (recitals 747, 748, 760 and 761 of the Decision).

21 Thus, the fines imposed on BASF were finally set as follows: EUR 46.17 million for vitamin A; EUR 89.78 million for vitamin E; EUR 18.9 million for vitamin B2; EUR 34.02 million for vitamin B5; EUR 14.68 million for vitamin C; EUR 7.56 million for vitamin D3; EUR 43.2 million for beta-carotene; and EUR 41.85 million for carotinoids (Article 3(b) of the Decision). The total amount of those fines ('the overall fine') comes to EUR 296.16 million.

Procedure and forms of order sought by the parties

22 By application lodged at the Registry of the Court of First Instance on 31 January 2002, the applicant brought the present action.

23 By application lodged at the Registry of the Court of First Instance on 24 June 2002, Aventis sought leave to intervene in the present proceedings in support of the form of order sought by the defendant. After the main parties were heard, leave was refused by order of the Court of First Instance (Fourth Chamber) of 25 February 2003 ([2003] ECR II-213), the date on which the written procedure was thus completed.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, requested the parties to reply to written questions and the defendant to produce certain documents. The parties complied with that request within the prescribed period.

25 The parties presented oral argument and answered the questions put by the Court at the hearing on 12 January 2005. On that occasion the Court requested the defendant to produce a letter that had been sent to it by Roche in the context of the cooperation afforded by that undertaking during the administrative investigation, and suspended the oral procedure.

26 The defendant complied with that request within the prescribed period and, on 18 January 2005, produced the letter requested, together with other letters that Roche had sent it in the context of the cooperation it had afforded during the administrative procedure. On 8 February 2005 the applicant, at the request of the Court, lodged observations on the documents produced by the defendant.

27 The applicant claims that the Court should:

— annul or substantially reduce the overall fine imposed in Article 3(b) of the Decision;

— order the defendant to pay the costs and other expenses incurred by the applicant in connection with the present case.

28 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The claims for annulment and for reduction of the overall fine

29 The applicant fully and unreservedly admits its involvement in the infringements relating to vitamins A, E, B2, B5, C and D3, beta-carotene and carotinoids and acknowledges the seriousness of those infringements. However, it observes that the Decision is unprecedented in terms of the severity of the fines imposed and represents a very radical shift in Commission enforcement policy.

30 The applicant relies on eight pleas in law in support of its application for annulment or substantial reduction of the overall fine. The first two pleas allege breach of the rights of the defence in various regards; the third plea alleges breach of the principles of proportionality and equal treatment in setting the starting amount of certain fines imposed on the applicant; the fourth plea concerns the increase, for the purpose of deterrence, in the starting amounts of fines imposed on the applicant; the fifth plea alleges errors of assessment in attributing to the applicant a role as leader and instigator with regard to seven infringements; the sixth and seventh pleas relate to the assessment of the applicant's cooperation in the context of the administrative procedure; the eighth plea alleges breach of professional secrecy and of the principle of sound administration.

A — *First and second pleas: breach of the rights of the defence*

1. *Arguments of the parties*

(a) First plea: breach of the rights of the defence owing to failure to give prior notice of the Commission's finding that there were a number of distinct cartels

31 The applicant claims that the Commission's finding that there was a distinct cartel for each vitamin, which led to the imposition of a number of separate fines, was not disclosed to the applicant before the Decision. The failure to give prior notice of this finding materially prejudiced the applicant's rights of defence in relation to the magnitude of all the fines imposed.

32 The applicant observes that it is a well-established principle that a Commission decision cannot rely on findings of law or of fact that are substantially different from those contained in a statement of objections. The Commission breached that principle by mentioning for the first time in the Decision a crucial new finding concerning the legal characterisation of the unlawful arrangements. In the applicant's view, the statement of objections stated, in particular in points 206, 210 and 212, that there was one single overarching cartel composed of collusive arrangements with regard to various vitamins, whereas the Decision, in recital 584, states for the first time that the arrangements in relation to each vitamin constituted 'distinct' infringements of Community competition law.

33 Thus, the starting point that could be set for any fine imposed on the applicant was not EUR 20 million, the proposed starting point for a single infringement under the Guidelines, but EUR 160 million for eight separate infringements. In fact, the finding

that there was an infringement in relation to each vitamin affected by the arrangements in question led the Commission to set a starting amount for the applicant's fine which was at least eight times more than was foreseeable. The applicant maintains that it ought to have been given an opportunity to comment on that finding and the conclusions drawn from it with regard to the setting of fines.

34 The defendant rejects these arguments as unfounded. It contends that the Decision faithfully reflects the structure and the legal assessment contained in the statement of objections and did not in any way modify the reasoning on which the statement of objections was based. In particular, both the structure of the statement of objections and numerous passages contained therein show clearly that the Commission did not regard all the agreements relating to the different product markets as one and the same continuous infringement, but as a number of separate infringements. That is also proved by the applicant's reply to the statement of objections in so far as the applicant referred, in the penultimate paragraph on page 5, to several 'infringements' and not just to one.

35 In its reply, the applicant observes that the section of the statement of objections describing the unlawful arrangements was entitled 'The cartel', whereas the corresponding section in the Decision refers to 'The cartels'. Furthermore the statement of objections contained numerous indications that the Commission was dealing with a single cartel. In any case, irrespective of the structure of the statement of objections and of particular passages therein, the only relevant point is the legal conclusion drawn in the statement of objections, namely that there was a single cartel for the purposes of calculating fines.

36 As regards the passage in its reply to the statement of objections which the defendant cites, the applicant submits that it was not addressing the problem of whether the unlawful arrangements constituted one or a number of infringements, but merely referred to the attenuating circumstances concerning BASF's role in the cartel.

(b) Second plea: breach of the rights of the defence owing to the inadequate explanation, in the statement of objections, of the elements which the Commission proposed to take into account in calculating the fines

37 The applicant maintains that the explanation in the statement of objections of the elements relevant to the calculation of the fines imposed on it was inadequate and did not enable it to exercise its rights of defence properly in relation to the level of those fines.

38 The applicant observes that the statement of objections is general and vague in explaining the elements on which the Commission intended to rely in calculating the fine. After a general introductory section, the statement of objections devotes only three paragraphs, out of a total of some 230, to explaining, in standard and very general terms, how the Commission proposed to take into account gravity, deterrence, duration, and all the aggravating and attenuating factors in setting the fines. That level of explanation of the proposed fines is, for three principal reasons, not compatible with the rights of the defence.

39 First, where an undertaking cooperates fully with the Commission and does not dispute the facts, like the applicant in the present case, the main, or perhaps the only, purpose of a statement of objections is to enable that undertaking to understand, as clearly as possible, the basis upon which the Commission proposes to fine it.

40 Second, the fines imposed by the Decision are the highest ever imposed in a Community competition law case and reflect a radical and unprecedented change in the Commission's fining policy. By way of example, the applicant notes that, before application of the Leniency Notice, the fines imposed on the undertakings to which the Decision is addressed total almost EUR 1 800 million, or more than six times the highest overall fine ever previously reached in a single case, namely EUR 273 million in Commission Decision 1999/243/EC of 16 September 1998 relating to a

proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case IV/35.134 — Transatlantic Conference Agreement) (OJ 1999 L 95, p. 1). The applicant adds that the overall fine payable by it before application of the Leniency Notice, namely almost EUR 600 million (see paragraph 17 above), is approximately six times more than the highest individual fine previously imposed by the Commission, namely EUR 102 million on Volkswagen AG in Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60). The obligation to state reasons and the right to be heard with regard to the basic elements on which the Commission intends to rely in setting the fine must be proportionate to the amount of the fine.

41 Third, the elements not properly explained in the statement of objections are extremely significant because they resulted in a substantial increase in the overall fine imposed on the applicant. This applies in particular to the 100% increase for deterrence, which led the Commission to increase from EUR 128.5 million to EUR 257 million the overall fine set on the basis of gravity (see paragraphs 14 and 15 above), and to the finding that the applicant was one of the leaders of the cartel, which led the Commission to increase the basic amount of the overall fine by 35%, i.e. by more than EUR 153 million, and to refuse a bigger reduction in the fine under the Leniency Notice (see paragraphs 17 and 19 above). In particular, the applicant observes that the statement of objections makes no mention of the Commission's intention to impose such a large increase in BASF's fine for deterrence and that the imputation of a leading role to BASF is inconsistent with the statement of objections.

42 The defendant disputes the validity of the applicant's claims.

2. *Findings of the Court*

43 By the first and second pleas, which should be examined together, the applicant is in essence seeking the annulment in full of Article 3(b) of the Decision and, consequently, of the fines imposed on it under that article.

44 In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9, and Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, paragraph 19).

45 Applying this principle, Article 19(1) of Regulation No 17 and Articles 2 and 3 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18) — the provisions applicable *ratione temporis* in the present case — require the Commission to notify the objections it raises against the undertakings and associations of undertakings concerned and in its decisions to deal only with objections in respect of which they have been afforded the opportunity of making their views known.

46 According to the case-law, the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85

Ahlström Osakeyhtiö and Others v *Commission* [1993] ECR I-1307, paragraph 42; judgment of the Court of First Instance in Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63, upheld on appeal by judgment of the Court of Justice in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855).

47 That requirement is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which they have had the opportunity of making known their views (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 94, and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 138).

48 With regard to exercise of the rights of the defence in respect of the imposition of fines, it is settled case-law that, provided the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21, and judgment of the Court of First Instance in Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 193, upheld on appeal by judgment of the Court of Justice in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, in particular paragraph 428).

49 Therefore, as regards determining the amount of fines, the rights of defence of the undertakings concerned are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the anti-

competitive nature of the alleged acts (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235, and *Lögstör Rör* v *Commission*, paragraph 48 above, paragraph 194).

50 In the present case, the Commission clearly stated, in point 229(b) of the statement of objections, that it intended to impose fines on the undertakings to which the statement was addressed.

51 The Commission also stated, in point 227 of the statement of objections, that Article 81(1) EC and Article 53(1) of the EEA Agreement had been deliberately infringed.

52 As regards the gravity of the alleged offences, the Commission, after stating in point 226 of the statement of objections that it would take account of the nature of the infringement, its actual impact on the market and the size of the relevant geographic market — which are all relevant circumstances in assessing the gravity of the infringement under Section 1 A, first paragraph, of the Guidelines — stated in point 227 that market sharing and price fixing are by their very nature the worst kind of violation of Articles 81(1) EC and 53(1) of the EEA Agreement; that the undertakings concerned were fully aware of the illegality of their actions; that they had combined to set up a secret and institutionalised system designed to restrict competition in a major industrial sector; that the cartel arrangements permeated the whole vitamin industry, were conceived, directed and encouraged at a very high level in the undertakings concerned and were operated entirely to their benefit and to the detriment of their customers and ultimately the general public, and that they covered the whole of the common market and, after the creation of the EEA, all the EEA States.

53 In point 226 of the statement of objections the Commission also indicated its intention to set any fines at a level sufficient to ensure deterrence.

54 The Commission added in point 228 that, in assessing the fine to be imposed on each individual undertaking, it would take account of the role played by each of them in the collusive arrangements, its importance in the vitamin industry and the impact of the offending conduct on competition, and any aggravating or attenuating factors. It mentioned expressly the leading role played in the collusive arrangements by the applicant in particular.

55 Also in point 228, the Commission referred to the need to take account of the duration of each undertaking's individual participation in those arrangements, as described in point 220 in respect of each vitamin and each participant.

56 It is clear therefore that the Commission set out in its statement of objections the elements of fact and of law on which it would base its calculation of the amount of the fines imposed on the applicant, so the latter's right to be heard was, at first sight, duly observed.

57 It is, however, necessary to consider to what extent the specific arguments which the applicant raises in its first and second pleas may invalidate that finding.

58 That is not so in the case of the argument based on the specific purpose of a statement of objections addressed to an undertaking that has fully cooperated with the Commission and has not disputed the facts (see paragraph 39 above). As the defendant has rightly stated, the function of the statement of objections does not vary according to the specific situation of the undertaking to which it is addressed. However much that undertaking cooperates, that function is still to give undertakings and associations of undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision (*Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 46 above, paragraph 42, and Case C-283/98 P *Mo och Domsjö* v *Commission*, paragraph 46 above, paragraph 63). From that point of view, the fact that the applicant cooperated with the Commission, acknowledging that it had committed unlawful acts and describing those acts, did not mean that it no longer had any right or interest in obtaining a document from the Commission setting out precisely all the objections that the Commission raised against it, including those that might be based on statements or evidence supplied by other undertakings involved. Moreover, the applicant's argument is not free of certain contradictions, since it is expressly based on a specific event, namely the applicant's failure to dispute the facts, which logically implies the prior dispatch of a statement of objections setting out the Commission's accusations and the facts on which those accusations were based, a statement whose nature and function could therefore in no way be affected by that later event.

59 The argument, again in the context of the second plea, alleging that the Decision represented a radical and unprecedented change in the Commission's fines policy (see paragraph 40 above) also cannot succeed. There is no need to consider here whether and to what extent the fines imposed in the Decision do indeed, in view of their high amounts, mark a new stage in that policy, but it should be noted that the Court has consistently held that the Commission is not bound to mention in the statement of objections the possibility of a change in its policy as regards the general level of fines, a possibility which depends on general considerations of competition policy having no direct relationship with the particular circumstances of the case in question (*Musique diffusion française and Others* v *Commission*, paragraph 48 above, paragraph 22, and *Lögstör Rör* v *Commission*, paragraph 48 above, paragraph 203). The Commission is not under an obligation to put undertakings on notice by

warning them of its intention to increase the general level of fines (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 311, and *Lögstör Rör* v *Commission*, paragraph 48 above, paragraph 203).

60 Also without foundation is the argument alleging, in a particularly confused manner and still in the context of the second plea, that there was no proper explanation in the statement of objections of what the applicant regards as two 'extremely significant' elements mentioned in the Decision in connection with calculating the amount of the fines, namely the 100% increase for deterrence and the finding that the applicant played a leading role (see paragraph 41 above).

61 With regard to the second of those elements, the applicant appears in reality to be arguing not that the explanations in the statement of objections are inadequate but rather that there is a lack of consistency between the statement of objections and the Decision, in so far as that element, which was included in the Decision, did not appear in the statement of objections. In that regard, as was noted in paragraph 54 above, the statement of objections expressly referred, in point 228, to the leading role played by the applicant, so the inconsistency alleged by the applicant does not exist.

62 With regard to the first element mentioned in paragraph 60 above, it was not for the Commission to inform the applicant in the statement of objections of the extent of any increase in the fine in order to ensure that it would act as a deterrent. The Commission is not required, once it has indicated the main factual and legal criteria on which it will base its calculation of the amount of the fines, to specify the way in which it will use each of those elements in order to determine their level. To give indications as regards the level of the fines envisaged, before the undertakings have been invited to submit their observations on the allegations against them, would be to anticipate the Commission's decision and would thus be inappropriate (*Musique diffusion française and Others* v *Commission*, paragraph 48 above, paragraph 21; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 19; and *Lögstör Rör* v *Commission*, paragraph 48 above, paragraph 200).

63 It is necessary to consider next the arguments which the applicant set out in its second plea and their effect on the provisional finding made in paragraph 56 above.

64 In this plea, the applicant complains that the Commission did not allow it to submit observations on another specific element which, in its opinion, had a significant penalising effect in connection with the calculation of the amount of the fines in the Decision, namely the Commission's finding that the offending conduct constituted a number of separate infringements and not a single infringement.

65 In that regard, first of all, the adverse effect which the Commission's finding might have had on the applicant should not be overstated.

66 The applicant starts from the premiss that if the Commission had found that only one infringement had been committed in the present case it would have imposed only one single fine on it, the starting amount of which would, according to the Guidelines, have been EUR 20 million, whereas the starting amount for the eight fines actually imposed on the applicant, when combined, is eight times greater than the starting amount that is likely for a single fine.

67 That premiss is based on an incorrect reading of the Guidelines. Section 1 A, second paragraph, of the Guidelines provides that the 'likely fines' for 'very serious infringements', for example 'horizontal restrictions such as price cartels and market-sharing quotas' are 'above [EUR] 20 million'. There is therefore no indication in this part of the Guidelines that the starting amount of a fine imposed on an undertaking for an infringement of that nature should in principle be limited to EUR 20 million.

68 It should be noted that the Commission stated in recital 675 of the Decision that for the purposes of determining the starting amount of the fines it took into consideration the size of each of the different vitamin markets concerned. Even if the Commission had found in its Decision that there was a single overall infringement covering all the different vitamin products markets concerned, when determining the starting amount of the single fine to be imposed it could, according to the criterion set out in recital 675 of the Decision, have taken into account the combined value of those markets. The starting amount would thus normally have been set at a level well above EUR 20 million, which is the minimum threshold by way of guidance for a very serious infringement.

69 As the figure of EUR 20 million, given as guidance in the Guidelines for very serious infringements, is a 'floor' not a 'ceiling', there is nothing to indicate that if the Commission had found in its Decision that there had been a single infringement it ought necessarily to have set a starting amount for the single fine on the applicant that was lower than the sum of the starting amounts actually set for the eight fines imposed on it.

70 Admittedly, describing certain unlawful acts as constituting one and the same infringement or as a number of separate infringements is not, in principle, without consequence as regards the penalty that may be imposed, since a finding that a number of separate infringements have been committed may lead to the imposition of several separate fines, each within the limits laid down by Article 15(2) of Regulation No 17 (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR , paragraph 118) and thus within the upper limit of 10% of turnover during the accounting period preceding the adoption of the decision.

71 However, in the present case the fact that the Commission classified the acts as separate infringements has not played any part from the point of view of applying that upper limit. The sum of the fines imposed on the applicant, even before

application of the Leniency Notice (EUR 592.32 million), remains significantly below the limit of 10%, which is calculated on the basis of total turnover (*Musique diffusion française and Others* v *Commission*, paragraph 48 above, paragraph 119), the applicant's total turnover in the year preceding the adoption of the Decision (2000) being EUR 35 946 million (see first table in recital 123 of the Decision).

72 It should be added that if the Commission had found in the present case that there had been a single infringement covering all the vitamin products referred to in the Decision, it could probably also have taken into account, for the purposes of calculating the fine to be imposed on the applicant, the latter's collusion in respect of Vitamins B1 and H, which the Commission did not punish in the Decision, as it regarded them as separate infringements relating to which its power to impose penalties was time-barred under Regulation No 2988/74.

73 The above considerations, intended to put the applicant's line of argument in a fuller and more objective perspective, do not however lead to the conclusion that the Commission's finding that there were a number of separate infringements in this case had no impact whatsoever on the level of the fines imposed on the applicant. It is therefore necessary to consider whether, in response to the statement of objections, the applicant has been able to put its point of view on whether the acts alleged in the statement of objections to have been committed by it constituted a single infringement or a number of infringements.

74 It is true that, although the Commission did indeed identify and describe in detail in the statement of objections the acts alleged to have been committed by the undertakings to which it was addressed and indicated the provisions (Article 81 EC and Article 53 of the EEA Agreement) which it regarded as likely to have been infringed by those acts, it did not adopt a clear position on that question.

75 On the one hand, the applicant is right in pointing to a number of elements in the statement of objections which might indicate that the Commission regarded the anti-competitive acts in question as constituting a single infringement.

76 It is necessary to refer first of all to the third paragraph of point 206 of the statement of objections, in which the Commission noted that:

'Notwithstanding the number of producers, the variation in the participation in the meetings and the diversity of their product ranges, the complex of collusive arrangements, in practice and in effect, constituted an overall coordinated scheme to control the world market across the whole range of vitamin products with [Roche] at the centre of the network of agreements and arrangements.'

77 It is important in particular to mention the second paragraph of point 212 of the statement of objections, in which the Commission stated:

'Given the continuity and similarity of method, the Commission considers it appropriate to treat in one and the same procedure the complex of agreements covering the different vitamins. The Commission will consider this as one single overarching vitamin cartel with [Roche], BASF and Rhône-Poulenc forming the

main "mass" and the other producers adhering to, and forming a subset of, the cartel for the particular vitamins which they produce.'

78 In the third and fourth paragraphs of point 225 of the statement of objections, the Commission stated that it was not possible to say with confidence that the 'infringement' had entirely ceased and that it was necessary to require the undertakings to which that statement was addressed to bring the 'infringement' to an end.

79 On the other hand, the defendant also rightly points to other elements in the statement of objections that could show that, on the contrary, the Commission intended to find that there had been a number of infringements.

80 In that regard, it should be mentioned that in the third paragraph of point 212 of the statement of objections the Commission observed in particular, citing the judgment of the Court of Justice in 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 111):

'There is no reason at all why the Commission should not make a single decision covering several infringements, even if some of the undertakings to which it is

addressed are unconnected with some of these infringements, provided that the decision permits each addressee to obtain a clear picture of the complaints made against it. ... When and if any penalty is to be assessed, the Commission will take full account of the part played by each of the participants and the size of the market for the particular vitamin concerned.'

81 The first paragraph of point 212 of the statement of objections reads:

'The Commission considers that the complex of infringements in this case present all the characteristics of a full agreement in the sense of Article 81 [EC].'

82 The third paragraph of point 225 of the statement of objections reads:

'The infringements continued for most products long after the start of the investigations.'

83 In the fourth paragraph of point 226 of the statement of objections the Commission stated that, as regards the application of the Leniency Notice, it would take into consideration any cooperation by the producers 'in relation to each product separately'.

84 The parties to the present case cite several other elements in the text of the statement of objections which, in their view, confirm their own interpretation of that document as to whether there was a single infringement or a number of distinct infringements. Those elements, in particular the use of terms such as 'arrangement', 'agreement' or 'cartel', used in either singular or plural, appear to be less significant.

85 Thus the defendant states in particular that the terms 'complex of agreements', 'complex of agreements and arrangements', 'cartel agreements', 'collusive agreements', used in the statement of objections, indicate that the Commission did consider that there had been a number of separate infringements in this case.

86 However, these terms, together with 'collusive arrangements', which also appears in the statement of objections, cannot be interpreted as necessarily giving a precise legal characterisation to the effect that there was a number of infringements. It is clear from case-law 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 'a decision by an association of undertakings' for the purposes of Article 81(1) EC, can constitute different manifestations of a single infringement of that article (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 113).

87 The applicant, for its part, relies on a number of passages in the statement of objections where the Commission used the term 'cartel' without relating it to a specific vitamin, in particular in point 195 of the statement of objections, where the Commission, in order to assert its competence in the present case, stated that 'the cartel had an appreciable effect on trade between EC Member States and competition in the Common Market'.

88 However, first, the use of the term 'cartel' does not necessarily imply that what is meant is the existence of a single restrictive practice for the purposes of Article 81 EC. That term may be used to describe a horizontal-type restrictive practice, but it may also be used more generally to describe a structure, an organisation responsible for conduct that is in breach of the competition rules. It cannot be excluded therefore that the term 'cartel' was used in the statement of objections to describe the global organisation set up by the vitamin producers, without thereby precluding the possible finding that there were a number of restrictive practices and hence a number of infringements. Second, some of the assertions made in the statement of objections about the 'cartel', such as that made in point 195 concerning its effects on trade between Member States, or the assertion made in point 227 that it constituted a deliberate infringement of Articles 81 EC and Article 53 of the EEA Agreement, may also be interpreted as meaning that in reality they were intended to describe characteristics common to all the restrictive practices referred to in the statement of objections, in order to avoid unnecessary repetition of those characteristics in respect of each practice.

89 As regards the structure of the statement of objections, on which the defendant relies, it is arranged in such a way that under Title C ('The cartel') it gives a specific and detailed description of the collusive agreements concerning each vitamin

separately, but with vitamins A and E being taken together, even though they are described as belonging to different markets. Subject to that slight reservation, in each Section of Title C the Commission considers a particular vitamin product, examining its characteristics, its producers and the market for it (identified as a separate market), the origin, duration, basic scheme, the meetings and operation of the cartel as regards the vitamin concerned, and the members of the cartel. Notwithstanding its title ('The cartel' in the singular), Title C of the statement of objections gave a clear impression that there were a number of separate restrictive practices.

90 Thus, consideration of the statement of objections as a whole suggests that in that document there were evidently doubts on the part of the Commission as to the precise legal characterisation of the acts alleged, in terms of whether they constituted a single infringement or a number of infringements, although it stated unequivocally that they were in breach of Article 81(1) EC and Article 53(1) of the EEA Agreement. The statement of objections did not therefore give a clear indication whether the Commission intended to find that one infringement or a number of infringements had been committed.

91 That finding does not, however, imply that in those circumstances, by considering in the Decision that a separate infringement had been committed in respect of each of the vitamins concerned, the Commission failed to respect the applicant's rights of defence.

92 It is true that in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 29, relied on by the applicant, the Court of Justice held that '[t]he statement of objections must specify clearly the facts upon which the Commission relies and its classification of those facts'.

93 It should also be pointed out, however, that according to the case-law, the decision establishing an infringement is not necessarily required to be a replica of the statement of objections. The Commission must be able to take into account, in that decision, the replies by the undertakings to the statement of objections. It must be able not only to accept or reject their arguments but also make its own analysis of the matters put forward by them in order either to abandon such objections as have been shown to be unfounded or to supplement and redraft its arguments both in fact and in law in support of the objections which it maintains (*ACF Chemiefarma* v *Commission*, paragraph 47 above, paragraphs 91 and 92; *Suiker Unie and Others* v *Commission*, paragraph 80 above, paragraphs 437 and 438; and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 68).

94 In particular, assessment of the facts is a part of the decision-making act itself and the right to be heard extends to all the matters of fact and of law which form the basis for the decision-making act but not the final position which the administration intends to adopt (see, to that effect, Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 231, and Case T-16/02 *Audi* v *OHIM* [2003] ECR II-5167, paragraph 75).

95 Thus, first, the rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the decision was not set out in the statement of objections in a manner sufficient to enable the addressees to defend their interests. Second, the legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that provisional classification. The Commission is required to hear the addressees of a statement of objections and, where relevant, to take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 98 to 100).

96 In the present case, there are grounds for considering that in the Decision the Commission merely adapted and provided legal clarification of the arguments on which it based the objections it had sustained and that it did not therefore prevent the applicant from making known its views on those objections before the Decision was adopted (see to that effect, Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 59 to 65). The applicant should have realised from reading the statement of objections that the Commission did not rule out a finding that there had been a number of separate infringements. The Commission would certainly have avoided the regrettable confusion and inconsistency arising from the legal assessment in the statement of objections as to whether it was a case of a single infringement or a number of infringements, if only it had set out more clearly the possible alternative in that regard on which it would pronounce in its final decision. None the less, that confusion and inconsistency did not prevent the applicant from making its point of view on that question known in its reply to the statement of objections.

97 As the defendant rightly pointed out, it is clear from that reply that the applicant itself was at least aware that the administrative procedure might relate to a number of infringements. On page 5 of the reply, at the end of the description of the measures it had taken to prevent future infringements of competition law within its organisation, the applicant noted that it had 'immediately brought to an end the infringements which are the subject of this proceeding'. The fact relied upon by the applicant, that that observation was made in the context of arguments designed to persuade the Commission to recognise, for the applicant's benefit, that there were attenuating circumstances, by no means rules out the possible inference from this that the applicant was aware, at that stage of the administrative procedure, that at the end of that procedure it might be found to have committed a number of infringements.

98 Also, the defendant rightly refers to the fact that, unlike the applicant, Roche, the addressee of the same statement of objections, made observations in its reply to that statement regarding the question whether there was one infringement or a number of infringements. It is of little relevance in that regard that Roche sought to make clear that in its view the Commission should find that there had been a number of

separate infringements. Contrary to what the applicant claims, it cannot be inferred from the fact that Roche's observations tended in that direction that Roche had interpreted the statement of objections as meaning that the addressees of the statement were accused of involvement in a single worldwide cartel. At any event, there is no need to consider how Roche might have interpreted the statement of objections since the important point is the objective content of that statement. In that regard, the applicant wrongly contends that it was alleged in the statement of objections to have taken part in a single worldwide cartel. The statement of objections contained, in addition to matters pointing in that direction, a number of matters pointing in the direction ultimately taken by the Commission in its Decision.

99 In those circumstances, the applicant was in a position to try, like Roche, to turn the Commission's legal assessment in the desired direction, an assessment which was evidently still not settled with regard to the question whether the conduct complained of constituted a single infringement or a number of infringements. The ambiguities contained in the statement of objections did not prevent the applicant from doing this. The fact that it did not include any arguments on this point in its reply to the statement of objections was therefore purely of its own volition.

100 Thus, in adopting a clear and complete final position on the legal classification of the unlawful acts, which attributed to the applicant as many infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement as there were vitamins affected by those acts, the Commission did not infringe the applicant's right to be heard.

101 It is clear from all the above that the first and second pleas should be rejected.

102 Lastly, inasmuch as, by way of a closing remark at the hearing, at the end of its submission of the arguments in support of the first plea, the applicant suggested that the question raised in that plea was not merely a procedural matter and observed that the Guidelines did not provide that in respect of a restrictive practice covering more than one product the Commission could multiply the fines by the number of such products, it should be noted that, even if, by that remark, the applicant was complaining that the Commission had also infringed the Guidelines by finding in the Decision that the number of infringements was equal to the number of vitamin products concerned and therefore imposing on the applicant the same number of fines, such a complaint would clearly exceed the scope of that plea and would constitute a new plea in law that is inadmissible under Article 48(2) of the Rules of Procedure, since it would not be based on any matter of law or of fact which had come to light in the course of the procedure before the Court.

B — *Third plea: breach of the principles of proportionality and equal treatment in setting the starting amount of certain fines imposed on the applicant*

1. *Arguments of the parties*

103 The applicant contests the starting amounts of the fines set for it by the Commission to reflect the gravity of the offences, which it claims are arbitrary, disproportionate and contrary to the principle of equal treatment.

104 The applicant notes that the Decision clearly states, in recitals 680 and 681, that, in setting the starting amount of the fines, the Commission took account of the relative importance of each undertaking in each of the relevant product markets and, more specifically, of the worldwide turnover in each vitamin. However, the Commission

did not use that criterion and was inconsistent in calculating the starting amounts of the fines in two main respects.

105 First, the starting amounts of some of the applicant's fines are disproportionate by comparison with those of other parties to the same cartels. The applicant points out that in the case of the infringements affecting vitamins B5, C and E, beta-carotene and carotinoids, the starting amount of the applicant's fine, expressed as a percentage of its worldwide turnover in the vitamin concerned, was much higher than Roche's, although Roche's market share was, in each case, much higher than the applicant's and, even on the Commission's view, Roche's leadership role in the cartels was very different from the applicant's.

106 Second, the starting amounts of some of the applicant's fines vary disproportionately as between different infringements, although its market shares for the different vitamins concerned were very similar. Thus, in the case of vitamins A and B2, the applicant was placed in the second category (after Roche) because it had market shares of 32% and 29% respectively, whereas, in the case of vitamin E, it was placed in the first category (with Roche) although its market share (29%) was the same or less than its market share in the case of vitamins A and B2 and despite similarities in the structure of the three markets. The applicant concludes that it ought to have been placed in the second category for all of those infringements and that that unequal treatment, for which the Commission offered no explanation, is unjustified.

107 The defendant replies that the starting amounts of the fines imposed on the applicant are within the range which the defendant is entitled to impose in its discretion and that they are objectively justified.

108 By constituting categories in relation to each offence, the defendant was considering orders of magnitude for duly weighting the fines rather than basing itself on arithmetical formulae. In particular, as indicated at recitals 685, 689 and 691 of the Decision, the undertakings were placed in the second category, below Roche, where their market shares were significantly smaller than Roche's, as was the case for the applicant in the context of the infringements relating to vitamins B5 and C.

109 However, with regard to the infringements relating to beta-carotene and carotinoids, it was found that, given the characteristics of those two markets, which were essentially in the hands of BASF and Roche, those two undertakings had the same 'specific weight' in the functioning of the cartel and that the difference in market shares was not a valid indication of the role of each undertaking in the infringement or of their overall size. That is why no separate category was created for those infringements and the starting amount of the fines was determined by reference only to the size of the market.

110 By way of measures of organisation of procedure ordered by the Court, the defendant provided some clarification as to the method it followed in determining the starting amounts for the fines imposed by the Decision.

111 In particular, the defendant explained that in order to adjust the starting amount for the gravity of each infringement on its own by reference to the size of each vitamin product market ('the general starting amount') it used the data on the size of the EEA market for the last complete year of the infringement. It also gave such data for each of the vitamin products in question and stated that, where the Commission had divided the undertakings into categories, the general starting amounts remained linked to the first category for each infringement.

112 In the same context, the defendant indicated how it had calculated the precise starting amount that had been applied — for each of the infringements for which it had divided the members of the cartel into categories under the fourth and sixth paragraphs of Section 1 A of the Guidelines — to undertakings in the second category. In that regard, it explained that the setting of the starting amount for the second category was based on the ratio between the average of the worldwide turnovers in the product ('the relevant turnovers') of the undertakings in that category and the average of the relevant turnovers of the undertakings in the first category, in rounded figures. The data used for that purpose were those for the last complete calendar year of the infringement, as listed, with no brackets, in the first column of the tables relating to the different vitamin product markets in recital 123 of the Decision.

113 Thus, for example, in the case of the infringement relating to vitamin A, the general starting amount, set at EUR 30 million on the basis of the size of the European market for that vitamin in 1998, was imposed on Roche, in the first category, and was adjusted for BASF and Aventis, in the second category, to EUR 18 million, that is to say 60% of EUR 30 million, since the average of the relevant turnovers of those undertakings was 60.64% of Roche's relevant turnover.

114 At the hearing the applicant, noting those explanations, which it regarded as essential, deplored the fact that the explanations did not appear in the Decision and that the Commission had not sent them to it in good time despite the fact that it had asked for them several times before bringing the present proceedings. At the same time it submitted further complaints against the starting amounts set for it in the Decision.

115 Thus, first of all, the applicant began by pointing out that some of the data supplied by the Commission in the context of measures of organisation of procedure, concerning both the size of the European vitamin product markets and the general starting amounts, were not the same as those given in the Decision. It observed that

when the Commission adjusted the general starting amounts according to the size of the European markets in the products concerned, it set for the smaller markets an amount which, expressed as a percentage of market size, was significantly higher than for the larger markets. It therefore complained that the Commission had not provided any reason to justify that situation.

116 Second, the applicant argued that the Commission's method of creating categories and calculating the starting amount for the second category on the basis of the ratio between the average of the relevant turnovers of the undertakings in that category and the average of the relevant turnovers of the undertakings in the first category resulted in distortions. That method led to starting amounts being imposed on the applicant in respect of the infringements relating to vitamins B5, C and E that were considerably higher than those that would have been obtained by a traditional, simple and more rational method of calculating the amounts directly as a percentage of the starting amount imposed on the main operator, according to the ratio between the applicant's relevant turnover and the relevant turnover of that operator. In the applicant's view, the method involving categories and averages is incompatible with the Guidelines, which make no mention of averages. Moreover, such averages do not reflect the specific weight, and hence the real impact, of the conduct of each of the undertakings belonging to a cartel.

117 At the hearing the defendant replied to those additional complaints, maintaining in particular that the Decision adequately explained to the requisite legal standard how the starting amounts of the fines were calculated, that the general starting amount was linked not to the main operator but to the first category and hence to all the undertakings in that category, and that, even if other approaches were possible, the approach taken in the present case was rational and coherent.

2. *Findings of the Court*

(a) Preliminary remarks

118 As a preliminary point, it is to be noted that it is clear from recitals 655 to 775 of the Decision that the fines imposed by the Commission in respect of the infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement were imposed pursuant to Article 15(2) of Regulation No 17 and that the Commission — even though the Decision does not expressly refer to the Guidelines — applied the method set out in the Guidelines when it set the fines.

119 Although the Commission has a discretion when determining the amount of each fine and is not required to apply a precise mathematical formula (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59), it may not depart from the rules which it has imposed on itself (see, by analogy, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, upheld on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235). Since the Guidelines are an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion when determining fines, the Commission must in fact take account of the Guidelines when determining fines, in particular the elements which are mandatory under the Guidelines (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 537).

120 According to the method laid down by the Guidelines, the Commission takes as the starting point for calculating the amount of the fines to be imposed on the undertakings concerned an amount determined by reference to the gravity of the

infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (Section 1 A, first paragraph). Within that context, infringements are put into one of three categories, namely 'minor infringements', for which the likely fine will be between EUR 1 000 and EUR 1 000 000, 'serious infringements', for which the likely fine will be between EUR 1 000 000 and EUR 20 000 000, and 'very serious infringements', for which the likely fine will be above EUR 20 000 000 (Section 1 A, second paragraph, first to third indents). Within each of these categories, the proposed scale of fines makes it possible, according to the Guidelines, to apply differential treatment to undertakings according to the nature of the infringements committed (Section 1 A, third paragraph). It is also necessary, according to the Guidelines, to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph).

121 Within each of the three categories of infringement thus defined, it may be necessary, according to the Guidelines, to apply weightings in certain cases to the amounts determined in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type and, consequently, to adjust the starting point for the basic amount according to the specific nature of each undertaking (Section 1 A, sixth paragraph).

122 In this instance, the applicant disputes neither the very serious nature of the infringements which the Decision imputes to it nor the findings on which the Commission relied to conclude that those infringements were very serious, which concern the nature of the infringements, their actual impact on the market and the size of the relevant geographic market (recitals 662 to 674 of the Decision).

123 Nor does the applicant put in doubt the criterion, employed by the Commission (recital 675), which entails taking into account, for the purposes of determining the starting amount of the fines, the size of each of the different vitamin product markets concerned. That criterion was, in essence, applied by adjusting the general starting amount by reference to the size of each market concerned. This amount was then linked to the first category of undertakings established by the Commission for each infringement, in cases where differential treatment was applied under Section 1 A, fourth and sixth paragraphs, of the Guidelines or, in cases where no differential treatment was applied, to all the undertakings involved.

124 Moreover, at no time during the written procedure did the applicant contest the absolute level of the general starting amounts. Even with regard to the infringements relating to beta-carotene and carotinoids, in respect of which the Commission did not divide the undertakings into categories, the applicant did not complain in the course of that procedure that the amount of EUR 20 million that had been set for both Roche and itself was excessive in absolute terms, but rather that there was no differentiation between the amounts set for them or, in other words, that the amount set for itself was excessive in relation to the amount set for Roche.

125 Nevertheless, at the hearing, on the basis of the explanations supplied by the defendant in the context of measures of organisation of procedure, the applicant contested the way in which the Commission had in fact adjusted the general starting amounts. In the arguments set out in paragraph 115 above, it alleges inconsistencies between the data which the defendant states it used and those given in the Decision, and the lack of justification for the fact that, for the smaller markets, the general starting amount, expressed as a percentage of market size, is significantly higher than for the larger markets.

126 The admissibility, under Article 48(2) of the Rules of Procedure, of these new complaints concerning the adjustment of the general starting amounts according to the size of the affected market, and also where appropriate their validity, should be considered before considering the complaints relating to the starting amounts specifically imposed on the applicant.

(b) Adjustment of the general starting amounts according to the size of the market affected

127 The complaints raised by the applicant at the hearing with regard to adjustment of the general starting amounts according to the size of the market affected are admissible since they are based on information that has been disclosed by the defendant in the course of the proceedings. It should be noted in particular that, when stating in recital 675 of the Decision that 'for the purposes of determining the starting amount of the fines, [it took] into consideration the size of each of the different vitamin markets', the Commission did not make clear whether it was referring to the markets at EEA level or at world level or which reference period had been used to assess the size of the markets. Those matters were clarified in the information given by the defendant in the context of measures of organisation of procedure (see paragraph 110 above).

128 Those complaints are, however, unfounded.

129 As regards the relevant data, there is indeed a discrepancy between what was stated in the defendant's answer to the written questions and what was stated in the Decision with regard both (i) to the size of the vitamin B5 market at EEA level in 1998 and (ii) to the general starting amounts set for the infringements relating to vitamins A, B2 and C. That discrepancy, however, is of no practical consequence

since it is clearly the result of clerical errors on the part of the defendant in preparing that answer, as the defendant acknowledged at the hearing when it stated that the correct data were those contained in the Decision.

130 With regard to the lack of justification for the fact that, for the smaller markets, the general starting amount, expressed as a percentage of market size, is considerably higher than that for the larger markets, examination of the data contained in the Decision, as given in the table below for each of the eight markets concerned (showing market size at EEA level for the last complete year of the infringement and the general starting amount expressed in absolute terms and as a percentage of market size), does indeed show that the applicant's argument is not factually incorrect.

Market	Size of EEA market (A) (in EUR million)	General starting amount (B) (in EUR million)	B as a percentage of A
Vitamin E	277	35	12.63%
Vitamin C	166	30	18.07%
Vitamin A	158	30	18.98%
Beta-carotene	63	20	31.74%
Vitamin B5	54	20	37.04%
Vitamin B2	45	20	44.44%
Carotinoids	42	20	47.62%
Vitamin D3	22	10	45.45%

131 Inasmuch as the applicant complains that the reasoning for this adjustment of the general starting amounts is inadequate, it is sufficient, in order to reject that complaint, to point out that, although the Decision does not indicate how the Commission determined those specific amounts on the basis of the size of the

various markets at issue, the Court of Justice has held that the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration and that it is not obliged to give in it a more detailed explanation or to indicate the figures relating to the method of calculating the fine (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 39 to 47, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* (*'PVC II'*) [2002] ECR I-8375, paragraphs 463 and 464; see also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 252). Moreover, once the defendant made clear during the proceedings what data it used to assess the size of the markets, the applicant was in a position to assess the validity of the adjustment at issue here and, where appropriate, to raise complaints in that regard.

132 Inasmuch as, in the argument referred to in paragraph 130 above, the applicant is in fact contesting the validity of that adjustment, the Court finds that its complaint is not adequately substantiated, since the applicant does not explain how the fact that the general starting amount expressed as a percentage of market size is considerably higher for the smaller markets than for the larger markets causes the Decision to be unlawful.

133 At any rate, even if the applicant were implicitly relying on infringement of the principle of proportionality, the principle of equal treatment or of the Guidelines, it should be noted that the general starting amount need not necessarily represent, in all cases of very serious infringements, the same percentage of the market size affected, expressed in terms of aggregate turnover.

134 On the contrary, the Guidelines take, as a starting point for calculation of a fine, an amount determined on the basis of brackets of figures reflecting the various degrees of gravity of the infringements (see the 'likely amounts' referred to in the second

paragraph of Section 1 A of the Guidelines) and which, as such, bear no relation to the relevant turnover. The applicant does not dispute that method, which in fact is the main innovation in the Guidelines and the essential feature of which is thus that fines are determined on a tariff basis, albeit one that is relative and flexible (*Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraph 225). That method does not require — but does not preclude — that the size of the affected market be taken into account for the purposes of determining the general starting amount and still less does it require the Commission to set that amount according to a fixed percentage of the total turnover on the market.

135 Moreover, even if, when it finds in one and the same decision that a number of very serious infringements have been committed and decides to adjust the general starting amounts in order to take account of the size of the various markets affected, the Commission were obliged to keep a strictly proportionate relationship between those amounts and the size of those markets, there is nothing in the present case to show that the general starting amounts set for the infringements affecting the smallest markets are too high. Indeed, application of that criterion could just as easily lead even higher general starting amounts being set for infringements affecting the largest markets. The applicant does not allege or show, in particular, that the principle of proportionality required that, for all the infringements in this case, a general starting amount should be set which, as for the infringement relating to vitamin E, should be equal to 12.63% of the size of the market affected.

136 Consideration of the relevant figures shows instead that the defendant adjusted the general starting amounts according to market size in a reasonable and coherent manner. It is clear from the table in paragraph 130 above that the Commission set general starting amounts that were larger where the markets were larger (see columns 2 and 3), but did not apply for that purpose a precise mathematical formula and was, moreover, not required to do so. Thus, for the clearly largest market, for vitamin E, the general starting amount was set at EUR 35 million; for the next two markets in order of size, those of vitamin C and vitamin A, which were practically the same size, the general starting amount was set at EUR 30 million; for the other

markets, which were manifestly smaller, the Commission — although the Guidelines provide, in respect of very serious infringements, that the amount set according to gravity could be 'above [EUR] 20 million' — considered it appropriate to limit that amount to EUR 20 million or, in the case of the smallest market, the size of which was EUR 20 million, to reduce it to EUR 10 million.

137 In those circumstances, it must be held that the applicant's arguments are not such as to reveal any defect affecting the legality of the method by which general starting amounts are adjusted according to the size of the different markets affected, as was carried out in the Decision.

(c) The specific starting amounts imposed on the applicant

138 Next it is appropriate to consider the complaints raised by the applicant in its pleadings (see paragraphs 104 to 106 above) and at the hearing (see paragraph 116 above) against the starting amounts specifically imposed on it for the infringements relating to vitamins B5, C and E, beta-carotene and carotinoids.

139 The applicant criticises the fact that, contrary to what the Commission had stated in recitals 680 and 681, its starting amounts were not determined as a percentage of the starting amounts set for the main operator, Roche, according to the ratio between the applicant's relevant turnover and that of Roche, or, in other words, the fact that the starting amounts of BASF and Roche do not represent the same percentage of their respective relevant turnovers.

140 The applicant observes that, in the case of vitamin E, although the same starting amount of EUR 35 million was set for both Roche and the applicant, that amount represented 14% of the applicant's relevant turnover during the last complete calendar year of the infringement (1998), whilst it represented only 10% of the corresponding turnover for Roche. Thus, expressed as a percentage of the relevant individual turnover, the starting amount set for the applicant was 40% higher than that set for Roche, even though the latter's share of the worldwide market in vitamin E was some 50% larger than that of the applicant. A similar anomaly is said to arise in relation to vitamins B5 and C and to an even greater extent as regards beta-carotene and carotinoids, since the starting amounts set for the applicant, again expressed as a percentage of its relevant turnover was, for each of the latter two products, three times higher than those for Roche, even though Roche's market share on both markets was approximately three times that of the applicant.

141 In that regard, it should be pointed out, first of all, that for the infringements relating to vitamin E, beta-carotene and carotinoids, the same starting amount was, in absolute terms, set for the applicant as for Roche. That is the consequence either of Roche and BASF being placed in the same category (first category) when the Commission divided the undertakings into categories (vitamin E), or of the decision not to divide the undertakings into categories and not to apply some other form of differential treatment (beta-carotene and carotinoids).

142 By contrast, for the infringements relating to vitamins B5 and C, the starting amount set for the applicant was lower in absolute terms than Roche's. That is the consequence of placing the applicant in a separate and lower category (second category) than that in which Roche was placed.

143 First, the Court observes, along with the defendant, that in recitals 680 and 681 of the Decision the Commission gave no indication that it was going to set the starting

amounts of the fines directly on the basis of the relevant turnovers of the undertakings concerned, as a proportion of that figure for example. On the contrary, those recitals indicate that the relevant turnover would be used to assess the relative importance of each undertaking on the market concerned in the context of the division of the undertakings into categories, an operation designed to adjust the general starting amount — determined according to the nature of the infringement, the impact of the infringement on the market concerned, the size of the relevant geographic market and the size of the market concerned — in order to take into account, in accordance with the fourth and sixth paragraphs of Section 1 A of the Guidelines, the 'effective economic capacity of [each undertaking] to cause significant damage to competition', and of the 'specific weight' of each undertaking 'and therefore the impact of each undertaking's offending conduct on competition' (see paragraphs 11 and 12 above). In addition, with regard to the infringements relating to beta-carotene and carotinoids, it is clear from recitals 682, 695 and 696 that the criterion adopted by the Commission in setting the starting amounts was precisely to avoid any difference in the treatment of the only two undertakings involved in those infringements (see paragraph 13 above).

144 Second, the method contained in the Guidelines for setting the amount of fines is not based on the turnover of the undertakings concerned and the Guidelines do not thereby depart from Article 15 of Regulation No 17 as interpreted by the Community judicature (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 282, upheld, on this point in particular, by the judgment in *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraphs 254 to 257 and 261).

145 According to the case-law, the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their

overall turnover or their turnover in the relevant product market (*LR AF 1998* v *Commission*, paragraph 144 above, paragraph 278, upheld, on this point in particular, by the judgment in *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraphs 255 and 312).

146 In that regard, it is appropriate to note that according to settled case-law the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent element of the fines (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; *LR AF 1998* v *Commission*, paragraph 144 above, paragraph 279).

147 Thus, the Commission, for the purpose of setting the fine, may indeed have regard to the turnover accounted for by the goods in respect of which the infringement was committed as a factor for assessing the gravity of the infringement, but it is important not to confer on that figure an importance which is disproportionate in relation to the other factors and the fixing of the fine cannot be the result of a simple calculation based on that figure (see *Musique diffusion française and Others* v *Commission*, paragraph 48 above, paragraphs 120 and 121, and *LR AF 1998* v *Commission*, paragraph 144 above, paragraph 280).

148 Moreover, although the Guidelines do not provide that the fines are to be calculated according to the relevant turnover, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it. Furthermore, the Guidelines state that the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetical calculation (seventh paragraph of Section 1 A) (*LR AF 1998* v *Commission*, paragraph 144 above, paragraphs 283 to 285, upheld, on this point in

particular, by the judgment in *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraphs 258 and 259).

149 Nor do the principles of proportionality and equal treatment, relied on by the applicant, dictate that the starting amount of the fine should represent the same percentage of individual turnover for all the different members of a cartel (see, to that effect, *Lögstör Rör* v *Commission*, paragraph 48 above, paragraph 303).

150 The fact that the starting amount of the fine does not necessarily represent the same percentage of respective turnovers for all members of a cartel is moreover inherent in the method of dividing undertakings into categories, which has the consequence that a flat-rate starting amount is fixed for all the undertakings in the same category. The Court has already held that this method, even though it ignores the differences in size between undertakings in the same category, cannot in principle be condemned (Cases T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385, and *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraph 217).

151 It follows that the simple fact that, for some of the fines imposed by the Decision, the percentage of BASF's relevant turnover represented by BASF's specific starting amount is higher than the percentage of Roche's corresponding turnover represented by Roche's specific starting amount does not in itself show that the Commission breached the principles of proportionality and equal treatment. The situation is no different if one considers at the same time, as the applicant argues, the difference between the two undertakings in terms of their worldwide market shares, since that difference adds nothing to the applicant's comparison between the specific starting amounts expressed as a percentage of the relevant turnover. That comparison, being based on the respective worldwide turnovers of both undertakings in the relevant product, already takes into account the difference between their worldwide market shares, since those shares are calculated on the basis of those turnovers.

152 However, the applicant's arguments, based on the comparison between the starting amounts imposed on it and those imposed on Roche, may be interpreted in essence as follows:

(a) as regards the infringement relating to vitamin E, in respect of which Roche and the applicant have been set the same starting amount since they were both placed in the same category, the starting amount for the applicant should, according to the relevant turnover criterion referred to in recital 681 of the Decision, have been lower than that set for Roche and the applicant should therefore have been placed for that purpose in a separate and lower category than Roche;

(b) as regards the infringements relating to vitamins B5 and C, in respect of which the applicant was placed in a separate and lower category than Roche, and was thus set a starting amount that was lower than that set for Roche, the starting amounts selected do not adequately reflect the situations of the two undertakings, which differ with regard to the abovementioned criterion;

(c) as regards the infringements relating to beta-carotene and carotinoids, in respect of which Roche and the applicant were set the same starting amount because the undertakings were not divided into categories or treated in any way differently, the Commission should, according to the same criterion, have treated the two undertakings differently by setting starting amounts for the applicant that were lower than those set for Roche.

153 It is appropriate to consider, first of all, the argument contained in subparagraph (a) jointly with the argument which the applicant, in order to contest being placed in the first category for the infringement relating to vitamin E, bases on a comparison between its placement in that category for that infringement and its placement in a different category for the infringements relating to vitamins A and B2 (see paragraph 106 above).

154 The argument contained in subparagraph (b) will be taken next, together with the applicant's complaint at the hearing (see paragraph 116 above) — which is admissible under Article 48(2) of the Rules of Procedure because it is based on information that came to light during the procedure — regarding the method of determining the starting amount for the second category on the basis of averages. The other complaint raised at the hearing, which criticises the method of creating categories, is inadmissible under Article 48(2) of the Rules of Procedure and in any event answered by the finding already made in paragraph 150 *in fine* above.

155 The argument contained in subparagraph (c) concerning infringements relating to beta-carotene and carotinoids will be considered last.

Vitamin E

156 Inasmuch as the applicant is disputing the way in which the Commission specifically divided the undertakings into categories in respect of the infringement relating to vitamin E, it should be noted that division into categories must comply with the principle of equal treatment, which prohibits similar situations from being treated differently and different situations from being treated in the same way, unless such treatment is objectively justified. Furthermore, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement (*Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraph 219, and case-law cited).

157 In order to ascertain whether a division of members of a cartel into categories is in keeping with the principles of equal treatment and proportionality, the Court, as part of its review of the lawfulness of the exercise of the Commission's discretion in

the matter, must none the less confine itself to checking that the division is coherent and objectively justified (*CMA CGM and Others* v *Commission*, paragraph 150 above, paragraphs 406 and 416, and *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraphs 220 and 222) and not immediately substitute its own assessment for that of the Commission

158 In the present case, with the exception of the infringements relating to beta-carotene and carotinoids, in respect of which it took the view that it was not suitable to make separate categories (see recitals 695 and 696 of the Decision), the Commission, for each of the infringements found in the Decision, divided the undertakings into two categories: a first category including the major producer or producers of the vitamin concerned on the worldwide market and a second category including the other producer or producers of that vitamin 'which had significantly lower market shares' (see recitals 683, 685, 687, 689, 691 and 693 of the Decision).

159 It must be held that a division of producers into two categories, the major producers and the others, is a not an unreasonable way of taking account of their relative importance on the market in order to adjust the specific starting amount, provided that it does not produce a grossly distorted picture of the markets in question.

160 As regards putting into practice, infringement by infringement, the division method followed in the Decision, it should be noted that, although in recital 681 of the Decision the Commission stated that it was taking into account 'the worldwide product turnover in the last complete calendar year of the infringement', nevertheless, it is evident, in the light of other passages of the Decision — and the defendant confirmed this, in substance, in its answer to a written question put by

the Court in the context of measures of organisation of procedure — that, for the purpose of placing the undertakings in categories, the Commission in actual fact took as its basis these undertakings' worldwide market shares throughout the period of the infringement.

161 Recital 682 of the Decision states that 'the relevant factors for establishing the category applicable to each producer' are set out 'separately for each vitamin' in recitals 683 to 696.

162 It is clear from those recitals that, as regards each of the infringements relating to vitamins A, E, B2, B5, C and D3, the Commission established two categories 'applying the criterion of an undertaking's relative importance in the market' and set the starting amounts 'taking account of [those] categories'. In order to place each undertaking in the first or second category for each infringement, the Commission relied on data relating to market shares. However, in the light of the data referred to in recitals 691 and 693 of the Decision, it can be seen that those market shares were not based on worldwide turnover in the last complete calendar year of the infringement (the figures not in brackets in the second column of the tables relating to the different vitamin product markets in recital 123 of the Decision), but are the average market shares of the undertakings throughout, in substance, the period of the infringement (average market shares being those shown in brackets in the second column of the abovementioned tables).

163 In those circumstances, it must be held that the reference to the last complete year of the infringement, in recital 681 of the Decision, as it is the result of a clerical error, is of no consequence and therefore does not form an integral part of the reasoning underpinning the placement of the undertakings in one category or the other.

164 Thus, the Commission, using worldwide market shares, drawn directly from worldwide product turnover for the whole period of the infringement, placed the operators in the two abovementioned categories, as follows:

Vitamins	First category Major producer(s) (market share)	Second category Other producer(s) (market share)
Vitamin A	44%	32% - 20%
Vitamine E	43% - 29%	14% - 10%
Vitamin B2	47%	29% - 12%
Vitamin B5	36% - 29%	21%
Vitamin C	40% - 24%	8% - 6%
Vitamin D3	40% - 32%	15% - 9%

165 It is clear from those figures that the Commission consistently set the threshold at the point of maximum difference, even if the difference was one percentage point. The category of major producers was limited to one undertaking only where the latter had very large market shares (44% and 47%). It is true that market shares of 29% were held to fall both in the first and the second category but the relative positions of the undertakings with the 29% market share were different in each case: the placement in the second category reflected an 18-percentage-point difference in relation to the major producer (vitamin B2), as opposed to a difference of just 7 and 14 percentage points in respect of placement in the first category (vitamins B5 and E). The only case in which a market share of 24% warranted an undertaking being classified as a 'major producer' (vitamin C) was where there was only a 16-percentage-point difference between that undertaking and the market leader and a very marginal (8% and 6%) position of the other producers.

166 As regards, more particularly, the infringement relating to vitamin E, the narrow difference between Roche, the first operator, and the applicant (14 percentage points), in view of Roche's not particularly high market share, meant that the

Commission could, coherently and objectively — and thus without infringing the principles of equal treatment or proportionality — treat the applicant in the same way as the first operator (and differently from the third and fourth operators) as a 'major producer' and accordingly set the same starting amount for it as for Roche.

167 Next, the comparison the applicant makes between its situation with regard to the infringement relating to vitamin E and its situation with regard to the infringements relating to vitamins A and B2 (see paragraph 106 above) is not capable of leading to a finding that the principle of equal treatment has been breached, since such a breach presupposes discrimination against one person or category of persons in comparison with another person or category of persons. That comparison could at most result in a finding that the Commission had made an error of assessment, in one or other of the cases, in applying the criterion it selected for the purposes of dividing the undertakings into categories. However, assuming the difference in treatment alleged by the applicant were established, this alone would not make it possible to identify the appropriate treatment the applicant should have received when the undertakings were divided into categories in respect of those three infringements and would not be sufficient to justify including the applicant in the second category for the infringement relating to vitamin E. The applicant's line of argument is therefore ineffective.

168 At any event, as the defendant has rightly contended, there are no grounds for considering that the situations thus described by the applicant were comparable because it had a market share in each of the three markets concerned that was the same or very similar. Since the Commission was assessing the importance of the undertakings on each market in relative terms, the circumstance raised by the applicant cannot be appraised without account being taken of the distribution of market shares. That distribution for the market in vitamin E was not comparable with the distribution for the markets in vitamins A and B2. First, the position of the first operator was stronger on those latter markets. Second, unlike the situation on the markets in vitamins A and B2, BASF's share of the market in vitamin E was closer to that of the first operator than to that of the third operator, with 14 and 15 percentage points separating BASF from each of them respectively. The fact that

BASF was in a different category with regard to the infringement relating to vitamin E than with regard to the infringements relating to vitamins A and B2 is therefore not without objective justification.

169 The applicant has not therefore established that the specific starting amount for the fine imposed on it in respect of the infringement relating to vitamin E was set in breach of the principles of proportionality and equal treatment.

Vitamins B5 and C

170 Inasmuch as the applicant considers the difference between the starting amounts set for it and for Roche in respect of the infringements relating to vitamins B5 and C to be insufficient in the light of the differences in their individual relevant turnovers, it is necessary to consider whether the method selected by the Commission for calculating those amounts complies with the principles of proportionality and equal treatment. In that regard, even if the Commission is not required to calculate the fines on the basis of a precise mathematical formula, it is none the less required to exercise its discretion in a coherent and objectively justified manner (*CMA CGM and Others* v *Commission*, paragraph 150 above, paragraph 431).

171 It should be noted that, as for vitamin E and for other vitamins, the Commission divided the undertakings involved in the cartels relating to vitamins B5 and C into categories in the Decision on the basis of their relative importance on the market concerned, assessed according to average market shares for the period of the infringement.

172 It is also appropriate to note that the starting amount linked to the first category for each infringement is the general starting amount, namely the amount resulting, in the Decision, from the finding that the infringements were very serious and from taking into account the size of the market concerned at EEA level.

173 However, as neither the Decision nor the defendant's pleadings show the method used to calculate the precise starting amounts applied, in respect of each of the infringements, to the Commission's second category of undertakings, the Court, in the course of measures of organisation of procedure, requested the defendant to explain that method, which was based on a system of averages and is summarised in paragraphs 112 and 113 above.

174 The applicant challenges this system of averages, arguing that its own specific starting amount should have been calculated solely on the basis of the ratio between its own relevant turnover and that of Roche, as the main operator.

175 Inasmuch as its challenge in fact questions the setting of a flat-rate starting amount for undertakings in the same category — and hence the very method of dividing undertakings into categories in which such setting of flat rates is inherent — or the number of categories created in the present case by the Commission, it cannot be accepted, for the reasons set out, respectively, in paragraph 150 and in paragraphs 159, 164 and 165 above.

176 Inasmuch as, without questioning the setting of a flat-rate starting amount for undertakings in the same category or the number of categories created by the Commission in the present case, that challenge is simply directed against the fact that the Commission used the average turnovers of each category to obtain the

specific starting amounts for the undertakings in the second category, it must be stated that the applicant has not shown in what way such an approach is not coherent or objectively justified, when it appears, at first sight, to provide a logical and balanced weighting of the starting amounts for the second category.

177 It follows that the applicant has not established that the specific starting amounts for the fines imposed on it for the infringements relating to vitamins B5 and C were set in breach of the principles of proportionality and equal treatment.

Beta-carotene and carotinoids

178 Lastly, inasmuch as the applicant complains that the Commission did not treat it differently from Roche with regard to the specific starting amounts for the infringements relating to beta-carotene and carotinoids, it should be noted that the sixth paragraph of Section 1 A of the Guidelines provides that '[w]here an infringement involves several undertakings (e.g. cartels)' it may be necessary 'in some cases to apply weightings to the amounts determined within each of the three categories [of infringement] in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition'. According to that paragraph, that approach is appropriate 'particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'.

179 In the present case, the Commission stated in recitals 695 and 696 of the Decision that, since the beta-carotene and carotinoids worldwide markets consisted of 'essentially two main producers', it was not suitable to make separate categories of

undertakings for the purpose of setting the appropriate starting amounts for the fines. Roche and BASF, which had together held 100% of each of those markets during the period of the infringement, were therefore set a starting amount of EUR 20 million in respect of each of the two infringements in question (see paragraph 13 above).

180 In that regard, it follows from the use of the expression 'in some cases' and the word 'particularly' in the sixth paragraph of Section 1 A of the Guidelines that a weighting according to the individual sizes of the undertakings is not a systematic stage in a calculation which the Commission has imposed on itself but falls within the scope of the flexibility which it has granted itself in cases where it is called for. It is appropriate in this context to refer to the case-law according to which the Commission enjoys a discretion enabling it to take account or not to take account of certain factors when determining the amount of the fines which it intends imposing, having regard, in particular, to the circumstances of the case (see to that effect the case-law cited in paragraph 146 above). In view of the terms of the sixth paragraph of Section 1 A of the Guidelines referred to above, it must be considered that the Commission retains a degree of discretion concerning the appropriateness of weighting fines according to the size of each undertaking (*JFE Engineering and Others* v *Commission*, paragraph 119 above, paragraph 553).

181 Since, in a market in which there are only two operators, a cartel can exist only if both operators participate, it is necessary to take the view, as the defendant does, that the participation of the second operator in terms of market shares is as essential for the very existence of the cartel as that of the first operator. Moreover, the operators in question were two large producers.

182 In those circumstances, despite the undeniable differences in the relevant turnovers and in the market shares of those undertakings during the period of the infringement, as shown by the tables for the markets in beta-carotene and carotinoids given in recital 123 of the Decision, it was possible for the Commission,

without exceeding the limits of its discretion, not to differentiate between its treatment of the applicant and of Roche when it calculated the starting amounts for the fines imposed on them for the infringements committed in those markets.

183 Consequently, the applicant has not established that the specific starting amounts of the fines imposed on it in respect of the infringements relating to beta-carotene and carotinoids were determined in breach of the principles of proportionality and equal treatment.

184 It is apparent from all the above considerations that the third plea should be rejected in its entirety.

C — *Fourth plea: increase, for deterrence, in the starting amounts of fines imposed on the applicant*

1. *Arguments of the parties*

185 The applicant disputes the increase in the starting amount of the overall fine from EUR 128.5 million to EUR 267 million for deterrence. The increase is not supported by sufficient reasons and is the consequence of a number of errors in law.

(a) First part: insufficient statement of reasons for the 100% increase 'for deterrence'

186 The applicant submits that sufficient reason is not given for the 100% increase in the starting amount of the fines for deterrence. The Decision does not explain why deterrence was required in the applicant's case or why such a large increase was necessary. The statement that the fines were increased on account of the undertaking's size or on the basis of a general concept of deterrence does not provide a reason for an increase of such magnitude for deterrence.

187 The inadequacy of the reasoning behind the Decision regarding deterrence becomes even more apparent if that reasoning is compared with the much more detailed statement of reasons given by the Commission to justify the application of a deterrence factor in Decision 1999/60/EC of 21 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/35.691/E-4 — *Pre-Insulated Pipes*) (OJ 1999 L 24, p. 1, 'the Pre-Insulated Pipes decision').

188 The defendant maintains that the Decision did indeed explain why the starting amount of the fines had to be increased by 100% in the case of BASF, Roche and Aventis. It refers to recital 698 of the Decision, which indicates that it was due to their size and their overall resources that such an increase was necessary. That recital must be read in the context of the reasons generally stated in the Decision (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 156), which explains at length the effect of those undertakings' offending conduct on the different vitamin markets.

(b) Second part: no increase for deterrence was required in the applicant's case

189 According to the applicant, the Decision fails to distinguish sufficiently between the punitive purpose and the deterrent purpose of the fine. In order to consider whether any increase for deterrence is justified, the Commission must decide whether an undertaking would be dissuaded from committing an offence in the future if the fine in relation to gravity and duration were not increased for deterrence.

190 It is unnecessary to impose an additional fine on a company as a deterrent merely because it is a large company. A policy of punishing large undertakings more severely with no other justification is contrary to any reasonable notion of non-discrimination. According to the case-law of the Court of Justice and the Court of First Instance, the Commission must verify whether deterrence is necessary for each undertaking on the basis of an assessment of the likelihood of repeated infringement by it (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 134). However, there is no rational connection between an undertaking's worldwide turnover and the requirements of deterrence, since turnover gives no indication of the likelihood of repeated infringement by that undertaking. The Guidelines themselves distinguish clearly, in separate paragraphs of Section 1 A, between the size of undertakings and deterrence.

191 In the present case, in assessing the need to increase the applicant's fines for deterrence, the Commission incorrectly failed to consider a number of circumstances which should have led it to conclude that no increase was necessary.

192 First, the applicant took exceptional measures in dismissing three very senior executives with direct responsibility for the cartel and in widely reporting to all employees the dismissal of those executives and the very serious internal and

external consequences for personnel engaging in similar illegal activities. Second, the applicant voluntarily admitted having taken part in the cartel and cooperated fully in the Commission's investigation. Third, the applicant paid fines totalling approximately EUR 270 million for the cartel in jurisdictions outside the EEA (United States of America, Canada and Australia) and expects that the civil damages which it will have to pay in the United States alone will amount to hundreds of millions of euro. Fourth, a deterrent effect was already inherent in the starting amount of the overall fine, which was set at EUR 128.5 million and was therefore very high, so that no further increase for deterrence was necessary. Fifth, the applicant has taken exceptional steps to increase awareness of and compliance with competition rules within the company, which demonstrates its intention to prevent future infringements (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 221).

193 The defendant asserts that, contrary to the applicant's contention, the 100% increase is not based on its worldwide turnover. It is, rather, a rough adjustment which took account of BASF's size in each of the different vitamin markets and its overall resources. If the applicant's interpretation were correct, the multiplier should have been higher in the case of BASF, since its worldwide turnover was higher than Roche's, although Roche received the same upward adjustment

194 The starting amount of the fine did not already have an inherent deterrent effect. The figure of EUR 128.5 million cited by the applicant does not appear anywhere in the Decision and is misleading, since it represents the aggregate of the starting amounts of the eight fines imposed for the different infringements in which the applicant participated.

195 Furthermore, the matters which, in the applicant's submission, rule out the need to increase the starting amounts for deterrence (as set out in paragraph 192 above) are irrelevant.

(c) Third part: the 100% increase for deterrence is contrary to the Guidelines and to the legitimate expectations arising from them

196 The applicant maintains that an increase of that magnitude 'for deterrence' is contrary to the Guidelines and to the applicant's legitimate expectations arising from them. The Guidelines indicate that deterrence is one of the elements that may be used, if appropriate, by the Commission to determine whether the fine should be higher or lower than the EUR 20 million level indicated for very serious infringements. However, nothing in the Guidelines suggests that the Commission may or must consider deterrence to be an additional and separate element which in itself justifies increasing the starting amount of a fine by 100% which, in the present case, was as much as EUR 128.5 million.

197 If the Commission wishes to impose fines on the basis of a starting amount above EUR 120 million and increase that amount by 100%, with the result, in the applicant's case, that the basic amount for gravity is EUR 257 million, the Commission must adopt new Guidelines. Such large fines are totally unforeseeable on the basis of the present Guidelines, and it is unreasonable and unjustifiable for the Commission to claim that fines of that magnitude, arrived at in that way, are compatible with the Guidelines.

198 The defendant contends that it did not infringe the Guidelines by increasing by 100% the starting amounts of the fines imposed on the applicant. In any case, no legitimate expectations can derive from the Guidelines as regards the level of the fines which the Commission, in its discretion, is entitled to raise within the limits laid down in Regulation No 17.

(d) Fourth part: the 100% increase for deterrence is excessive and disproportionate

199 The applicant maintains that, irrespective of the Guidelines, the Commission can only impose a fine for deterrence that is proportionate to the aim of preventing a company from committing a further infringement. In the present case, the Commission has not observed that principle and has increased the fine *in terrorem*. The 100% increase in the starting amount of the fine, for reasons of general deterrence alone, is excessive and disproportionate.

200 In that regard, the increase represents, in real terms, more than 40% of the total fine ultimately imposed after application of the Leniency Notice, and the same 100% increase was imposed for all the infringements committed by the applicant, regardless of its turnover in the different vitamin product markets and regardless of the different duration of the various infringements.

201 The defendant states that the fines should be proportionate to the gravity and the duration of the infringement. It is irrelevant that the increase for deterrence represents 40% of the overall fine imposed on the applicant after application of the Leniency Notice. Nor is the defendant under any obligation to set the final amounts of fines by reference to the different turnovers of the undertakings.

(e) Fifth part: the deterrent effect ought to have been assessed by reference to the overall amount and not to the starting amount of the fine

202 The applicant submits that the Commission erred in assessing the requirement for deterrence before the overall fine was set by reference to gravity, duration and

aggravating and attenuating circumstances. It is only at that point that the Commission can determine whether the fine, as such, will have a sufficiently deterrent effect or whether a further increase for deterrence is necessary.

203 The gravity of an infringement depends only on the nature and duration of the offence itself, and not on external factors such as the need to deter future conduct. The applicant refers to paragraph 109 of the judgment in *Tate and Lyle and Others* v *Commission*, paragraph 190 above, which makes clear that the gravity of an infringement relates only to the circumstances of the offence and that deterrence must be considered for each undertaking separately, after the amount of the fine has been calculated in all other respects.

204 The defendant contends that the Court of First Instance has confirmed that the deterrent effect of a fine is one of the factors for the Commission to consider when assessing the gravity of the infringement (*ABB Asea Brown Boveri* v *Commission*, paragraph 192 above, paragraph 167). Further, the deterrent effect of a fine is mentioned in Section 1 A of the Guidelines in relation to the gravity of the infringement and there is nothing in the judgment in *Tate & Lyle and Others* v *Commission*, paragraph 190 above, to suggest that deterrence is not to be taken into account when assessing the gravity of the infringement.

2. *Findings of the Court*

(a) Compliance with the obligation to state reasons (first part)

205 The statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons

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

206 In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be established, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors including, in particular, the specific circumstances of the case, its context and the deterrent element of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 146 above, paragraph 54; *PVC II*, paragraph 131 above, paragraph 465; and *ABB Asea Brown Boveri* v *Commission*, paragraph 192 above, paragraph 252).

207 In the present case, it should be noted with respect to the 100% increase in the starting amounts of the fines set for the applicant that in recital 697 of the Decision the Commission stated that 'in order to ensure that the fine has a sufficient deterrent effect, [it] will determine whether any further adjustment of the starting point is needed for any undertaking'. Next, the Commission considered in recital 698 that, in the cases of BASF, Roche and Aventis, 'the starting point for a fine resulting from the criterion of the relative importance in the market concerned [required] further upward adjustment to take account of their size and their overall resources'. Lastly, in recital 699, the Commission set out in respect of each of those undertakings and each infringement the increase that 'the need for deterrence' required. In each case the increase was 100% of the starting amount of the fine.

208 It follows from those recitals, which make up the section of the Decision entitled 'Sufficient Deterrence', that the Commission found that an increase in the starting amounts set for the applicant was necessary in order to ensure that the fines had a sufficient deterrent effect, given the applicant's size and overall resources.

209 It is true that that section of the Decision does not specify the facts on which the Commission based its assessment of the applicant's size and overall resources. Nevertheless, it is apparent to the requisite legal standard from the Decision — and the applicant does not deny — that the Commission relied in that connection on the total worldwide turnover of the undertakings as set out in the first table in recital 123 of the Decision.

210 In recital 123 of the Decision, the Commission stated that the tables in that recital '[gave] an overview of the relative importance of each undertaking on the worldwide and EEA market and of their respective size'. The first of those tables shows the total worldwide turnover in 2000 of each of the undertakings to which the Decision was addressed and the subsequent tables show, in respect of each vitamin product market, the relevant turnover for the last complete calendar year of the infringement and the market share during the period of the infringement, worldwide and in the EEA, of each of the companies active in that market.

211 Since the Decision shows that the Commission assessed the relative importance of each undertaking on the market concerned by reference to the data relating to the worldwide market for the vitamin product concerned (turnover or market share: see, in that regard, the analysis of the third plea above), those data had been exhausted already for the purposes of setting the starting amount of the fines, and the figures relating to the EEA market were irrelevant in the present context (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraph 246), it follows that the Commission assessed the size and overall resources of each undertaking — taken into account for the purposes of increasing the starting

amounts — by using the total worldwide turnover figure for 2000 set out in the first table of recital 123. That table shows that it was precisely BASF, Roche and Aventis which had the highest total worldwide turnovers of the undertakings to which the Decision was addressed.

212 It is settled case-law that total turnover is an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power (*Musique diffusion française and Others* v *Commission*, paragraph 48 above, paragraph 121; Case 183/83 *Krupp Stahl* v *Commission* [1985] ECR 3609, paragraph 37; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139; Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176; and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 61). By contrast, the relevance as indicia of size and overall resources — the only factors mentioned in recital 698 of the Decision — of the other factors set out by the defendant in its pleadings (the impact of the individual infringing conduct, the size in each of the various vitamin markets, the size in the vitamins sector as a whole, the ability of Roche and BASF to squeeze the margins of their customers who, like them, operate in the downstream market of pre-mixes or the involvement of the directors of Roche, BASF and Aventis in the illicit cartels) is not immediately apparent and nowhere does the Decision suggest that, such factors were, like the total turnover, in fact taken into account in increasing the starting amounts of the fines for deterrence. Moreover, at the hearing the defendant eventually confirmed that it was indeed the total turnover figures set out in recital 123 of the Decision which alone were used, in the context of recital 698, in assessing the size and overall resources of the undertakings concerned.

213 In so far as, by the present part of the plea, the applicant also alleges a failure to state reasons for the precise amount of the increase in question (100%, or a multiplier of two) as fixed uniformly in respect of all the infringements in recital 699 of the Decision, it should be noted that, whilst it is true that the Decision does not specify

the method adopted by the Commission in arriving at that precise figure, the Court of Justice has held that the essential procedural requirement to state reasons is satisfied where the Commission sets out in its decision the factors which enabled it to measure the gravity and duration of the infringement and it is not required to set out a more detailed account or the figures relating to the method of calculating the fine (see the case-law cited in paragraph 131 above).

214 In particular, it is clear from *Cascades* v *Commission*, paragraph 131 above (paragraphs 47 and 48), that it is desirable, but not a requirement of the obligation to state reasons, that the Commission indicate the figures which influenced the exercise of its discretion when setting the fines, especially in regard to the desired deterrent effect.

215 Thus it is apparent that, in the Decision, the Commission set out the factors taken into consideration in increasing the starting amounts of the fines for deterrence, as regards inter alia the applicant, thus enabling the applicant to ascertain the reasons for that increase and to defend itself and enabling the Community judicature to exercise its power of review. The question whether those reasons are a sufficient legal basis for such an increase is one of substance, which will be examined in the analysis of the other parts of the present plea (in particular of the second and fifth parts).

216 Since there is a sufficient statement, in recitals 697 to 699 in conjunction with recital 123 of the Decision, of the reasons for the increase for deterrence in the starting amounts of the fines imposed on the applicant, the present part must be rejected.

(b) Merits of the 100% increase for deterrence (parts two to five)

217 By the second to fifth parts of the present plea, the applicant challenges the merits of that increase. The Court will, first of all, examine the second part, in which the applicant challenges the need for any increase for deterrence in its case, together with the fifth part, in which the applicant alleges that the Commission examined whether there was any such need at an early stage of its calculation of the fines. Then the Court will analyse the third and fourth parts, which essentially seek to challenge the amount of the increase in question.

Second and fifth parts

— The taking into account of the need for deterrence in setting the fine

218 It should be noted that the object of the penalties laid down by Article 15 of Regulation No 17 is to suppress illegal activities and to prevent any recurrence (*ACF Chemiefarma* v *Commission*, paragraph 47 above, paragraph 173; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 1166, and *JFE Engineering and Others* v *Commission*, paragraph 119 above, paragraph 543).

219 Deterrence is therefore one objective of the fine.

220 Section 1 A of the Guidelines, dealing with 'Gravity', refers to that objective. More particularly, the fourth paragraph of that section states that 'it will be necessary ... to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

221 In the present case, that requirement is referred to in the heading of the relevant section of the Decision ('Sufficient Deterrence') and on two occasions in the recitals in that section (recital 697: 'in order to ensure that the fine has a sufficient deterrent effect'; recital 699: 'the Commission considers that the need for deterrence requires').

222 In satisfying that requirement, the Commission considered that it was appropriate, in the case of three undertakings, including the applicant, to multiply by a coefficient (in this case, two, or 100%) the specific starting amounts of the fines as they resulted from the assessment of the gravity of the infringement as a whole, the consideration of the size of the market and, where appropriate, the relative importance of each undertaking in the market concerned. When the fines are calculated, that step precedes consideration of the duration of the infringement pursuant to Section 1 B of the Guidelines and consideration of the aggravating and attenuating circumstances pursuant to Sections 2 and 3 thereof.

223 The applicant, relying on the passages cited in paragraph 221 above, interprets that section of the Decision as meaning that in it the Commission ascertained whether the starting amounts set in the preceding section of the Decision were appropriate in light of the need for deterrence. On that premiss, it criticises the Commission, first, for having failed specifically to verify the likelihood of repeated infringement on its part and for having examined the need for deterrence on the basis of an irrelevant criterion, namely the size and overall resources of the undertaking, and, second, for having carried out that assessment at a premature stage of calculating the fine, thereby wrongly failing to have regard to the additional deterrent effect arising from the additional amounts imposed on it by the Commission in respect of the duration of the infringements and the aggravating circumstance of its being a leader in or instigator of the infringements.

224 It is not in dispute that, when increasing the starting amounts of the fines imposed on the applicant and the two other undertakings in question (Roche and Aventis), the Commission did not assess the likelihood of repeated infringement by those undertakings. As is clear from recitals 697 to 699 of the Decision, it merely took account of the size and overall resources of the undertakings.

225 However, the failure to assess the likelihood of repeated infringement by the applicant does not affect the lawfulness of that increase.

226 It should be noted that, as deterrence is an objective of the fine, the need to ensure it is a general requirement which must be a reference point for the Commission throughout the calculation of the fine and does not necessarily require that there be a specific step in that calculation in which an overall assessment is made of all relevant circumstances for the purposes of attaining that objective.

227 Thus, even if the fourth paragraph of Section 1 A of the Guidelines — which concerns the setting of the amount of the fine for the gravity of the infringement — refers to the need 'to set the fine at a level which ensures that it has a sufficiently deterrent effect', the Guidelines refer, amongst the aggravating circumstances, to the 'need to increase the penalty in order to exceed the amount of the gains improperly made as a result of the infringement where it is objectively possible to estimate that amount' (Section 2, fifth indent). The consideration of any economic or financial benefit derived by the offenders — which is also referred to in Section 5(b) of the Guidelines as an 'objective factor' to be taken into account, after the calculations referred to in the preceding sections of the Guidelines and to adjust the fines accordingly — is justified precisely by the deterrent objective of the fine. The deterrent effect of the fines would be diminished if undertakings which committed an infringement of competition law could expect that their conduct would be penalised by a fine of an amount lower than the profit which was likely to be derived from that conduct (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 456, confirmed on appeal, inter alia as regards that point, by *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraph 292).

228 Similarly, the need for deterrence is the basic reason for increasing the fine on the basis of 'repeated infringement of the same type by the same undertaking(s)', which is also an aggravating circumstance under the Guidelines (Section 2, first indent) (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 293).

229 Since the need for deterrence is not a specific factor to be taken into consideration, marking a particular step in the calculation of the fine, the applicant's argument that the deterrence must be assessed in the light of the likelihood of repeated infringement is insufficient to challenge the increase in the starting amounts made by the Commission in the present case. That increase is for the size and overall resources of the undertakings, the deterrent objective of the fines being the reason put forward in the Decision for taking into consideration the size and overall resources of the undertakings in setting the fines (see recital 698 of the Decision).

230 In other words, even if the Commission wrongly omitted to consider the factors which, in the applicant's view, were likely to reduce the risk of repeated infringement by the applicant (see paragraph 192 above), such an omission could not affect the lawfulness of the principle of the increase carried out in recitals 697 to 699 of the Decision, which depends solely on the question whether the criterion adopted by the Commission, namely the size and overall resources of the undertakings, is relevant for the purposes of ensuring the deterrent effect of the fines. On the other hand, that omission would justify an assessment by the Court of those factors separately from its analysis of the lawfulness of that increase.

231 Furthermore, with regard to paragraph 134 of *Tate & Lyle and Others* v *Commission*, paragraph 190 above (confirmed, on appeal, by Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933), cited by the applicant, the Court of First Instance merely observed there that the Commission has the power to determine the level of fines with a view to reinforcing their deterrent effect where infringements of a given type, even though established as being unlawful from the outset of Community

competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them. Contrary to the applicant's contention, it does not in the least follow from that observation that it is possible to seek to give deterrent effect to the fine exclusively where the undertaking in question intends to reoffend.

232 It is therefore necessary to address the question whether the criterion of size and overall resources of the undertakings is relevant for the purposes of ensuring the deterrent effect of the fines (see paragraphs 233 to 236 below) and, if the answer is in the affirmative, to verify the way in which that criterion was applied in the applicant's case (see paragraphs 237 to 245 below). Only then will it be necessary to ask whether the circumstances cited by the applicant as indicia of the low risk of its reoffending are relevant in calculating the fine and are such as to justify the application of factors reducing the amount of that fine (see paragraphs 264 to 271 below).

— The relevance of taking into account the size and overall resources of the undertakings for the purposes of ensuring the deterrent effect of the fines

233 The case-law of the Community judicature has repeatedly recognised the relevance of the size and economic power of an undertaking as criteria in setting the fine to be imposed under Article 15 of Regulation No 17. It has been held, for example, that those criteria may be used as indicia of the influence which the undertaking was able to exert on the market (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 48 above, paragraph 120, and Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 52; *SCA Holding* v *Commission*, paragraph 212 above, paragraph 176) or, in accordance with Section 1 A, fifth indent, of the Guidelines, as evidence of knowledge on the part of the undertaking of the requirements and consequences of competition law (*ABB Asea Brown Boveri* v *Commission*, paragraph 192 above, paragraph 169).

234 In the Decision, the taking into consideration of the size and overall resources of the undertakings is, however, explained by the need to ensure the deterrent effect of the fine.

235 The link between the size and overall resources of the undertakings, on the one hand, and such a need, on the other, is not open to challenge. It should be noted in this connection that a large undertaking, owing to its considerable financial resources by comparison with those of the other members of a cartel, can more readily raise the necessary funds to pay its fine, which, if the fine is to have a sufficiently deterrent effect, justifies the imposition, in particular by the application of a multiplier, of a fine proportionately higher than that imposed in respect of the same infringement committed by an undertaking without such resources (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraphs 241 and 243; see also *ABB Asea Brown Boveri* v *Commission*, paragraph 192 above, paragraph 170, confirmed on appeal in *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, and *JFE Engineering and Others* v *Commission*, paragraph 119 above, paragraph 244).

236 The applicant therefore wrongly challenges the relevance of the size and overall resources of the undertakings as criteria for deciding whether to increase the fine for deterrence and it should further be noted that the applicant does not challenge the relevance of the data used by the Commission in the present case to assess the size and overall resources of the undertakings penalised, namely, as noted at paragraphs 210 and 211 above, the total turnover of those undertakings in the year (2000) preceding that of the adoption of the Decision.

— Stage in the calculation of the fine at which it is appropriate to take account of the size and overall resources of the undertakings for the purposes of deterrence

237 By the fifth part of the present plea, the applicant submits essentially that the assessment as to whether the fine should be increased for deterrence should not be

made on the basis of the starting amount but on the basis of the final amount of the fine, arrived at by assessing gravity, duration and the aggravating and attenuating circumstances.

238 As is clear from the considerations set out in paragraphs 226 to 229 above, the need for deterrence is not the subject of a separate assessment to be carried out on the basis of all the relevant circumstances at a specific stage of the calculation of the fines, but must underpin the entire process of setting the amount of the fine.

239 In so far as the fifth part seeks in any event to challenge the stage in the calculation of the fine at which the Commission took account of the size and overall resources of the undertakings for the purposes of deterrence, it cannot be upheld since it is based on a false premiss, namely that the increase in question is based on an assessment that a particular amount of a fine is appropriate to the deterrent objective of the fine assessed in the light of the size and overall resources of the undertakings.

240 Recital 699 of the Decision itself shows that the Commission did not regard the operation whereby it took account of size and overall resources for the purposes of deterrence as being such an assessment. The amounts arising from that operation differ markedly, in respect of the same undertaking, according to the infringement alleged against it. For example, the starting amount of the fine imposed on the applicant was increased to EUR 70 million in respect of vitamin E (starting amount of EUR 35 million increased by 100%) and only to EUR 8 million (starting amount of EUR 4 million increased by 100%) in respect of vitamin D3. It is difficult to see why the Commission would take the view that the starting amount of EUR 35 million for vitamin E was not a sufficient deterrent given the applicant's total turnover and that it had to be increased to EUR 70 million, even though, with regard to vitamin D3, it found that EUR 8 million sufficed to ensure deterrence.

241 By the increase in the starting amounts set out in recital 699 of the Decision, the Commission, regardless of the size of those amounts, in reality merely applied — to ensure the deterrent objective of the fines — differential treatment to the members of each individual cartel to take account of the way in which they are actually affected by the fine. That differentiation is carried out by means of multipliers set in the light of the size and overall resources of the undertakings, irrespective of the size of the amounts to which those multipliers are applied.

242 That approach, which is consistent with the rule set out in paragraph 235 above, implies that the decision as to whether there is any need for a deterrent factor to be applied by virtue of size and overall resources, in that it does not concern the appropriateness of a particular amount, is not influenced by the stage in the calculation of the fine at which it occurs.

243 Furthermore, it should be noted that, with regard to a calculation based, as in the Decision, on the application to a starting amount of multipliers or divisors (which essentially amount to increases or decreases expressed in percentage points), if the 100% increase in issue in this case had been applied at the stage suggested by the applicant, namely after and not before the assessment of the duration and aggravating and attenuating circumstances, the final figure would not have differed from that arrived at by the Commission in the Decision.

— The need to increase the applicant's fine by virtue of its size and overall resources for the purposes of deterrence

244 It should be noted that the Commission was manifestly right to find that, given the size and overall resources of the applicant, assessed on the basis of the total turnover for 2000, it was appropriate to increase for the purposes of deterrence the fine to be

imposed on the applicant. It is apparent from the first table in recital 123 of the Decision that that figure was EUR 35 946 million, which shows the very considerable size of that undertaking, exceeding by far all the other undertakings to which the Decision was addressed.

245 The applicant's argument that the figure of EUR 128.5 million already posed a sufficient deterrent cannot rebut that finding. First, as the defendant points out, the Decision did not set any starting amount at that figure, it not being mentioned in the Decision and being only the sum resulting from the applicant's addition of the starting amounts of all the fines imposed on it in respect of the various infringements alleged to have been committed, with the highest of those figures in fact being EUR 35 million. Second, and fundamentally, as has just been set out in paragraphs 239 to 241 above, the operation in question is not based on an assessment that the starting amount of a fine is appropriate to that fine's deterrent objective, so that even the figure of EUR 35 million is irrelevant in the present context.

246 It follows from the foregoing that there is nothing in the present case from which it may be concluded that, in considering that in the light of the applicant's size and overall resources it was necessary for the purposes of deterrence to increase the specific starting amounts in its case, the Commission misapplied the Guidelines or infringed the principle of equal treatment or any other rule or principle of law governing the calculation of fines.

Third and fourth parts

247 By the third and fourth parts, the applicant essentially challenges the amount, in its view excessive, of the increase in the starting amounts applied to it under recital 699 of the Decision. First, it submits that a 100% increase, amounting in this case to

EUR 128.5 million and to a basic amount for gravity of EUR 257 million, was not reasonably to be expected on the basis of the Guidelines. Second, the increase in question — which, the applicant stresses, amounts to 40% of the overall fine imposed on it after application of the Leniency Notice — is not proportionate to the objective of preventing it from committing a further infringement and, since it is the same for all infringements, bears no relationship to BASF's turnover in the various vitamins markets and to the difference in duration of its infringements.

248 First of all, the Court points out, as does the defendant, that the figure of EUR 128.5 million referred to by the applicant does not correspond to the absolute value of the increase in the starting amount set for a given infringement, but is the sum total of all the increases applied by virtue of size and overall resources and for the purposes of deterrence, in respect of the numerous infringements on the part of the applicant penalised in the Decision. The highest increase, in absolute terms, applied to the applicant in recital 699 of the Decision is EUR 35 million for vitamin E.

249 There is nothing in the Guidelines to preclude, in the case of 'very serious' infringements such as those in the present case, an increase by such an amount in absolute terms or a percentage increase of 100%.

250 It should be noted in this connection that, as is stated in the first introductory paragraph of the Guidelines, the principles laid down in those guidelines seek 'to ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover'. The objective of the Guidelines is therefore transparency and impartiality, and not the foreseeability of the level of the fines.

251 Furthermore, as regards specifically the infringements to be classified as 'very serious', the Guidelines merely state that the likely fines are 'above EUR 20 million'. The only limits referred to in the Guidelines which apply in the case of such infringements are the general limit of 10% of overall turnover set by Article 15(2) of Regulation No 17 (see the preamble and Section 5(a) of the Guidelines) — which is not alleged to have been exceeded in the present case — and the limits relating to the additional amount which may be imposed in respect of the duration of the infringement (see Section 1 B, first paragraph, second and third indents of the Guidelines) — which, again, are not alleged to have been exceeded in the present case.

252 Consequently, the Guidelines cannot give rise to a legitimate expectation as to the level of the starting amount, of amounts added to it for reasons other than the duration of the infringement and, thus, of the final figure for fines to be imposed in respect of very serious infringements. The same applies to the proportion of the final figure represented by an additional amount imposed in the course of the calculation.

253 Moreover, the Commission's application, for the purposes of deterrence, of a multiplier intended to reflect the size and overall resources of the undertakings is not precluded by the fact that the Guidelines do not expressly provide for it. Section 1 A, fourth paragraph (in the context of the assessment of the gravity of an infringement) refers to the need to set the fine at a level which ensures that it has a sufficiently deterrent effect. As is clear from paragraphs 235 and 236 above, the taking into account of the size and overall resources of the undertakings may contribute to satisfying such a need, by directly fixing a starting amount that takes account, inter alia, of those factors or by applying to the starting amount set on the basis of other factors (such as the nature of the infringement or the impact of the individual offending conduct) an adjustment intended to reflect the size and overall resources of the undertakings. That second method, followed in the Decision, not only does not contradict the Guidelines, but even increases the transparency of the Commission's calculation as compared with the first method.

254 In relation to the applicant's argument alleging that the increase in question is disproportionate to the need to deter repeated infringement by it, it has already been held in the analysis of the second part of the present plea (see paragraphs 218 to 236 above) that the increase referred to in recital 699 of the Decision is based on the size and overall resources of the undertakings and not on an assessment of the likelihood of repeated infringement by them and that such an approach is unimpeachable. It follows that the proportionality of that increase must be assessed solely in the light of the size and overall resources.

255 It has already been held that, in the Decision, the Commission assessed the size and overall resources of the undertakings concerned on the basis of the total turnover figures for 2000, the relevance of which in that context has not been challenged by the applicant. In those circumstances, the fact that an identical multiplier was applied in respect of all the infringements alleged against the applicant, regardless of its relevant turnover and the duration of the infringement, is not in the least surprising and does not demonstrate any infringement whatsoever of the principle of proportionality.

256 Lastly, as regards the precise amount of such a multiplier (two, or 100%), it should be noted that the applicant is by far the largest of the undertakings concerned by the Decision. Its total turnover for 2000 was EUR 35 946 million. Whilst its total turnover was double that of Roche (EUR 17 678 million) and appreciably higher than that of Aventis (EUR 22 304 million), the same multiplier was applied to the applicant as to those two undertakings.

257 Furthermore, it should be noted that in the Pre-Insulated Pipes decision, referred to in paragraph 187 above, adopted in 1998 and which was the subject of inter alia the judgment in *ABB Asea Brown Boveri* v *Commission*, paragraph 192 above (see paragraphs 162 to 172), a multiplier of 2.5 (or an increase of 150%) was applied in the case of one undertaking, ABB, which was the ultimate holding company of a

group which in 1997 posted a consolidated turnover of some EUR 27 600 million. The Court of First Instance in that judgment did not question the proportionality of such a multiplier, which that undertaking had challenged.

258 Next, in its judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, paragraph 131 above (paragraphs 245 to 249), the Court of First Instance, by contrast, was persuaded that a multiplier of 2.5 to reflect the size and overall resources of Showa Denko KK ('SDK') was excessive. According to the contested decision in that case (Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/E-1/36.490 — Graphite electrodes (OJ 2002 L 100, p. 1, 'the Graphite electrodes decision')), SDK was 'by far the largest undertaking concerned' by that decision. The Court concluded that the multiplier was excessive by comparing that multiplier with that of 1.25 (or an increase in the starting amount of 25%) applied to another member of the cartel, which the Court found had a total turnover (EUR 3 693 million in 2000) of less than half of that of SDK (EUR 7 508 million in 2000). The Court thus held in the exercise of its unlimited jurisdiction that the starting amount set for SDK should be multiplied merely by 1.5 (or an increase of 50%).

259 In the present case, BASF's total turnover in 2000 (which was taken into consideration in the Decision) is approximately five times higher than SDK's turnover in 2000 (which was taken into consideration in the Graphite electrodes decision (paragraph 258 above) adopted some months before the Decision, and in the judgment in *Tokai Carbon and Others* v *Commission*, paragraph 131 above). Moreover, it is approximately 30% higher than ABB's turnover for 1997, which was taken into consideration in the Pre-Insulated Pipes decision (paragraph 187 above) adopted in 1998, and in the judgment in *ABB Asea Brown Boveri* v *Commission*, paragraph 192 above. The multiplier of two applied to the applicant in the present case therefore no longer appears excessive in comparison with those precedents.

260 Accordingly, there is nothing in the present case from which it may be concluded that the amount of the increase in the applicant's specific starting amounts referred to in recital 699 of the Decision is contrary to the Guidelines, the applicant's legitimate expectations on the basis of those Guidelines or the principle of proportionality.

261 It follows that the third and fourth parts of the present plea must be rejected.

Conclusion on the application of the increase in the fines referred to in recital 699 of the Decision

262 In the light of the foregoing considerations, the application in the applicant's case of an increase in the fine of 100% to take into account, for the purposes of deterrence, the applicant's size and overall resources cannot be criticised.

263 That finding does not, however, prejudge the question whether the Commission in the present case should, in applying factors reducing the fine, have taken account of the circumstances cited by the applicant in the second part of the present plea in order to demonstrate the low risk of repeated infringement by the applicant.

The circumstances allegedly demonstrating the low risk of repeated infringement by the applicant

264 The circumstances which, according to the applicant, attenuate the need for deterrence in its case are the dismissal of the senior executives involved in the events giving rise to the infringements, the adoption of internal programmes for compliance with competition rules and to increase staff awareness in that regard, the applicant's cooperation during the Commission's investigation and the payment or the obligation to pay fines and damages pursuant to decisions of courts of non-member countries relating to the collusive arrangements in vitamin products (see paragraph 192 above).

265 Whilst it is clear from the foregoing analysis that those circumstances do not preclude, in the applicant's case, the application of an increase in the fine to take into account, for the purposes of deterrence, the size and overall resources of the undertaking, an assessment must be made of the extent to which those circumstances called for a reduction by the Commission of the fine imposed on the applicant.

— The measures adopted by the applicant to prevent repeated infringement

266 As regards the internal measures adopted by the applicant in order to prevent any repetition after the infringements had come to an end (dismissal of the senior executives involved in the events giving rise to the infringements, the adoption of internal programmes for compliance with competition rules and to increase staff awareness in that regard), it should be noted that, whilst it is indeed important that an undertaking took measures to prevent further infringements of Community competition law from being committed in the future by its staff, that does not alter the fact that the infringement was committed. Merely because in certain previous decisions the Commission took account of a compliance programme as an

attenuating circumstance does not mean that it is under a duty to do so in each case which comes before it (*Hercules Chemicals* v *Commission*, paragraph 119 above, paragraph 357; Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 395; Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 127; and *LR AF 1998* v *Commission*, paragraph 144 above, paragraph 345, confirmed on that point, by *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraph 373).

267 Thus, the preventive measures which the applicant claims to have adopted placed no duty whatsoever on the Commission to reduce the fine.

— Cooperation with the Commission during the investigation

268 Since the Commission acknowledged the cooperation provided by the applicant during its investigation and rewarded it with reductions in the fines pursuant to the Leniency Notice, the question whether that cooperation merited any larger reductions in the fines must be assessed in the context of the analysis of the arguments raised by the applicant in the sixth and seventh pleas, specifically in regard to its cooperation during the Commission's investigation.

— Judgments in non-member countries

269 As regards the question whether the Commission, in assessing the need for deterrence in the case of an undertaking which should be penalised for an infringement of the Community competition rules, is required to take account of judgments in non-member countries in respect of the same collusive arrangements, it should be noted that the objective of deterrence, which the Commission is entitled

to pursue when setting fines, is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the EEA. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be determined by reference solely to the particular situation of the undertaking sanctioned or by reference to whether it has complied with the competition rules in non-member countries outside the EEA (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 110, and *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraph 147).

270 Accordingly, the Commission cannot be criticised for considering that the judgments against the applicant in non-member countries for collusive arrangements in vitamin products did not give rise to an entitlement to a reduction in the fines imposed on it.

— Conclusion on the circumstances relied on by the applicant

271 It follows from the preceding analysis that the circumstances relied upon by the applicant to demonstrate the low risk of repeated infringement by it not only did not preclude an increase in the fines imposed on the applicant to take account, for the purpose of deterrence, of its size and overall resources, but also did not require the Commission to reduce the fines imposed on the applicant.

(c) Conclusion on the fourth plea

272 It follows from all the foregoing considerations that the fourth plea must be rejected in its entirety.

D — *Fifth plea: errors of assessment in attributing to the applicant a role as leader and instigator with regard to the infringements relating to vitamins A, E, B5, C and D3, beta-carotene and carotinoids*

1. *Preliminary questions of a general nature*

(a) Arguments of the parties

273 The applicant submits that the Commission erred in treating BASF, together with Roche, as a leader and instigator with regard to the infringements relating to vitamins A, E, B5, C and D3, beta-carotene and carotinoids. The applicant claims that its role in those infringements was significantly less than Roche's and no more than that of any other undertaking involved which was not classified as a leader or instigator.

274 In the context of a cartel, a leading role is taken by an undertaking which plays a decisive part in establishing the cartel (e.g. creating the cartel, recruiting other companies), proposes the main arrangements for operating it (e.g. fixing prices and quotas) and polices the operation of the cartel, in particular by punishing others for non-adherence to the agreed course of action. When judged by this criterion, the leadership acts cited by the Commission in the case of BASF are in reality mere acts of participation in a course of conduct that was planned, worked out and policed by Roche. The applicant submits that if the Commission's interpretation were upheld, all cartel participants would, by virtue of their participation alone, be regarded as cartel leaders.

275 The applicant contends that only Roche's conduct could be regarded as amounting to leadership and that no increase for leadership should have been applied to BASF. The Commission's analysis of the issue of leadership is defective in several respects and does not meet the standards of proof laid down in the case-law, namely that the Commission must not distort the meaning of documents or evidence by omitting material words, by producing partial, inaccurate or insufficient evidence to support its allegations, or incorrectly analysing documents relied upon (Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] II-1403, paragraphs 95, 223, 228, 271 et 281).

276 The Decision's treatment of the issue of cartel leadership differs substantially from that in the statement of objections. The statement of objections essentially treated Roche as the overall cartel leader and BASF, Aventis and Takeda Chemical Industries Ltd ('Takeda') as having played minor roles. On the other hand, the Decision, while relying essentially on the same facts, no longer mentions the leading roles previously attributed to Aventis and Takeda and treats BASF as a cartel leader with Roche. That inconsistency in the Commission's approach, which amounts to a manifest error of law, is particularly obvious in the case of the infringements relating to vitamins A and E.

277 The applicant stresses that the Commission's finding that the applicant played a leading role in the cartels had a significant effect on the applicant's overall fine, since the Commission took that finding as a basis, first, for increasing the basic amount of the fine by 35% (i.e. by over EUR 153 million) and, second, for refusing to grant the applicant a greater reduction in its fine pursuant to Sections B and C of the Leniency Notice.

278 The defendant notes that the Court of First Instance has accepted that it may apply different rates of increase to the basic amounts of fines to take account of the different roles played by undertakings (*LR AF 1998* v *Commission*, paragraph 144

above, paragraph 204). For all the infringements referred to by the applicant in the framework of the present plea, the difference between the roles played by Roche and BASF is reflected in the different rates of increase in their fines, namely 50% for Roche as against only 35% for BASF.

279 The defendant contends that it did indeed analyse the available evidence and that, on the basis of a series of indicia or evidence considered collectively, it was entitled to take the view that BASF had acted as a leader in each of the cartels concerned. In accordance with consistent case-law, the reasons for a decision must be read in the context of the behaviour of the parties during the administrative procedure (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95). Neither in its reply to the statement of objections nor at the hearing before the Commission did the applicant dispute the finding in the statement of objections that it had played a leading role in the infringements concerned. On the contrary, in the reply to the statement of objections the applicant went so far as to confirm that it agreed with the Commission's overall assessment of the case.

(b) Findings of the Court

Preliminary remarks

280 Where an infringement has been committed by several undertakings, it is appropriate, in setting the fines, to consider the relative gravity of the participation of each of them (*Suiker Unie and Others* v *Commission*, paragraph 80 above, paragraph 623, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004]

ECR I-123, paragraph 92), which implies, in particular, establishing their respective roles in the infringement during the period of their participation (see *Commission* v *Anic Partecipazioni*, paragraph 86 above, paragraph 150, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 264).

281 It follows, in particular, that the role of 'ringleader' played by one or more undertakings in a cartel must be taken into account in setting the fine, in so far as undertakings which have played such a role must therefore bear a special responsibility by comparison with other undertakings (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 291, and *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraph 301).

282 In accordance with those principles, Section 2 of the Guidelines lays down, under the heading of aggravating circumstances, a non-exhaustive list of circumstances which can result in an increase in the basic amount of the fine and include in particular 'the role of leader in or instigator of the infringement' (third indent).

283 In recital 712 of the Decision, the Commission found that 'Roche and BASF were joint leaders and instigators of the collusive arrangements affecting the common range of vitamin products they produced' and that 'therefore their role in the different cartels [is] considered an aggravating factor'. The basic amounts of their fines, as fixed for gravity (within the meaning of Section 1 A of the Guidelines) and duration (within the meaning of Section 1 B of the Guidelines) of the infringements, were therefore increased by 50% for Roche and 35% for BASF (recital 718 of the Decision).

284 It is plain from recitals 712 to 717 of the Decision that the Commission found that for two sets of reasons Roche and BASF were leaders in and instigators of the eight infringements for which the fines were imposed.

285 First, by a reference in the footnote to recital 712 to several recitals inserted in the section of the Decision containing the description of the facts relating to each infringement (Section 1.4), the Decision sets out a series of facts which are said to justify the Commission's assessment of the role played by Roche and BASF in the various infringements.

286 Second, recitals 713 to 717 contain more general considerations, valid for all the infringements, which are not based on specific facts but on the advantages which Roche and BASF could derive from the extended range of the vitamin products they supplied, on the 'common front' which they formed in conceiving and implementing the collusive arrangements, and on their common objective to eliminate competition in the vitamins sector.

287 After analysing two preliminary questions (paragraphs 289 to 293 below), the Court will consider the relevance of the considerations set out in recitals 713 to 717 of the Decision (paragraphs 294 to 301 below), then of the facts referred to in the Decision as evidence of the applicant's role of leader and/or instigator, on which the parties present submissions in respect of each infringement referred to in the Decision (paragraphs 304 to 463 below).

288 Furthermore, it should be noted that the applicant contests that it played the role of leader in or instigator of seven of the eight infringements relating to which it received a fine. It does not object to the increase in the fine which was imposed upon it, because of its role of leader or instigator, in respect of the infringement relating to vitamin B2.

Discrepancy between the statement of objections and the Decision as regards the role of leader of the cartels

289 The applicant's argument alleging, in order to show that the Commission manifestly erred in law, that between the statement of objections and the Decision the Commission changed its approach as to the leadership of the cartels (see paragraph 276 above) must be rejected.

290 That argument manifestly has no basis in fact in that — in common with the argument alleging an infringement of the rights of the defence referred to in paragraphs 41, 60 and 61 above and already rejected by the Court — it concerns the assessment of the role of the applicant in the infringements. As has already been held in paragraph 61 above, point 228 of the statement of objections expressly referred to the applicant's role of leader.

291 In any event, it should be noted that, clearly, the mere fact that the Commission in its Decision might have changed its legal assessment as to the leadership of the cartels as compared with the — by definition — provisional assessment made in the statement of objections is not capable in itself of demonstrating any defect affecting the merits of the Decision.

The applicant's failure to dispute its role of leader during the administrative procedure

292 Without formally raising a plea of inadmissibility of the present plea, the defendant nevertheless points out that neither in its reply to the statement of objections nor at the hearing in the course of the administrative procedure did the applicant challenge

the assertion made in that statement that it was a leader of the infringements alleged against it. On the contrary, in replying to the statement of objections, the applicant even confirmed that it accepted the Commission's overall assessment of the case (see paragraph 279 above).

293 It should be held in this regard that the fact that the applicant does not challenge a legal characterisation of the facts in the final stage of the administrative procedure does not preclude it from doing so in the procedure before the Court. The present plea is therefore admissible.

General considerations set out in recitals 713 to 717 of the Decision

294 It should be noted that since the Commission found in the Decision several distinct infringements and imposed separate fines in respect of them, it must — when applying the aggravating factor referred to in Section 2, third indent, of the Guidelines — demonstrate in respect of each of those infringements, by referring to and proving facts peculiar to each undertaking, that one or other of the participants in the different cartels was a leader or instigator.

295 It must be found that the considerations set out in recitals 713 to 717 of the Decision are not, in themselves, sufficient to discharge such burden of proof on the Commission.

296 The fact, referred to in recitals 713 to 716, that Roche and BASF produced 'a broad range of products in separate but closely-related product markets' does not prove that those undertakings were in fact leaders in or instigators of the infringements. Neither in those recitals nor before the Court, has the Commission even explained the relationship between the extent of the range of vitamin products and the actual role played in those infringements. In fact, it is clear from those recitals that, according to the Commission, the broad range of Roche's and BASF's vitamin products conferred advantages on them — such as a stronger position in relation to their customers, flexibility to structure prices, promotions and discounts, economies of scale and scope in their sales and marketing activities, greater credibility in their threat to refuse to supply — which increased their 'overall ability ... to implement and maintain the anti-competitive agreements'.

297 It is thus apparent that, under the heading of leader or instigator, the Commission in those recitals gave weight to circumstances which do not show the role in fact played by Roche and BASF in the infringements but which could not be ruled out as factors in the assessment of the gravity of the infringement within the meaning of Section 1 A of the Guidelines, as being evidence of the effective economic capacity of offenders to cause significant damage to other operators or of 'the specific weight' of the individual offending conduct.

298 It cannot however be presumed from the fact that Roche and BASF produced a broad range of vitamins, or from the advantages which they derived from it, that those undertakings were in fact leaders in or instigators of the infringements in the present case.

299 Thus, for the purposes of the question whether the applicant was a leader in or instigator of the various infringements which it is found in the Decision to have committed, the taking into account of that fact or of such advantages can serve, at most, to place in perspective the particular conduct which the Commission alleged

against the applicant as evidence that it was a leader in or instigator of the cartel. Such evidence must be assessed in the particular context of the case and especially in the light of the market position enjoyed by the undertakings and the resources at their disposal (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 269 above, paragraph 241).

300 The same applies with regard to the Commission's very general findings in recital 717 of the Decision. The 'common front' allegedly formed by Roche and BASF and their objective 'to eliminate all effective competition between them in the Community and the EEA across almost the whole range of important vitamins' are factors which may reveal their motives in the cartel arrangements but which do not in themselves show that they bore individual and specific liability for the creation and operation of the cartels in question. Furthermore, the objective of eliminating mutual competition is characteristic of the involvement of any undertaking in an illegal cartel and the fact that that objective covers the entire range of BASF's and Roche's vitamins merely reflects the scope of that range and does not, at least in the absence of more detailed explanations, have any particular significance.

301 It should be noted however that, before the Court, the defendant essentially based its defence, as regards the application of the aggravating circumstance in question, on the reference to particular facts which were capable in its view of demonstrating that BASF was a leader in and/or instigator of the various infringements.

Facts advanced by the defendant as evidence that BASF was the leader in and/or instigator of each infringement

302 It should be noted that in the Decision the Commission did not carry out a detailed analysis of the role of the applicant in each of the eight infringements for which it

was penalised, but, as was noted in paragraphs 285 and 286 above, relied on findings of a general nature (paragraphs 713 to 717) and on a reference to the recitals of the Decision which, in the description of the facts relating to each infringement, set out certain particular facts (footnote to recital 712).

303 However, in its pleadings, the defendant, at least in respect of some of the infringements in the present case, also cited further facts, mostly also mentioned in the Decision, which, in its view, contribute to demonstrating that the applicant was a leader or instigator. Since those facts were not however cited, even not indirectly by way of reference, in the part of the Decision concerning the aggravating circumstance in question, the Court will take them into account only if it finds that there has been a defect affecting the legality of that part of the Decision and therefore exercises its unlimited jurisdiction within the meaning of Article 229 EC and Article 17 of Regulation No 17.

2. *Assessment of the applicant's role in the various infringements*

(a) Infringements relating to vitamins A and E

Arguments of the parties

304 The applicant states that the footnote to recital 712 of the Decision cites two isolated facts to support the conclusion that BASF was a leader with Roche in the infringements relating to vitamins A and E.

305 The first fact, stated in recital 183 of the Decision, namely that Roche sometimes asked BASF to take the lead in announcing a price increase, is not comparable to the numerous acts carried out by Roche in creating, organising and setting up the cartel and suggests, at most, that BASF may, at Roche's request, have announced a small number of price increases in order to conceal the fact that they were prompted by Roche. The applicant observes that the Commission's overall conclusion in recital 569 of the Decision was that BASF was following Roche's instructions. Such a stance on the part of BASF is inconsistent with a role of leader.

306 The second fact, stated in recital 160 of the Decision, namely that BASF took part in discussing the basic scheme of the arrangements, is also true of Aventis, although it received full immunity from fines on the ground, inter alia, that it was not a leader. That fact cannot therefore be relied upon to support the conclusion that BASF was a leader. In reality, BASF's role was essentially the same as that of Aventis.

307 Thus, the applicant believes that the Commission ought to have concluded, as it did correctly in the case of Aventis, that BASF was a participant but not a leader in the infringements relating to vitamins A and E.

308 The defendant replies that BASF's role as instigator and leader in the cartels affecting vitamins A and E is proven by a number of matters set out in the Decision and not only by those referred to by the applicant. The defendant mentions, in particular, the applicant's task of nominating the usual participants in the meetings held at the regional product marketing level (recital 177). The fact that BASF and Roche were the instigators of those cartels in establishing the first contacts between

themselves and holding the first meeting between themselves on 7 June 1989 is confirmed by statements made by Aventis and Takeda during the administrative procedure.

309 The defendant denies the applicant's contention that the roles of Aventis and of the applicant in the cartels in question were comparable. In particular, BASF and Roche jointly approached Aventis and it was BASF, and not Aventis, that announced a major, albeit occasional, price increase.

310 In its reply, the applicant refers to the accounts given in the course of the administrative procedure by Roche and Aventis concerning the arrangements relating to vitamins A and E, from which it appears that Roche conceived and organised those arrangements and that the roles played by BASF and Aventis were equivalent to each other and secondary. In particular, Roche's account shows that Roche organised certain preparatory meetings to discuss the framework of the arrangements, the first of which took place with Aventis in Basle on 24 April 1989 and was followed only later by a meeting between Roche and BASF on 7 June 1989, also in Basle. Nor do Takeda's statements corroborate the defendant's assertions, in so far as they say nothing about the sequence of the meetings and the participants, which did not include Takeda because it did not produce vitamins A and E. In any event, the Commission must produce proof of leadership, not merely assert it on the basis of a sequence of meetings.

311 With regard to the supposed task of nominating the participants of the meetings organised at regional product marketing level, the applicant points out that the relevant recital of the Decision, namely recital 178, merely indicates that, in cooperating with the Commission's investigation, BASF provided the Commission with a list of names of those attending such meetings. It cannot be seriously concluded from this that BASF was responsible for organising those meetings.

312 As regards the announcements of price increases, the applicant submits that Roche states clearly in its account that it had been agreed among the participants that one party should announce the price increase first and that the others would follow suit. Furthermore, the defendant's allegation that only BASF and Roche made such announcements is wrong in so far as the statements by Aventis show that Aventis was the first to announce a price increase on 1 January 1997.

313 In the rejoinder, the defendant alleges that, according to the very wording of Roche's account cited by the applicant, that account cannot be regarded as an accurate and objective description of what happened. In any event, nowhere in Roche's account is it stated that Roche was the only one to take the initiative in bringing the producers together or that the roles of BASF and Aventis were equivalent to each other and secondary. The applicant makes selective and inaccurate references to Aventis's account, the latter showing, in particular, that, unlike Aventis, BASF announced prices more than once.

314 The meeting between Roche and BASF on 24 April 1989 is irrelevant for the purposes of determining who was the leader of the cartels, since it took place prior to the date (September 1989) established in the Decision as the beginning of the infringement.

Findings of the Court

315 It should be noted that, according to the Decision, the three European producers Roche, BASF and Aventis participated in the cartels relating to vitamins A and E, and they did so together with the Japanese producer Eisai Co. Ltd in relation to vitamin E alone. The three European producers began the two infringements in September 1989 whilst Eisai only joined the vitamin E cartel in January 1991 (recitals 701 to 703 of the Decision).

316 As the defendant pointed out on several occasions in its written submissions and as is clear from the wording of Section 2, third indent, of the Guidelines, when examining the role of the applicant in the infringements in the present case it is necessary to distinguish between the concept of leader in and that of instigator of an infringement and to carry out two separate analyses to check whether the applicant was one or the other. Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation.

317 The defendant in its written submissions submits that it demonstrated in the Decision that the applicant was both the instigator of and the leader in the two cartels in question.

318 The footnote to recital 712 refers inter alia to recitals 160 and 183 of the Decision, which concern respectively the origin and the operation of those cartels. It is to be inferred from that that the 35% increase in the basic amount of the fines imposed on the applicant for the infringements relating to vitamins A and E is based on the finding that it was the instigator of and leader in those infringements.

— Role of instigator

319 The applicant's role as instigator, with Roche, of the infringements relating to vitamins A and E is, according to the defendant, apparent from recital 160 of the Decision, which is not challenged by the applicant and describes the origin of the two cartels, and is confirmed by the statements of Aventis and Takeda during the administrative procedure. It is said to be established in particular that the first contacts took place between Roche and BASF, whereas the contacts with Aventis took place only later, on the joint initiative of Roche and BASF.

320 Whilst recital 160 is one of the recitals listed in the footnote to recital 712 of the Decision, so that the facts which it sets out may be regarded as underpinning the statement of reasons for the Commission's finding that BASF was an instigator of the cartels relating to vitamins A and E, it must be found that that finding does not stand up to scrutiny. Those facts, assessed in the light of the statements of Aventis and Takeda, referred to by the defendant, and of Roche's statements, referred to by the applicant, do not prove that BASF played such a role in the cartels in question.

321 It should be noted that in order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it. By contrast, it is not sufficient merely to have been a founding member of the cartel. Thus, for example, in a cartel created by two undertakings only, it would not be justified automatically to classify those undertakings as instigators. That classification should be reserved to the undertaking which has taken the initiative, if such be the case, for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so.

322 Recital 160 of the Decision refers to three meetings held in 1989: the first on 7 June between Roche and BASF in Basle, the second in the summer of that year in Zurich with the participation of Aventis and the third in September between Roche, BASF and Aventis. According to the Decision (see, in particular, recital 162), it was that last meeting, which also took place in Zurich, which marked the start of the two cartels.

323 The decisive fact on which the Decision based its finding that BASF was an instigator of the cartels for vitamins A and E is thus the fact that the first preparatory meeting for those cartels took place exclusively between Roche and BASF.

324 Paragraphs 3.1 and 3.2 of Aventis's statement of 19 May 1999, to which the defendant refers, state that a representative of Aventis had been contacted by representatives of Roche and BASF at the beginning of the 1980s to discuss business in the vitamins sector, that contacts had been maintained between those three undertakings throughout the 1980s without however giving rise to agreements seeking to influence the market and that, towards the end of 1989, when it had consolidated its position in the market, Aventis was invited to a meeting with BASF and Roche to discuss the size of the market, in the course of which the anti-competitive arrangements were concluded. Those facts do not suggest that the applicant took the initiative in the creation, in September 1989, of cartels relating to vitamins A and E.

325 It is true that paragraph 2.5 of that statement, to which the defendant indeed does not refer in its written pleadings, states that '[Aventis] was approached in late 1989 by Roche and BASF to participate in the [anti-competitive] activities'.

326 Nevertheless, in its account of the vitamin E cartel, which forms Annex 5 of Roche's reply of 16 July 1999 to the Commission's request for information of 26 May 1999 ('Roche's reply of 16 July 1999'), Roche claimed that it alone was responsible for having taken the initiative in bringing together the representatives of those three undertakings in order to set up a cartel, in which the Japanese producer Eisai was subsequently to be involved (paragraph 1 of page 2 of Annex 5).

327 Furthermore, in that account, Roche referred to two preparatory bilateral meetings which took place in 1989 in Basle (where Roche has its head office) between the highest-level directors in the vitamins sector of each undertaking: that of 7 June 1989 between Roche and BASF, referred to in recital 160 of the Decision, and an earlier meeting of 24 April 1989 between Roche and Aventis (page 3 of Annex 5).

328 It is clear from Roche's account of the vitamin A cartel, contained in Annex 1 of Roche's reply of 16 July 1999 (see pages 2 to 4), that those two meetings also concerned vitamin A.

329 Paragraphs 32 and 33 of Takeda's reply of 5 October 2000 to the statement of objections, on which the defendant also relies, do not contain information capable of supporting the latter's position. From them it is apparent merely that the first anti-competitive agreements on vitamins were those of 1989 between Roche, BASF and Aventis relating to vitamins A and E. That fact, which applies equally to Aventis — which the Commission, however, did not classify as an instigator in the Decision —, does not enable any assessment to be made as to whether BASF was an instigator of those cartels. It was indeed difficult for Takeda to give reliable information in that regard since, as it did not produce vitamins A and E, it was not party to the agreements in respect of those vitamins. By contrast, in paragraph 30 of Takeda's reply, it is asserted in general terms that 'Roche ... was clearly the instigator of cooperation between the producers'.

330 Thus, the defendant's assertion that BASF and Roche jointly took the initiative to contact Aventis — which would appear to be corroborated by Aventis's statement of 19 May 1999 — appears to be undermined by the account of the meetings given by Roche in its reply of 16 July 1999 and in particular by the bilateral meeting of 24 April 1989 between Roche and Aventis.

331 With regard to that meeting, the defendant objects, first, that Roche's account is not an exact and objective description of the events, in so far as Roche itself stated in its reply of 16 July 1999 that the 'information [supplied] is not complete in all details but reflects the best personal recollection of the respective Roche executives'. Second, the defendant submits that that meeting is irrelevant for determining who was the leader of the cartels since it took place before the date (September 1989) when, according to the Decision, the infringement began.

332 Those objections on the part of the defendant cannot be upheld.

333 It must be found with regard to the first objection that Roche clearly stated the date (24 April 1989), the place (Basle) and the names of the participants in that bilateral meeting and that the Commission, in the Decision, had no reservations as regards the reliability of the information given by Roche but on the contrary even acknowledged the 'very substantial' nature of the evidence submitted by Roche in relation to the infringements relating to vitamins A and E (recital 743) and granted Roche, for those infringements in particular, a 50% reduction under Section D, second paragraph, first indent, of the Leniency Notice. Moreover, unlike Aventis, which could have an interest in minimising its role in the establishment of the cartels by emphasising Roche's and BASF's role in that regard, Roche had no particular interest in attributing such a responsibility to itself alone.

334 The second objection — by which the defendant confuses, contrary to its general approach, the concepts of leader and instigator — is unfounded, as the applicant refers to the meeting of 24 April 1989 between Roche and Aventis in order to demonstrate that it was not an instigator. However, even if it were correct, that objection would also invalidate the defendant's reference to the meeting of 7 June 1989 between Roche and BASF, cited in recital 160 of the Decision, which also took place before the infringement began.

335 It follows that the evidence provided by the defendant does not support the conclusion that the applicant was an instigator, in particular with regard to Aventis, in setting up the cartels relating to vitamins A and E.

336 As for the involvement of the Japanese producer, Eisai, in the cartel relating to vitamin E, any possible role played by the applicant in that regard was not addressed by the defendant in its pleadings. None of the recitals of the Decision describing Eisai's involvement (recitals 212 to 220) is cited in the footnote to recital 712. It is also clear from recitals 212 and 234 that Roche alone made overtures to Eisai with a view to that company potentially joining that cartel.

337 In those circumstances, it must be concluded that the finding in the Decision that the applicant was an instigator of the infringements relating to vitamins A and E is insufficiently substantiated.

338 Since the Decision is vitiated by illegality on that point and the Commission imposed on the applicant a single increase of 35% of the basic amount of the fine in respect of the aggravating circumstance referred to in Section 2, third indent, of the Guidelines, the Court must exercise its unlimited jurisdiction regarding the assessment of the applicant's role in the infringements in question in order to confirm, set aside or adjust that increase in the fine. Since the defendant did not adduce before the Court any further evidence in addition to that set out in recital 160 of the Decision in order to prove that the applicant was an instigator of the infringements in question, the Court's analysis will focus on the applicant's alleged role of leader in those infringements.

— Role of leader

339 In order to support its finding that the applicant was a leader in the cartels relating to vitamins A and E the defendant refers to two types of action which, it claims, the applicant carried out in the performance of the cartels and are referred to in the Decision.

340 First, the defendant refers to BASF's task of designating the usual participants in the meetings organised at regional product marketing level, which is said to be clear from recital 177 of the Decision.

341 Second, the defendant refers to the price increases which the applicant announced to the public, and refers in that regard to recitals 183 and 224 of the Decision.

342 As for the alleged task of designating the participants in certain meetings, the relevant recital of the Decision — namely recital 178, the defendant's reference to recital 177 clearly being a typographical error — states that 'BASF named the usual participants in the meetings over the relevant period'.

343 The defendant misinterpreted that recital in its pleadings. As the applicant submitted and as it appears from the documents in the administrative file disclosed by the defendant in the performance of the measures of organisation of procedure ordered by the Court, recital 178 of the Decision merely indicates that the applicant, in the course of its cooperation with the Commission's investigation, identified by name the individuals who participated in the meetings on behalf of their respective undertakings. When requested by the Court to adduce evidence that the applicant had the task, in the framework of the cartels in question, of designating the participants in the meetings organised at regional product marketing level, the defendant was unable to do so.

344 As regards the price increases announced by the applicant, the defendant relies in particular on recital 183 of the Decision, also referred to in the footnote to recital 712, which states as follows:

'If a price increase was decided, Roche usually took the lead and announced first. Apparently, however, it occasionally asked BASF to lead the increase publicly.'

345 The applicant does not deny that sometimes, at Roche's request, it announced price increases agreed within the cartels relating to vitamins A and E. It submits that it cannot, however, be inferred from that fact that it was a leader in those cartels.

346 That argument of the applicant cannot be upheld.

347 It is true that recital 201 of the Decision states that 'the decisions on whether, when and by how much to increase prices were taken by the Heads of Vitamin Marketing in their periodic meetings'. Similarly, recital 203, on the basis of the statements in Annex 5 of Roche's reply of 16 July 1999 and referred to by the applicant, states that 'the parties normally agreed that one producer should first "announce" the increase, either in a trade journal or in direct communication with major customers' and that 'once the price increase was announced by one cartel member, the others would generally follow suit'.

348 However, the fact that the price increases were decided jointly at meetings between the cartel members, including their amount, timing and the mechanism by which

they would be implemented, does not remove the special responsibility assumed by a particular undertaking when it decided to be the first in fact to implement the agreed increase. By taking such an initiative, without being under a specific and individual obligation to do so pursuant to the agreement to increase prices entered into at a cartel meeting, the undertaking was voluntarily giving a major boost to the performance of that agreement by ensuring that, instead of remaining unimplemented, it had an effect on the market.

349 It is not in dispute that the applicant more than once took such an initiative and it cannot evade responsibility by arguing that Aventis did so too at least once.

350 The evidence on which the applicant relies, namely that Aventis was once first to announce a price increase agreed upon within the cartel, is in the form of the statement of Aventis itself of 19 May 1999 (paragraph 3.4) in which that undertaking states that it took such an initiative 'only once', which, for infringements lasting nine and a half years such as those in question, is certainly not sufficient evidence that Aventis was a leader.

351 Moreover, as regards the vitamin E cartel, the facts set out in the Decision show that the applicant's role cannot be equated to that of Aventis. It should be mentioned in that regard, first, that after Aventis's factory was put out of production by a fire in December 1990, the applicant, following the example of Roche, supplied Aventis with vitamin E until that factory was restored to production (see recitals 216 and 220); second, in 1997, the applicant, like Roche, made compensating purchases from Aventis of vitamin E intended for animal feed, so as to enable Aventis to maintain its agreed market share of 16% of the overall market for vitamin E in spite of the increase in the demand for vitamin E for human consumption, a sector in which Aventis did not have a presence (see recital 225). Those facts — already reported in

the statement of objections (points 53, 55 and 58) and cited by the defendant in its defence (paragraph 81) — which are not challenged by the applicant, characterise Aventis's position within the cartel as one which was dependent upon the support of Roche and BASF and reveal the determination of those two undertakings to ensure the stability and success of the cartels.

352 As for the fact referred to in recital 224 of the Decision, namely the applicant's announcement in the trade press on 14 February 1994 of increases of 5% in the prices for vitamins A and E, it adds nothing to that disclosed by recital 183 in that, even if that announcement had preceded similar announcements made by the other members of the cartel — which is neither alleged nor demonstrated by the defendant — at most it could constitute a specific example of the conduct of the applicant referred to in recital 183.

353 In the light of the foregoing, it must be found that the Commission did not err in its assessment in finding, in the Decision, that the applicant played the role of leader in the infringements relating to vitamins A and E.

— Conclusion on the application of the aggravating circumstance as regards the infringements relating to vitamins A and E

354 Even if the Commission could not validly find, on the basis of the evidence it adduced, that the applicant played the role of an instigator of the infringements relating to vitamins A and E, consideration of the file, in the light of the arguments of the parties, leads the Court to conclude in the exercise of its unlimited jurisdiction that the increase of 35% in the basic amount of the fines applied to BASF

with regard to those infringements remains fully justified in view of the fact that BASF was, jointly with Roche, a leader in those infringements, albeit to a lesser degree than Roche.

(b) Infringement relating to vitamin B5

Arguments of the parties

355 As regards the vitamin B5 infringement, the applicant observes that the Decision states at recital 296 that the cartel 'was organised, orchestrated and policed by Roche' and concedes that BASF did not instigate the unlawful arrangements. It emphasises that at a meeting in December 1990, Roche and Daiichi Pharmaceutical Co Ltd ('Daiichi') discussed the creation of the cartel and arrangements for fixing prices and allocating quotas, and that BASF was recruited by Roche at Daiichi's request (recital 298 of the Decision). Roche played a very active part in organising, orchestrating and policing the cartel, establishing the basic structure of the cartel, organising separate meetings with each participant, collecting price and volume data from each participant, and complaining if the parties did not adhere to the agreement. In contrast, the Decision cites only one instance where BASF announced its prices and provides no evidence that BASF took a leading role or an active role in running the cartel.

356 The applicant maintains that its role was no greater and probably less than that of Daiichi, which was not described as a leader. Daiichi encouraged the extension of the arrangements to new members and urged Roche to recruit BASF (recital 298 of the Decision). Together with Roche, Daiichi organised all the top level and operational meetings relating to vitamin B5, which implies an ongoing and active role of sharing leadership responsibilities with Roche.

357 The defendant contends that it proved in the Decision that BASF had played a leading role — although a less important one than that played by Roche — in the vitamin B5 cartel. The Decision refers to a 'top level' meeting between Roche and BASF in June 1992, prior to the 'top level' meetings between the three cartel members (recital 314). Both the statement of objections and the Decision (recital 319) state that Roche or BASF periodically informed Daiichi that one of them was going to increase prices, advised it of the date on which the increase would take place and invited it to follow the initiative. The Decision also shows that Roche and BASF constituted a common front vis-à-vis the other producers, in so far as it states that they were always able to increase prices and actually did so, even if Daiichi opposed the increases (recitals 321 to 324).

358 Furthermore, it contends that Daiichi's role in the vitamin B5 cartel could not in any event be regarded as that of a leader.

359 In its reply, the applicant denies that the meeting in June 1992 between Roche and BASF might suggest that the latter was a leader or instigator. The fact that Roche and BASF took turns to announce the price increases does not indicate who proposed the price increases or whether any pressure was brought to bear on other members who did not agree to the increase. It is therefore irrelevant for the purposes of determining who led the cartel.

360 As for the common front which Roche and BASF are alleged to have adopted vis-à-vis Daiichi with regard to price increases, the applicant emphasises that a common feature of cartels is that members do not always share the same interests. The fact that Roche's and BASF's interests regarding prices might have differed from Daiichi's says nothing about the leadership of the cartel. Furthermore, the actual conduct of the three participants when the proposed price increase for the spring of 1998 was announced shows an absence of any leadership of the cartel, since each participant

pursued its own policy in furtherance of its own objectives, to such an extent that the increase was ultimately unsuccessful on the market (recitals 323 to 325 of the Decision). In that regard, the applicant observes that the defendant itself admits in its defence (paragraph 95) that leadership over other participants in a cartel is established where the functioning of the cartel shows that an undertaking's behaviour on the market is effectively dictated by other undertakings.

361 In the rejoinder, the defendant submits that the Decision never claimed that BASF had initiated the vitamin B5 cartel. The role of leader on the market does not necessarily imply that an undertaking must have also acted as an instigator of the cartel. Therefore the arguments whereby the applicant seeks to establish that Roche and Daiichi were the instigators are irrelevant.

Findings of the Court

362 According to the Decision, Roche, BASF and the Japanese manufacturer Daiichi participated in the vitamin B5 cartel.

363 Next, it should be noted that the defendant in its pleadings submits solely that BASF was a leader in that infringement but does not classify it as an instigator as well.

364 In that connection, even if recital 712 of the Decision refers to Roche's and BASF's role as leaders and instigators, it nevertheless does so in a general way and in relation to all the infringements, whereas the footnote to that recital refers, as regards the vitamin B5 cartel, merely to recitals 319 and 322, which are not concerned with the establishment or enlargement of that cartel but with the increases in the price of that vitamin as part of the implementation of that cartel.

365 It must therefore be concluded that the increase of 35% in the basic amount of the fine imposed on the applicant for the infringement relating to vitamin B5 is based solely on its alleged leadership. Therefore, in reviewing the lawfulness of that increase, the Court should restrict its analysis to the facts set out in the Decision as evidence of BASF's leadership, which relate to the increases in the price of vitamin B5 made as part of the implementation of the cartel.

366 Recital 319 of the Decision states that 'according to Daiichi, either Roche or BASF would indicate to it periodically that one or other of them was going to make a price increase announcement, advised when it was to take place, and invited Daiichi to "follow"', and 'these announcements were often made via the trade press'.

367 Recitals 321 and 322 of the Decision refer to the common motives which led Roche and BASF to raise the price of vitamin B5, namely, first, to squeeze the margins of their competitors in the downstream market of pre-mixes in order to force them out of that market and, second, the need to ensure that currency fluctuations did not lead to price differentials between the regions and distortion of trade in the form of trans-shipment by the distributors. As the defendant points out, recitals 323 to 325 of the Decision also make it clear that Roche and BASF increased the prices even if Daiichi opposed the increases.

368 The applicant does not challenge the facts set out in the recitals referred to in the two preceding paragraphs.

369 It interprets recital 319 as meaning that Roche and BASF took it in turns to announce the price increases and stresses that that fact gives no indication as to who proposed those increases.

370 It is clear from that recital — as it is from point 101, third subparagraph, of the statement of objections and the relevant extract from Daiichi's statement of 19 July 1999 placed on file by the defendant in the performance of the measures of organisation of procedure — that the applicant or Roche did not merely announce those increases first, but decided on them and warned Daiichi of them.

371 Contrary to the position with regard to the cartels for vitamins A and E (see paragraph 347 above), the Decision, in the description of the facts relating to the vitamin B5 cartel, does not state that at their periodic meetings the parties to that cartel jointly decided on the price increases, their amount and the date of their implementation. Recital 317 of the Decision refers to 'a series of concerted price increases' and recital 319 describes a mechanism, which Daiichi disclosed to the Commission, by which Roche or BASF took the initiative to increase prices and notified Daiichi thereof in advance and invited Daiichi to follow suit. It is thus apparent that the specific implementation of the concerted increases did indeed fall within the individual initiative of Roche or BASF as regards the fact, amount and timing of the increase.

372 In any event, even if the parties agreed in advance not only on the basic mechanism of price concertation (individual initiative, prior communication to the other producers, those producers follow), but also, on a case by case basis, on the actual

price increases, their amount and the date of their implementation, these increases nevertheless remain dependent on Roche's and BASF's spontaneous initiative (see, to that effect, the matters set out in paragraph 348 above).

373 The division of responsibilities between Roche and BASF in that field is also explained in the light of the convergent interests of those undertakings — as set out in recital 321 and especially recital 322 of the Decision — and of the common front which they formed — as was shown in particular at the time of the price increase referred to in recitals 324 and 325 — factors which characterise the context of the present case in the light of which the evidence of the role of leader must be assessed (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 269 above, paragraph 241).

374 As for the fact cited by the applicant that, unlike Roche, Daiichi did not follow the price increase referred to above and that this was ultimately unsuccessful on the market (recitals 323 to 325 of the Decision), it in no way diminishes the sizeable responsibility, in terms of being the spur to unlawful conduct on the part of the participants in the cartel, which the applicant, like Roche, assumed in taking the initiative for the increases in the price of vitamin B5 according to the scheme outlined in recital 319 of the Decision. It should be noted that, contrary to the applicant's assertion, the fact that an undertaking exerts pressure and even dictates the behaviour of the other members of the cartel is not a precondition for that undertaking to be described as a leader in the cartel. It is sufficient that the undertaking was a significant driving force for the cartel, which may be inferred in particular from the fact that it took upon itself responsibility for developing and suggesting the conduct to be adopted by the members of the cartel, even if it was not necessarily in a position to impose it upon them.

375 The Commission was therefore right, in the Decision, to infer from the fact set out in recital 319 that the applicant, like Roche albeit to a lesser extent, had a particular responsibility in the operation of the vitamin B5 cartel.

376 That responsibility is not called into question by the argument that Daiichi for its part could have been an instigator of the cartel or organised a number of cartel meetings.

377 Accordingly, it must be found that the applicant has not demonstrated that the Commission erred in its finding that BASF together with Roche was a leader in the infringement relating to vitamin B5.

378 Consequently, in so far as the present plea challenges that finding, it must be rejected, and it is further to be noted that the applicant has advanced no specific complaint regarding the percentage increase in the fine which was applied to it in that regard.

(c) Infringement relating to vitamin C

Arguments of the parties

379 With regard to the infringement relating to vitamin C, the applicant claims that the evidence cited in the Decision does not establish that the applicant instigated the unlawful arrangements with Roche or jointly led those arrangements with Roche. Taken as a whole, the Decision clearly establishes that Roche alone led the vitamin C cartel. The only evidence cited in the Decision against the applicant is that it held two meetings with the other members of the cartel at its own offices to discuss the challenge from Chinese producers, during which, moreover, it was Roche, not BASF, that proposed price increases and volume reductions. Furthermore, Takeda was at least as involved as the applicant, if not more so, in the conception of and instigation to conclude the unlawful arrangements relating to vitamin C. Takeda was not, however, found to be a leader.

380 The defendant maintains that its finding that the applicant had a leading role in the vitamin C cartel is correct; that also applies in respect of Takeda's role. The applicant omits to refer to other significant passages in the Decision which prove that Takeda was confronted with a compact bloc formed by the European producers, including Roche and BASF. Recital 433 in particular indicates that it was BASF that, at one of the meetings it organised, wanted to be the leader in imposing target prices. It is clear from that recital that, in spite of Roche's price proposals, BASF intended to set prices at DEM 25, 26 and 27 for the second, third and fourth quarters of 1993, and clearly manifested to the other members of the cartel that it wanted to be the leader on that market by applying those prices. Moreover, recital 437 refers to the preparation by BASF of working papers for the purpose of presenting its proposals at a meeting on 25 May 1993. The defendant states that the applicant even admits that it led the vitamin C cartel where it states, at paragraph 149 of its application, that 'BASF occasionally played a role'.

381 So far as the allegedly identical roles of BASF and Takeda are concerned, the defendant states that, in order to be considered a leader in a cartel, it is not enough to approach competitors (i.e. act as instigator) if the functioning of the cartel shows that conduct on the market is effectively dictated by other undertakings. That is precisely the case for Takeda. BASF agreed with Roche's policy on pricing (recital 424 of the Decision) and the European producers presented Takeda with an ultimatum: unless it agreed to cut back its vitamin C sales, they would withdraw from the agreement (recital 442). By contrast, a price increase announced by Takeda was not followed by Roche and BASF (recital 425) and Takeda's proposals were systematically opposed or not followed by the other European producers (recitals 446, 447 and 456 of the Decision). Takeda did not comply with the quotas set by the European producers, who took it to task for failing to do so. Furthermore, they held meetings among themselves, without Takeda.

Findings of the Court

382 According to the Decision, the three European producers Roche, BASF and Merck KgaA, and the Japanese producer Takeda participated in the vitamin C cartel.

383 Next, it should be noted that the defendant in its pleadings submits solely that BASF was a leader in that infringement but does not classify it as an instigator as well.

384 It is true that the footnote to recital 712 of the Decision also cites, amongst the recitals said to substantiate BASF's role of leader and instigator in the different infringements, recital 388 of the Decision, concerning the origin of the cartel. However, it should be noted that BASF is not even mentioned in recital 388, which reveals by contrast that the first meetings preparatory to the creation of the cartel took place between Roche and Takeda. The reference to recital 388 in the footnote to recital 712 is therefore clearly a typographical error.

385 It follows that the increase of 35% in the basic amount of the fine imposed on the applicant for the infringement relating to vitamin C is based solely on its alleged leadership. Therefore, in reviewing the lawfulness of that increase, the Court should restrict its analysis to the facts set out in the Decision as evidence of BASF's leadership, namely those in recitals 432, 437 and 439, which concern the organisation and the conduct of certain cartel meetings.

386 Recital 432 of the Decision refers to a meeting organised by the applicant at its head office in Ludwigshafen at the beginning of 1993 with Roche and Merck to consider the problems arising from the competition from the Chinese producers. Recital 439 refers to another meeting which took place in the applicant's Frankfurt offices between the four members of the cartel.

387 It should be noted that the fact that the applicant thus hosted two meetings of the cartel is relatively unimportant if it is recalled that the Decision refers to numerous bilateral meetings between Roche and Takeda in Basle (the site of Roche's head office) or Tokyo (the site of Takeda's head office) (recitals 388, 390, 391, 403, 407, 413, 418, 420 and 456) and the fact that, from 1991 to May 1993, the quarterly meetings between the European producers usually took place in Basle (recital 415).

388 Recital 437 states that the applicant 'has provided its working papers intended for [the multilateral meeting in Zurich on 25 May 1993] showing the details of the proposal for a 5% cut [in the quotas] and the compromise solution'.

389 In the light of the somewhat ambiguous nature of that sentence, on which the defendant relies in its pleadings, the Court requested, by way of measures of organisation of procedure, that it disclose those working papers and state whether, by that sentence, it meant to find that BASF had provided those documents to the other members of the cartel for the purposes of the meeting of 25 May 1993.

390 In reply to that request, the defendant disclosed a document which BASF had sent to it during the administrative procedure concerning the quotas to be allocated for 1993 in the case of vitamin C ('the 1993 quota document'). Moreover, it stated that, in recital 437 of the Decision, it did not mean to find that the applicant had provided that document to the other members of the cartel, but to indicate that BASF's

position to be presented at the meeting of 25 May 1993 was in favour of a 5% reduction in the quotas and that BASF intended to invite the other participants to discuss that proposal. The defendant pointed out that, according to the explanations given by BASF during the administrative procedure, the quotas in typescript in the 1993 quota document had been drawn up by Roche whereas the quotas in manuscript had been added by a representative of BASF and corresponded to the proposed arrangement discussed at that meeting.

391 The defendant's explanations in that regard are somewhat unclear and it is not possible to ascertain from them in particular whether BASF, in the course of the meeting of 25 May 1993, supported Roche's proposal or whether at the outset it proposed to the other members of the cartel the alternative in the form of the manuscript quotas set out in the 1993 quota document. It is also not clear from the file that those manuscript quotas were added to that document by the BASF representative before the meeting of 25 May 1993 rather than during or after it.

392 On the other hand it is clear from recitals 436 and 437 of the Decision that, during that meeting, it was Roche who proposed a general reduction of 5% in the quotas for 1993, that Takeda opposed that proposal and made a counter-proposal, and that a compromise was arrived at consisting of a reduction in the quotas of the European producers by 2.5% and of Takeda's quota by 2.2%. Even if such a solution were devised by BASF prior to the meeting and proposed by it at the meeting, given its context, such a fact is not significant evidence that BASF was a leader. That context shows that Roche was behind the initiative to restrict production in 1993 (see too, to that effect, recitals 432 and 434 of the Decision) and that at least three producers made detailed proposals as to the extent of the reduction in the quotas. The fact that the proposal finally adopted was that of BASF as a compromise between Roche's and Takeda's position does not make the applicant a leader in the cartel.

393 The facts set out in the Decision as evidence of BASF's leadership in the cartel relating to vitamin C, even when considered in the light of the context of the present case, have no real significance for the purposes of attributing such a role to the applicant.

394 It follows that in that respect the Decision is vitiated by illegality which enables the Court to exercise its unlimited jurisdiction in order to determine, in the light of all the relevant circumstances of the case (see, to that effect, *Michelin* v *Commission*, paragraph 62 above, paragraph 111, and Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 151), whether the applicant may nevertheless be regarded as having been a leader in the cartel in question and whether the basic amount of the fine imposed on it for its participation in that cartel should therefore be increased in respect of such an aggravating circumstance.

395 In support of its finding that the applicant did in fact have such a role, the defendant, in its pleadings, also referred to facts set out in the recitals of the Decision not cited in the footnote to recital 712.

396 It must be held, first, that the defendant's reference to recital 433 to show that the applicant had assumed a leadership role in imposing target prices is irrelevant.

397 Recital 433 states that BASF supplied a detailed note of the meeting it organised at its Ludwigshafen head office at the beginning of 1993 (see paragraph 386 above) and that that note shows the target prices for the last three quarters of 1993.

398 Following the Court's request to it by way of measures of organisation of procedure, the defendant disclosed that note and stated that it proves that BASF was a leader, in that it was created by BASF, BASF did not challenge it, and it makes clear that BASF intended to fix the target prices respectively at DEM 24, DEM 25 and DEM 26 for each of those quarters.

399 The Court points out that recital 433, by stating that that note was supplied by BASF, clearly intends to convey that it was supplied by BASF to the Commission during the administrative procedure and not that it was sent by the applicant to the other cartel members prior to the meeting in Ludwigshafen, and it must be found, as the applicant claims, that recital 432 clearly indicates that at that meeting it was Roche which proposed, inter alia, to raise the price during those quarters.

400 Furthermore, the defendant does not explain how that note, in respect of which it has not been established whether it was drafted by BASF before, during or after that meeting, is evidence of a specific intention on the part of BASF as regards the amount of the target prices or of a particular role which it played in the setting of such targets. It should be noted that, in sending it to the Commission as an annex to its letter of 23 June 1999, the applicant had merely stated in an explanatory note (page 4428 of the administrative file) that that note reflected 'the arrangements with respect to vitamin C'.

401 The defendant is therefore wrong to use recital 433 of the Decision as the basis for its assertion that, at that meeting, the applicant wished to assume the role of leader so as to impose target prices.

402 Second, as regards the facts which, in the defendant's view, show the consensus between the European producers concerning the trajectory to be followed by prices and sales and the disagreement between those producers and Takeda (see paragraph

381 above), it should be noted that the alignment of interests, objectives and positions adopted within a cartel by a group of its members does not necessarily mean that the members of that group are to be classified as leaders or that such a classification — applied on the basis of other factors to one of those members — is to be extended to all the others. Furthermore, Merck was also a part of that 'compact front' of European producers referred to by the defendant, but was not however labelled a leader. It is true that the Decision refers to more adverse factors for BASF than Merck — the organisation of two meetings (see paragraph 386 above) and the promise to Roche to change, where necessary, the local organisation if Roche found that BASF's prices at the local level disturbed the market (recital 424 of the Decision) — but those factors are not sufficiently weighty to justify substantially different treatment of Merck and BASF with regard to the aggravating circumstance in question. As for the comparison with Takeda's role, whilst it is true that the Decision shows that, on some occasions, Takeda was obliged formally to accept the maintenance of the original agreements on quotas required by the European producers, it also shows that in fact Takeda did not comply with that compromise and that on other occasions (such as the meeting of 25 May 1993 in Zurich, referred to in recitals 436 and 437) it did not accept the proposals made to it and forced a compromise.

403 More generally, it must be found, as the applicant claims, that all the facts to which the defendant pointed with regard to the opposition between the European producers and Takeda are merely evidence of the instability of the cartel following the substantial and unexpected increase in sales by the Chinese producers and of the sometimes heated negotiations which the members of the cartel, all actively but not as leaders, entered into on a continuous basis to overcome the difficulties engendered by the Chinese competition. Recitals 439 and 440 of the Decision show, for example, that each of the four members of the cartel put forward its own proposals. Furthermore, the ultimata issued by the European producers to Takeda (see, in addition to that referred to by the defendant and set out in recital 442, a similar ultimatum issued to Takeda by BASF and Merck through the intervention of Roche, referred to in recitals 444 and 446) were not intended as retaliation but quite simply as the withdrawal from the cartel and, in any event, it is clear from recital 425 of the Decision that Takeda also issued an ultimatum to Roche and BASF with the intention of '[reacting] against them' where they did not adopt its price.

404 In such circumstances, the only undertaking which could conceivably be classified as a leader remains Roche, which organised a significant number of meetings (recital 415), separately met BASF and Merck on the one hand (recitals 415 and 432) and Takeda on the other (recitals 403, 407, 412, 413, 415, 418, 419, 420, 443 and 456), undertaking to represent BASF and Merck in the negotiations with Takeda (recitals 444 and 456) and Takeda at the quarterly meetings between the European producers (recital 416), collected the sales figures of the cartel members and in return reported to them the overall results by undertaking (recital 417). Moreover, it is clear from the Decision that Roche is the member of the cartel which most often undertook to make proposals as to the operation of the cartel (for example, Roche proposed that the cartel members coordinate their positions as suppliers of Coca-Cola: recital 410; at the bilateral meeting with Takeda on 15 and 16 May 1991, it proposed to fix the European sales quotas for 1991 on a country-by-country basis: recital 423; at the meetings at the beginning of 1993 and on 25 May 1993, it proposed a restriction of output and/or a price increase: recitals 432 to 434 and 436; at a meeting on 10 November 1993 with Takeda in Tokyo, it proposed a new scheme for the quotas for 1994: recital 445).

405 Furthermore, the statement in paragraph 149 of the application that 'BASF occasionally played a role' is by no means an admission on the part of the applicant of its leadership role, since the applicant at the same time stated in that paragraph that it did not manage or direct the arrangements.

406 Given the foregoing considerations, it must be found that neither in the Decision nor before the Court did the Commission demonstrate to the requisite legal standard that the applicant played, jointly with Roche, the role of leader in the infringement relating to vitamin C.

407 Consequently, the increase of 35% in the basic amount of the fine imposed on the applicant for that infringement must be set aside.

(d) Infringement relating to vitamin D3

Arguments of the parties

408 As regards the infringement relating to vitamin D3, the applicant maintains that the Commission itself recognised, at recital 461 of the Decision, that it was not capable of determining whether it was Roche, BASF or Solvay Pharmaceuticals BV ('Solvay') which took the initiative in the infringement. The applicant was nevertheless treated as an instigator and leader with Roche, whereas Solvay was not so classified. The Commission failed to provide the slightest evidence to support that conclusion concerning the applicant. The Decision relies only on recitals 459 and 460, which merely show, on the one hand, that Roche stated that Solvay initiated the cartel arrangements and, on the other, that Solvay stated that it was not the instigator but was the last member to join the cartel. Those circumstances do not justify the conclusion that BASF was an instigator and a leader of the arrangements.

409 The applicant's role in the cartel contrasts with the active leading roles played by both Roche and Solvay, which are apparent from a number of circumstances referred to in the Decision.

410 The defendant states that, in relation to vitamin D3, it did not find that the applicant had played the role of instigator, but rather that of leader, i.e. the active role in the operation of the cartel. Furthermore, the Guidelines state that an increase may be applied to the leader in or instigator of a cartel. Nor is there any evidence that Solvay took the initiative in starting the cartel and, even if that were proved, the fact that

the Commission wrongly failed to increase Solvay's fine on account of its role as an instigator does not mean that it erred in increasing the applicant's fine on account of its role as leader.

411 Recital 472 to the Decision states that, at their first meeting in January 1994, the producers set 'list' and lowest prices for each region and that a handwritten comment on a note from Solvay stated that BASF would be the first to announce the prices.

412 Furthermore, the leading roles played by BASF and Roche in the vitamin D3 cartel are mentioned by Solvay in its reply to the statement of objections, while Roche itself recognised that the cartel started with the establishment of bilateral contacts with BASF.

413 The Decision, when examining target quotas (recital 476), takes account of Solvay's relatively weaker position by comparison with the other two producers. The Decision also indicates that the first price increase was led by BASF and that it was only later that Solvay in turn led an increase (recitals 472, 473 and 479). It was on the basis of those factors that the defendant considered that, although the leading role played by BASF was less important than that played by Roche, its role was nevertheless more important than Solvay's.

414 In its reply, the applicant states that the evidence adduced by the defendant does not establish that it was a leader in the cartel in respect of vitamin D3.

Findings of the Court

415 It should be noted that, according to the Decision, Roche, Solvay, BASF and Aventis took part in the cartel in respect of vitamin D3.

416 The defendant, in its pleadings, stated that it did not find that the applicant was an instigator of that cartel, but a leader (see paragraph 410 above). However, it states that Roche acknowledged that the cartel began with the establishment of bilateral contacts with BASF (see paragraph 412 above).

417 It should be noted that whilst recital 712 finds in general terms that Roche and BASF were leaders in and instigators of all the infringements, the footnote to that recital makes no reference to any of the Decision's recitals concerned specifically with the facts relating to the cartel in respect of vitamin D3.

418 In those circumstances, it must be found that the statement of reasons for the increase for aggravating circumstances of 35% of the basic amount of the fine imposed on the applicant in respect of its participation in that cartel is inadequate in that it does not explain whether that increase was imposed in respect of BASF's instigation of or leadership in the infringement, or even both at once.

419 Furthermore, in any event, whichever is the case, the statement of reasons is based solely on the general matters set out in paragraphs 713 to 717 of the Decision, in respect of which it has already been found, in paragraphs 295 to 300 above, that they do not in themselves substantiate the finding that the applicant was a leader in or instigator of the infringements alleged against it in the present case.

420 Since the increase in the fine in question is vitiated by illegality, the Court will exercise its unlimited jurisdiction with regard to assessing the applicant's role in the infringement relating to vitamin D3 in order to determine whether that increase should be upheld, set aside or adjusted.

— Role of instigator

421 However the defendant's position as to whether the applicant was an instigator of the cartel in respect of vitamin D3 is to be understood, the Court finds, as the applicant submits, that no evidence adduced before the Court supports the finding that the applicant played such a role.

422 The recitals of the Decision relating to the origin of that cartel, namely recitals 459 to 463, do not demonstrate that BASF played such a role, but set out, inter alia, contradictory allegations of Roche and Solvay as to which undertaking took the initiative in constituting the cartel, since Roche ascribed that responsibility to Solvay and Solvay denied any such responsibility. In recital 461 the Commission even expressly left open the question as to which undertaking took the initiative in establishing the cartel. The defendant's assertion that Roche acknowledged that that cartel began with the forging of bilateral contacts with BASF is manifestly unfounded in the light of the document supplied by Roche on which the defendant bases that assertion. The extract of Roche's letter to the Commission of 30 July 1999 supplied by the defendant in that context contains no such admission on the part of Roche, but instead twice states that it was Duphar (an undertaking in the Solvay group) which took the initiative ('Duphar took the initiative'; 'Duphar invigorated its attempts to organise a cartel agreement with Roche and BASF').

423 The applicant is therefore right to assert that there is no evidence that it was an instigator of the cartel in respect of vitamin D3.

— Role of leader

424 In support of its finding that, together with Roche, the applicant was a leader in the cartel in question the defendant essentially refers to four matters.

425 First, it refers to the setting, at the first meeting of the cartel in January 1994, of 'list' and lowest prices for the second quarter of 1994, as set out in recital 472 of the Decision. In that respect the defendant notes that a handwritten comment on Solvay's note made at that meeting states that 'BASF [would go] first with price announcement' and that it was the first price increase by the cartel in that case.

426 That matter has no weight for the purposes of ascribing to the applicant the role of leader.

427 The mere fact that a member of a cartel was the first to announce a new price or a price increase cannot be regarded as indicating that it was a leader of the cartel where the circumstances of the case show that the price or increase in question was fixed in advance by agreement with the other cartel members and those members also agreed which of them would be the first to announce it, since the designation of

that member shows that the fact of being the first to announce the price or the increase is merely a step performed strictly in accordance with an agreed predefined plan and not a voluntary initiative propelling the cartel.

428 That is precisely the position in the present case, contrary to the findings made in relation to price increases led by BASF in respect of the cartels for vitamins A, E and B5 (see paragraphs 348 and 372 above). Solvay's note cited by the defendant, made in the course of the meeting in January 1994, sets out the agreed 'list' and lowest prices, and the handwritten comment in question demonstrates precisely that the fact that BASF would announce those prices first was discussed and decided upon at that meeting, so that it cannot be inferred from this that the applicant exercised any substantial initiating role.

429 It should also be noted that the Decision (recitals 478 and 479) also refers to a price increase announced first by Solvay, an increase which had been agreed between Solvay and Roche (and approved by BASF) as regards its amount, the timing of its announcement and the undertaking (Solvay) which would announce it first (which was not however found by the Commission to be a leader).

430 The fact that the new prices announced first by BASF, referred to in recital 472, were the first new prices ever agreed by the cartel does not in any event distinguish the applicant's position, in terms of the role of leader, from that of the other members of the cartel, such as Solvay, which also appear to have been the first to announce price increases in the framework of the implementation of a cartel which lasted several years such as that in issue.

431 Second, the defendant states that Roche's and BASF's leadership is pointed out by Solvay in its reply of 2 October 2000 to the statement of objections, in the context of arguments showing the link between the infringement in question and those in respect of vitamins A and E.

432 That argument cannot be upheld.

433 In that reply Solvay does not ascribe the role of leader to either Roche or BASF but attempts to demonstrate that, contrary to Roche's statement in Annex 3 of its letter to the Commission of 30 July 1999, it was indeed in Roche's interest, as it was in that of BASF and Aventis, that a cartel for vitamin D3 be set up and operating. Solvay's argument sought essentially to refute Roche's argument advanced in that annex to the effect that Solvay had taken the initiative in the setting-up of a vitamin D3 cartel and that Roche, which had no interest in increasing the price of that vitamin, proved to be recalcitrant.

434 In its reply Solvay stresses the link which, in its opinion, existed between the cartels in respect of vitamins A and E on the one hand and vitamin D3 on the other and which is said to be shown by Roche's assertion, in Annex 3, that 'when Roche, BASF and [Aventis] had trilateral gatherings regarding Vitamin A or Vitamin E, the pricing policies of Vitamin D3 were also summarised at these meetings'.

435 However, Roche's assertion, to which Solvay referred in order to gain recognition of the fact that its responsibility was less than that of the three other producers which committed the infringement relating to vitamin D3, do not show that BASF exercised any leadership role in that infringement, still less because it is clearly

implied by Roche's account in Annex 3 of its letter of 30 July 1999 that, whilst the pricing policy in respect of vitamin D3 was recapitulated during the trilateral meetings on vitamins A and E between Roche, BASF and Aventis, it was not in the context of adopting decisions on vitamin D3 in the absence of Solvay, but to point out decisions adopted at meetings concerning vitamin D3 in the absence of Aventis, which was represented by Solvay.

436 Third, the defendant submits that, again in that Annex 3, Roche acknowledged that the cartel in respect of vitamin D3 began with the forging of bilateral contacts with BASF. That argument, which has already been held in paragraph 422 above to have no factual basis, is also irrelevant for the purposes of determining whether the applicant was a leader in that cartel, since the defendant itself rightly highlighted the distinction between the concept of instigator and that of leader.

437 Fourth, to show that, contrary to the applicant's allegation, BASF's role in the cartel was greater than Solvay's, the defendant also refers to the recitals of the Decision which examine the targets set for quotas (in particular recital 476), which are said to show Solvay's relatively weak position by comparison with Roche and BASF.

438 That argument is unfounded. Recital 476, like recitals 463 and 474 of the Decision, show that the quotas allocated to Solvay — which also include Aventis's share (see recital 483) — were almost double those allocated to BASF, which reflected the relationship between the respective market shares of the producers as calculated by agreement between Roche, BASF and Solvay at the first meeting of the cartel on 11 January 1994 (see recital 462).

439 On the other hand, it must be held, as the applicant points out, that the Decision sets out clearer evidence, in terms of the leadership of the cartel in question, against Roche and Solvay. It should be noted in that regard that recital 478 shows that, during a bilateral meeting between Roche and Solvay in Basle, Roche proposed a price increase for which Solvay was to be the leader in Europe and that it undertook to ensure that the two other members of the cartel (BASF and Aventis) followed that increase. It is clear from the Decision that Solvay separately met Aventis, which did not attend the meetings with the other cartel members. Solvay collected data from Aventis for use at those meetings, and notified Aventis of the outcome of those meetings (recitals 468 and 482). Solvay was allocated a production quota on behalf of Aventis (recital 483) and Solvay collected data and presented the collated results after the meetings were interrupted by the launch of the American investigations (recital 480).

440 In the light of the foregoing it cannot be found on the basis of the evidence in the file that the applicant was, jointly with Roche, a leader in the infringement relating to vitamin D3.

441 The increase in the basic amount of the fine imposed on the applicant in respect of that infringement must therefore be set aside.

(e) Infringements relating to beta-carotene and carotinoids

Arguments of the parties

442 As regards the infringements concerning beta-carotene and carotinoids, the applicant claims that the Decision offers no evidence to support the conclusion that BASF and Roche jointly conceived and instigated the cartel arrangements and

led them. In fact, the evidence suggests that Roche, rather than BASF, played an active role in managing and directing the arrangements.

443 In particular, as regards the instigation and conception of the arrangements, although the Decision, at recitals 520 and 521, contains two references to initial meetings between Roche and BASF, it provides no evidence as to which party initiated those meetings. It submits that a cartel is not jointly conceived and instigated by all the participants attending the first meeting.

444 As regards the management of the arrangements, the applicant refers to a series of circumstances mentioned in the Decision (recitals 520 to 522, 525 and 526) which in its view prove the active role played by Roche in this respect. Roche organised the first meeting, the quarterly meetings and a meeting aiming to extend the scope of the beta-carotene cartel to include red carotinoids, as Roche thereby wished to limit BASF's market share. Roche's leading position is also shown by the fact, set out at recital 525 of the Decision, that BASF was of the opinion that it could not enter the pink astaxanthin market without obtaining Roche's approval.

445 The defendant contends that the statement of objections and the Decision indicate, on the basis of the applicant's own statements during the administrative procedure, that the functioning of the arrangements concerning beta-carotene and carotinoids reflected the structure of the arrangements relating to vitamins A and E (in particular, recitals 522 and 530). Thus, the account of the functioning of the latter arrangements set out at recitals 175 to 188 of the Decision is also relevant to the arrangements concerning beta-carotene and carotinoids. The defendant relies, in particular, on recital 183, which states that if a price increase was decided Roche

usually took the lead and announced first, although it occasionally asked BASF to lead the increase publicly. Those facts, which are not contested by the applicant, therefore prove that BASF also acted as a leader of the beta-carotene and carotinoids cartels, although only occasionally and played a lesser role than Roche.

446 In its reply, the applicant observes, first, that in the present action it disputes the Commission's finding that it was a leader in the vitamins A and E infringements.

447 Second, the Commission has not discharged the burden of proof regarding the leadership role that it attributed to BASF in the infringements concerning beta-carotene and carotinoids. The Commission must specifically prove that BASF, by its own actions, played a leading role, and cannot simply recycle allegations made in the context of other infringements or refer to the description of the operation of an unlawful agreement.

448 Third, the defendant's argument is illogical, since the only two members of a cartel cannot both be leaders, as leadership requires a leader and at least one follower.

449 In its rejoinder, the defendant contests the applicant's last-mentioned assertion by observing that in infringements of long duration such as those in the present case it is very possible that at different times during the operation of the cartel, one or the other undertaking leads the cartel, which could find a proper reflection in different increases in the fines so as to take into account the difference in leading roles of these undertakings (*LR AF 1998* v *Commission*, paragraph 144 above, paragraph 204).

Findings of the Court

450 It should be noted that, according to the Decision, only Roche and BASF participated in the cartels in respect of beta-carotene and carotinoids.

451 The defendant, in its pleadings, refers only to BASF's leadership in those cartels, without finding that it was also an instigator. Further, the matters to which it refers to defend the application to the applicant of the aggravating circumstance in question for those two infringements concern the operation and not the creation of the cartel.

452 It should be noted that the footnote to recital 712 does not refer to any of the recitals of the Decision dealing with the description of the facts relating to the cartels in respect of beta-carotene and carotinoids.

453 In those circumstances, as found in paragraph 418 above concerning the infringement relating to vitamin D3, it must be found that the statement of reasons for the increase for aggravating circumstances of 35% of the basic amount of the fines imposed on the applicant for its involvement in those cartels is inadequate in that it does not explain whether that increase was imposed in respect of BASF's instigation of or leadership in those two infringements, or even both at once.

454 Furthermore, in any event, whichever is the case, the statement of reasons is based solely on the general matters set out in paragraphs 713 to 717 of the Decision, in respect of which it has already been found, in paragraphs 295 to 300 above, that they

do not in themselves substantiate the finding that the applicant was a leader in or instigator of the infringements alleged against it in the present case.

455 Since the increase in the basic amounts of the fines imposed on the applicant for the infringements relating to beta-carotene and carotinoids is vitiated by illegality, the Court will exercise its unlimited jurisdiction with regard to assessing the applicant's role in each of those infringements in order to determine whether that increase should be upheld, set aside or adjusted.

456 As was held in paragraph 451 above, the defendant does not allege that BASF was an instigator of those infringements. Furthermore, as the applicant rightly claims, there is no evidence in the file to suggest that it played such a role, since it is not sufficient merely to have been a founding member of the cartel for an undertaking to be classified as an instigator of the cartel (see paragraph 321 above).

457 In support of its finding that, together with Roche, the applicant was a leader in the two infringements in question, the defendant refers to the matters set out in recitals 175 to 188 of the Decision in relation to the cartels in respect of vitamins A and E. The defendant explains that, on the basis of BASF's statements in the report it sent to the Commission under cover of the letter of 15 June 1999, it stated both in the statement of objections (paragraph 186) and in the Decision (recital 522) that for beta-carotene and carotinoids, as for vitamins A and E, 'the parties prepared a detailed "budget", compared actual sales against "budgeted" quotas, made estimates of future market growth and agreed on the timing and amount of price increases'. The Decision also states that 'quarterly beta-carotene meetings were held in Basle at the same location and on the same occasion as the vitamins A and E cartel meetings' (recital 522) and that 'carotinoid meetings were held each quarter on the same occasion as the beta-carotene meetings and involved essentially the same persons'

(recital 530). It argues that the express references to the operation of the cartels in respect of vitamins A and E make it possible to infer that BASF was a leader in the cartels in respect of beta-carotene and carotinoids from the circumstances referred to in recitals 175 to 188 of the Decision, which prove that BASF was a leader in the vitamins A and E cartels. The defendant refers in particular to recital 183, concerning the mechanism for the announcement of the price increases for vitamins A and E (see paragraph 344 above).

458 The defendant's argument in that regard cannot be upheld.

459 First, the fact that the beta-carotene and carotinoids meetings might have taken place at the same time as the vitamin A and E meetings and followed essentially the same scheme (allocation of quotas, compliance control, estimating future market growth, price collusion) does not make it possible to answer the question as to which undertaking was in fact a leader in each of those cartels. Thus it cannot be presumed from those similarities between the two groups of cartels under consideration that, in the context of the cartels in respect of beta-carotene and carotinoids, BASF was also the first to announce price increases, which it has been found to have done sometimes in the context of the cartels in respect of vitamins A and E and which justified the increase of 35% in the basic amount of the fines imposed on the applicant for its participation in those cartels (see paragraphs 344 to 354 above).

460 Second, whilst it is true, as the defendant contends, that in a long-term infringement such as those in issue the members of the cartel may, at various times, take turns in exercising leadership — so that it cannot be ruled out that each may have the aggravating circumstance of leader applied to them — nevertheless, in the present case it must be found that the defendant neither asserts nor demonstrates that BASF and Roche acted in that way in the cartels in respect of beta-carotene and carotinoids or at which times they did so.

461 Third, as the applicant points out, the description of the facts in respect of the two infringements in question set out in the Decision (recitals 520 to 534) refer to certain circumstances which could be interpreted as evidence of Roche's leadership. Thus, the Decision makes it clear that several meetings between Roche and BASF in respect of beta-carotene and carotinoids took place at Basle, the site of Roche's head office (recitals 520, 522 and 526), and that Roche supplied BASF with astaxanthin (a carotinoid) which it needed for pre-production marketing and trials whilst it was constructing its own new plant for producing astaxanthin (recital 528). By contrast, recitals 520 to 534 set out no specific fact which might be evidence of BASF's leadership.

462 In those circumstances, it must be found that there is insufficient evidence in the file to support a finding that the applicant was a leader in respect of the infringements relating to beta-carotene and carotinoids.

463 It follows that the increase in the basic amount of the fines imposed on the applicant for those infringements must be set aside.

3. *Conclusion on the increase, for aggravating circumstances, in the basic amount of the fines imposed on the applicant*

464 It is clear from the preceding analysis that the increase of 35% — on the basis that the applicant was a leader or instigator — of the basic amount of the fines imposed on it in the Decision is upheld with regard to the infringements relating to vitamins A, E and B5 — in addition to the infringement relating to vitamin B2, which is not covered by the present plea — whereas it is set aside with regard to the infringements relating to vitamins C and D3, beta-carotene and carotinoids.

E — *Sixth plea: infringement of Section B of the Leniency Notice and of the applicant's legitimate expectations created by that notice*

1. *Arguments of the parties*

465 The applicant submits that the Commission erred in finding that the applicant was not entitled to a larger reduction in fines under Section B of the Leniency Notice. In the case of all the infringements for which it was fined, the applicant satisfied all the conditions set out in Section B(a) to (e), whereas the Commission found, with regard to the vitamin A and E infringements, that it did not satisfy the condition under paragraph (b) because Aventis was the first to adduce decisive evidence of those offences in its written statements of 19 and 25 May 1999 and, in the case of the other infringements, that the applicant did not satisfy the condition under paragraph (e) as it had played the role of leader in or instigator of the cartels with Roche.

466 As regards the condition under paragraph (b) in respect of the vitamins A and E infringements, the applicant maintains that it, together with Roche, was the first undertaking to inform the Commission of the cartel in the vitamins sector and to provide it with details of the individual vitamins involved, the participating undertakings and the duration of the cartel. This evidence was given to the Commission orally at a meeting on 17 May 1999 and was 'decisive' within the meaning of Section B(b) of the Leniency Notice, since it was sufficient in itself to establish the existence of the cartel, in accordance with the criterion used by the Commission in Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/36.545/F3 — Amino acids) (OJ 2001 L 152, p. 24, recital 409) and Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18; 'the Citric Acid Decision', recital 306).

467 The applicant describes the context and the course of that meeting as follows. By letter dated 6 May 1999 to Mr K. Van Miert, the Commissioner then responsible for competition policy, BASF informed the Commission of the existence of a cartel in the vitamins sector, identifying itself and Roche as participants in the unlawful arrangements and requesting a meeting to discuss them with the Commission with a view to cooperating with the Commission and in order to benefit from the Leniency Notice. On the same day, Mr J. Scholz, of BASF's legal department, contacted Mr Van Miert's office by telephone to make an appointment to discuss the matter in detail.

468 After some difficulty in finding a date that would suit the Commission, a meeting took place on 17 May 1999 between representatives of BASF, including Mr Scholz, Roche and the Commission. At the meeting, BASF described a series of unlawful collusive arrangements in the worldwide vitamins industry, providing details of the vitamin products involved, the names of the major participating undertakings and the duration of the infringement. BASF also expressed its firm intention to cooperate with the Commission during any investigation into these activities, informed the institution of the then imminent conclusion of a plea agreement with the United States Department of Justice and agreed to provide copies of the agreement as soon as it was filed with the appropriate United States court. The applicant has annexed to its application a statement by Mr J. Scholz ('the Scholz statement'), summarising the statements made by BASF and the level of cooperation which it offered at the meeting.

469 The information which the applicant provided orally at the meeting would have enabled the Commission to prove the infringements in question, in particular the vitamins A and E infringements, even if BASF had not subsequently cooperated with the Commission. In the Citric Acid Decision, paragraph 466 above (recital 305), the Commission itself accepted that decisive evidence may be provided orally; and there is nothing in the text of the Leniency Notice to suggest that evidence must be given in writing. Section B of the Leniency Notice differentiates between 'information',

'documents' and 'evidence', which suggests that decisive evidence is not necessarily documentary evidence. Likewise, there is no reason connected with legal certainty or administrative efficiency why oral evidence should not be sufficient. The Commission can keep minutes of meetings, and can also, in the interests of certainty, compile a version of such meetings which is agreed with the participants.

470 Thus the written report which it subsequently provided at the Commission's request, giving additional details of the infringements, was not essential for the purpose of applying the Leniency Notice and was no more than an administrative convenience for the Commission.

471 The Commission therefore erred in finding that it was Aventis's written statements of 19 May and 25 May 1999 that provided it with the first decisive evidence of the vitamins A and E infringements.

472 Alternatively, should the oral evidence given by BASF during the meeting on 17 May 1999 not be considered decisive, the applicant objects that that is mainly attributable to the Commission's insistence on written evidence, which was contrary to the principle of sound administration.

473 First, the Commission refused to accept additional evidence offered by BASF during that meeting and, in particular, refused to receive further witness testimony which could have been provided at short notice. Conducting interviews with the principal BASF employees involved in the vitamins cartel would have been a fast, efficient, and convenient method of gathering evidence on the vitamins cartel, and the

Commission's desire to save itself work cannot be held against the applicant or impair its legal position. In particular, the Commission should not refuse evidence offered where such a refusal may prevent an undertaking from being the first to adduce decisive evidence for the purposes of the Leniency Notice.

474 Second, the applicant submits that if the Commission had considered that only written statements were sufficient for the purpose of the Leniency Notice, it should have so informed BASF, since it was aware from BASF's letter of 6 May 1999 that BASF wished to admit participation in the vitamins cartel and to cooperate with the Commission investigation in order to obtain the benefit of the Leniency Notice. However, the Commission never indicated that the oral statements made at the meeting on 17 May 1999 were not sufficient for that purpose until they were confirmed in writing. Had the Commission done so, BASF could have confirmed immediately in writing what had been said at the meeting. Furthermore, if BASF had been told before the meeting that only written evidence would be accepted by the Commission, it would have adduced a written statement at that meeting.

475 As regards the condition in Section B(e) in connection with all the offences for which the applicant was fined, the applicant, referring to the arguments developed in the context of the fifth plea, reiterates that the Commission erred in finding that it was a leader in or instigator of the cartels.

476 The defendant maintains that, with regard to the infringements relating to vitamins A and E, the applicant was not the first undertaking to adduce decisive evidence within the meaning of the Leniency Notice and that it correctly held that Aventis was the first to do so. The information which the applicant claims to have provided orally at the meeting of 17 May 1999 between Roche, BASF and the Commission is not decisive evidence given orally for the purposes of that Notice.

477 As stated in recital 127 of the Decision, at that meeting Roche and BASF merely expressed their intention to cooperate but did not provide the Commission with the evidence necessary to prove the infringements.

478 If the defendant found that Aventis, not BASF, fulfilled the condition under Section B(b) of the Leniency Notice, it did so because Aventis adduced decisive evidence on 19 May 1999, almost one month before BASF presented the first document that could be taken into account in the context of the Leniency Notice, namely its statement of 15 June 1999 (recitals 125, 132, 741 and 743 of the Decision).

479 The Scholz statement, which is dated two days before the applicant brought its action before the Court, can in no way constitute a transcript of the meeting of 17 May 1999 and it cannot support the applicant's claims.

480 The mere offer by BASF, referred to in the Scholz statement, to make employees available to the Commission to testify is not decisive evidence in so far as it did not enable the Commission to establish the infringements.

481 According to the defendant's recollection of the meeting of 17 May 1999, the applicant was unable to indicate at the meeting the content of the illegal agreements relating to vitamins A and E. The applicant even indicated that further documents could only be produced once the class actions against it in the civil courts had been settled. The Commission officials present at the meeting were therefore entitled to insist that detailed evidence be provided after the meeting, as the applicant itself stated that it had some documents which it would only be able to produce at a later

date. As that circumstance is not mentioned in the Scholz statement, the defendant suggests that the Court should, pursuant to Articles 65(2)(a) and (c) and 66 of its Rules of Procedure, hear from the persons who attended the meeting of 17 May 1999 and were referred to in paragraph 179 of the application.

482 Finally, as regards the condition in Section B(e) of the Leniency Notice in relation to all the infringements for which the applicant was fined, the defendant claims, first, that the applicant does not deny that it had a role as leader in or instigator of the vitamin B2 cartel and, second, that the role of leader or instigator played by the applicant in the other cartels is sufficiently made out in the Decision. In those circumstances, the applicant cannot claim that the Commission has misapplied the Leniency Notice.

483 In its reply, the applicant begins by setting out three aspects of the defence that it considers important. First, it states that the Commission does not challenge the substance of the account of the 17 May 1999 meeting in the Scholz statement and, in particular, the fact that BASF described the important elements of the arrangements, including those relating to vitamins A and E, the participants in those arrangements and their duration. Second, the Commission does not disagree with the applicant's arguments that oral information may constitute decisive evidence within the meaning of the Leniency Notice. Third, contrary to good practice and to what happened in the Citric Acid case, it is now clear that the Commission kept no contemporaneous minutes of the meeting and made no subsequent effort to compile an agreed version of that meeting with the participants.

484 As regards the concept of decisive evidence, the applicant maintains that, in the context of a complex, long-running, multi-party cartel such as the subject of the

Decision, it is unnecessary for an undertaking to provide oral details of every meeting and it is sufficient if the existence of an agreement is admitted and explained, since the Commission can then exercise its powers under Regulation No 17 to obtain the precise details, as it did in the present case. The Commission's defence does not deny that the request for information of 26 May 1999 on the basis of Article 11 relies on information provided by BASF during the meeting of 17 May 1999.

485 In its rejoinder, the defendant states that, contrary to the applicant's assertions, decisive evidence must in itself enable the Commission to adopt a decision finding an infringement and not simply to send out requests for information pursuant to Article 11 of Regulation No 17. During the meeting, the applicant merely admitted having taken part in a cartel, mentioning other participants and giving some details. That is clear from the Scholz statement (paragraph 9) and also from the written internal notes made by the case handler, a typed version of which is produced in Annex D.3 to the rejoinder and which were written at the end of the meeting and are a written record of it. The information given at that meeting therefore only enabled the defendant to send requests for information pursuant to Article 11 of Regulation No 17.

2. *Findings of the Court*

486 By the present plea, the applicant simultaneously challenges the Commission's findings that it did not satisfy the condition in Section B(b) of the Leniency Notice in respect of the infringements concerning vitamins A and E and the condition in paragraph (e) of that section in respect of the eight infringements for which the Commission imposed a fine on it.

(a) Whether the applicant satisfied the condition in Section B(b) of the Leniency Notice in respect of the infringements concerning vitamins A and E

487 It should be noted as a preliminary point that the Commission in its Leniency Notice defined the conditions in which undertakings cooperating with it during its investigation into a cartel may be exempt from fines, or may be granted reductions in the amount of the fine which would otherwise have been imposed on them (see Section A, paragraph 3, of the Leniency Notice).

488 As is stated in Section E, paragraph 3, of the Leniency Notice, the notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission had therefore to adhere to the notice when, for the purposes of determining the fine to be imposed on the applicant, it assessed the applicant's cooperation (see, to that effect, *HFB and Others* v *Commission*, paragraph 227 above, paragraph 608, and Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2235, paragraphs 192 and 193).

489 Against that background, it should be noted that in accordance with Section B of the Leniency Notice, an undertaking 'will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if [it] had not cooperated' if it:

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

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

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

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

(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity'.

490 As regards, more particularly, the condition in paragraph (b), the applicant submits that, in the case of the infringements relating to vitamins A and E, it was indeed, with Roche, the first undertaking to have adduced decisive evidence of the cartel's existence, which it did orally at the meeting with the Commission on 17 May 1999, i.e. two days before the disclosure of Aventis's first written statement.

The concept of 'decisive evidence' within the meaning of Section B(b) of the Leniency Notice

491 According to the applicant, which clarified its position in that regard by replying to a written question from the Court by way of measures of organisation of procedure,

where the Commission receives a voluntary admission of the existence of an illegal activity, the relevant goods, the undertakings involved, the geographical scope and the duration, there can be no shadow of a doubt that it has 'decisive evidence' of the cartel's existence within the meaning of Section B(b) of the Leniency Notice. The concept of decisive evidence cannot in its view cover all the evidence required by the Commission in order to prepare the decision finding an infringement, but evidence enabling that institution to be aware of the existence of a cartel, to use its powers to carry out investigations and to obtain any further information it finds necessary for the statement of objections and then a decision. The defendant, by contrast, submits that evidence is decisive where, in itself, it enables the Commission to adopt a decision finding an infringement and not where it enables that institution merely to formulate requests for information.

492 It should be held in that connection, first, that contrary to the defendant's contention, the notion of decisive evidence does not refer to evidence which in itself is sufficient to establish the cartel's existence, as is shown by a comparison with the wording of Section B(a) of the Leniency Notice that specifically includes the adjective 'sufficient', which, by contrast, is not used in Section B(b) of that notice (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 70 above, paragraph 362).

493 Second, although the evidence referred to in Section B(b) of the notice need not be sufficient in itself to establish the cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement.

494 It is in the light of that interpretation of 'decisive evidence' that the question whether, in the present case, the applicant satisfied the condition referred to in Section B(b) of the Leniency Notice should be examined.

Whether decisive evidence within the meaning of Section B(b) of the Leniency Notice can be adduced orally

495 On the question whether decisive evidence within the meaning of Section B(b) of the Leniency Notice can be adduced orally, the defendant, without expressly denying that it can, stated in reply to a written question from the Court by way of measures of organisation of procedure, that evidence adduced orally must be corroborated in writing in order to be taken into consideration under Section B. That position, which the defendant repeated at the hearing and which is explained by the need to give the other undertakings an opportunity to comment on any evidence which the Commission uses against them, is not free from ambiguity, in that the defendant does not specify whether or not, for the undertaking in question to satisfy the condition referred to in Section B(b) of the Leniency Notice, the written confirmation must necessarily precede any evidence adduced, after that undertaking's oral disclosure of the evidence, by the other undertakings wishing to avail themselves of that notice.

496 In that regard, as the applicant rightly pointed out at the hearing, the Court in its judgment in *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraph 431, confirmed, albeit in the context of the application of Section D, paragraph 2, first indent, of the Leniency Notice, that the oral disclosure to the Commission of information may be taken into consideration for the purposes of applying the benefits laid down by that notice. The Court noted that the abovementioned provision provides that not only 'documents' but also 'information' may be 'evidence' contributing to establishing the existence of the infringement and inferred from this that that information need not be provided in documentary form.

497 Those considerations are also relevant, mutatis mutandis, in the context of the application of Section B of the Leniency Notice in that the condition referred to in

paragraph (b) refers to 'decisive evidence' and not documents and the condition referred to in paragraph (d) lists 'relevant information', 'documents' and 'evidence'.

498 Furthermore, the oral disclosure of information has no major disadvantage from the point of view of legal certainty, since information provided orally to a public administration in a meeting is normally likely to be preserved by sound recording and/or in written minutes.

499 The argument put forward by the defendant at the hearing that the Commission is not required to take minutes of its meetings with individuals or undertakings needs to be qualified.

500 It is true that there is no such general obligation on the defendant institution (see, to that effect, Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 94, and *Atlantic Container Line and Others* v *Commission*, paragraph 47 above, paragraph 351).

501 Nevertheless, the lack of an express provision that minutes be drawn up does not preclude that in a particular case the Commission may be under a duty to make such a record of the statements it receives. Such an obligation may, depending on the circumstances of the particular case, arise directly from the principle of sound administration, referred to by the applicant at the hearing, which is one of the guarantees conferred by the Community legal order in administrative proceedings (see *ABB Asea Brown Boveri* v *Commission*, paragraph 192 above, paragraph 99, and the case-law cited).

502 If an undertaking makes contact with the Commission with a view to cooperating to an extent which may be rewarded under the Leniency Notice and a meeting is organised in that context between the institution and that undertaking, the minutes of such a meeting, recording the essential aspects of the assertions made at that meeting, must be drawn up or, at the very least, a sound recording must be made, pursuant to the principle of sound administration, if the undertaking in question so requests at the latest at the beginning of the meeting.

503 It is true that oral information has the disadvantage that its disclosure to the Commission requires the collaboration of that institution and is therefore subject to the availability of that institution's staff and facilities (the availability of a meeting room, recording equipment etc.). That disadvantage is not however decisive in deciding whether oral information can be accepted for the purposes of applying Section B of the Leniency Notice.

504 First, where several undertakings ask to meet Commission staff with a view to cooperating in a manner capable of earning immunity from a fine or a reduction in its amount, the institution can and must ensure that it does not itself have an impact on the conditions of competition between undertakings that is inherent in the application of the condition referred to in Section B(b) of the Leniency Notice.

505 Second, the oral disclosure of information, precisely because of the need for cooperation from the Commission, must be regarded in principle as a slower means of cooperation than the disclosure of information in writing, which requires no cooperation on the part of the Commission and is not therefore subject to the availability of the Commission's resources. If it chooses to disclose information orally, the undertaking in question must accordingly know that it runs the risk that another undertaking may disclose to the Commission, in writing and before it, decisive evidence of the cartel's existence.

506 It must therefore be found that decisive evidence within the meaning of Section B(b) of the Leniency Notice may also be adduced orally.

Whether, at the meeting with Commission staff on 17 May 1999, the applicant adduced decisive evidence of the cartels' existence in respect of vitamins A and E

507 Before referring to the meeting of 17 May 1999, the applicant alleged that by its letter of 6 May 1999 to Mr Van Miert it informed the Commission, inter alia, of the existence of illegal cartels in the vitamins sector, and identified Roche and itself as participants in those arrangements. The terms of that letter themselves show that in fact the applicant merely referred to investigations in the United States into vitamin producers, including the applicant, 'on the basis of suspected cartels in the vitamins sector which breach competition law'. Thus it must be found that, by that letter, the applicant did not inform the Commission that there were illegal cartels in the vitamin sector, in which it participated, but merely referred to 'investigations under way in the United States' and 'suspected cartels', which hardly amounts to an admission of infringement on its part. The fact that the applicant also stated that it was lending its support to the American investigation and, like Roche, wished to discuss the case with the Commission 'in the interests of cooperation in the context of the Community's Leniency Programme' does not alter that finding.

508 Having clarified that point, it is necessary to identify the information which was adduced by the applicant to the Commission at the meeting on 17 May 1999.

509 It is common ground that no minutes of that meeting were drawn up either on the same day or subsequently and that the meeting was not recorded in a form which

could be transcribed. The applicant criticises the Commission's failure in that regard, without asserting that it had in fact asked the institution to comply with those formalities. In those circumstances the Commission cannot be criticised for such an omission.

510 Moreover, in the present case, even if that omission were wrongful, it would not in itself justify upholding the applicant's allegations.

511 It is clear from the applicant's pleadings (see, in particular, paragraphs 180 and 183 of the application and paragraphs 117 and 120 of the reply) that the applicant claims to have informed the Commission, at the meeting of 17 May 1989:

(a) of the existence of illegal arrangements concerning certain vitamin products, including vitamins A and E, affecting the EEA market;

(b) of the principal participants in those arrangements, including the four involved in those relating to vitamins A and E (Roche, BASF, Aventis and Eisai);

(c) of the nature of those arrangements, namely price-fixing agreements and the sharing of sales and capacity;

(d) of the period covered by those arrangements (from 1989 to 1999).

512 The defendant does not deny that the applicant adduced that evidence at that meeting, even if it considers that that evidence was not 'decisive' within the meaning of Section B(b) of the Leniency Notice.

513 On the other hand, the applicant has not claimed that at that same meeting its representatives offered the Commission specific information as to the operation of the cartels disclosed, the meetings between producers and the precise content of what was agreed at those meetings. It is further clear from the Scholz statement that the meeting only lasted about an hour, which was in all likelihood insufficient to allow two undertakings to give a detailed description of the cartels.

514 Moreover, it should further be noted that the transcript, disclosed by the defendant, of the manuscript notes which were taken for internal purposes by the case handler at the time of that meeting ('the manuscript notes') do not show that the discussion at the meeting of 17 May 1999 between Commission staff and the representatives of Roche and BASF included the disclosure of such information. Whilst it complained of not having received a copy of that document in spite of numerous requests to the Commission from before the introduction of the action, the applicant challenged neither its disclosure nor its content and even submitted that the document corroborated in several respects its allegations of fact and law in relation to that meeting.

515 Furthermore, the manuscript notes show that that discussion — in addition to the provision of the evidence set out in paragraph 511 above — was concerned less with the cartels in question than with the detailed arrangements for the cooperation to be provided by the two undertakings. The notes show, in particular, a certain caution on the part of the representatives of Roche and BASF and their admitted reluctance to disclose to the Commission more precise information or documents before the closure of the class actions (see paragraph 481 above) brought against them in the United States. In the case of Roche, it is apparent from those notes that its representatives even declared that they did not have the factual evidence and that they were seeking disclosure of it from Roche's American lawyers.

516 In any event, it is not necessary for the Court to rule on the question whether, as the defendant asserts, at the meeting on 17 May 1999 the applicant demonstrated its unwillingness to disclose documents before the closure of the class actions, as what matters is simply which evidence was in fact provided by the applicant at that meeting and whether or not that evidence may be regarded as 'decisive' in proving the existence of the infringements in question.

517 Whilst the evidence which the applicant claims to have provided at the meeting of 17 May 1999, as set out at paragraph 511 above, would certainly place the institution in a position to formulate requests for information, and even to order investigations, it nevertheless left the institution with almost the entire task of reconstructing and proving the facts, notwithstanding the applicant's admission of its responsibility, whereas that was clearly not the case for Aventis's detailed description of the illegal activities concerning vitamins A and E in its statement of 19 May 1999.

518 Without needing to hear witnesses, as requested by the defendant, on the alleged unwillingness of the applicant to disclose documents before the closure of the class actions, it must therefore be found, in the light of the considerations set out in paragraphs 492 to 494 above, that that evidence cannot be regarded as 'decisive evidence of the cartel's existence' in respect of vitamins A and E, within the meaning of Section B(b) of the Leniency Notice.

519 It must therefore be found that the applicant has not shown that it satisfied the condition laid down by that provision in respect of those infringements.

Whether the Commission unduly delayed in acquiring the information offered by the applicant

520 The applicant's alternative argument, namely that it was the Commission's unlawful requirement that the evidence be supplied in writing which prevented it from providing decisive evidence of the existence of the infringements relating to vitamins A and E (see paragraphs 472 to 474 above), is essentially in two parts. First, the applicant criticises the Commission's alleged refusal to accept the additional evidence proposed by BASF at the meeting of 17 May 1999 and, in particular, to hear at short notice its principal employees involved in the cartels. Second, it criticises the Commission for not having drawn its attention to the fact that oral statements were insufficient for the purposes of applying the condition in Section B(b) of the Leniency Notice.

521 Since, as was stated in paragraphs 495 to 506 above, that condition may also be satisfied by the oral disclosure of information, the second part of the applicant's alternative argument is irrelevant. In so far as by that part the applicant also seeks to demonstrate that the Commission was in any event under a duty to notify it of the inadequacy of the information provided at the meeting on 17 May 1999 for the purposes of the application of the condition in Section B(b) of the Leniency Notice in order to draw its attention to the need to supplement that information without delay, it should be noted, as the defendant asserts, that there was no such obligation on the Commission. Section E, paragraph 2, of that notice states that 'only on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met'.

522 In relation to the first part of the applicant's alternative argument, it should be noted, as a preliminary point, that an undertaking's offer to make its employees available to give evidence to the Commission, even if it had to be accepted by that institution, would not in itself suffice to enable that undertaking to meet the

condition set out in Section B(b) of the Leniency Notice. That condition requires that the decisive evidence is in fact adduced to the Commission, and a mere offer or indication of the source from which it may be obtained does not suffice.

523 Whilst the applicant submits, in paragraph 189 of its application, that 'the Commission refused to accept additional evidence offered by BASF during the meeting', it does not however state that the Commission's staff prevented or even deterred its representatives from providing at that meeting the further information which would have made the evidence adduced by the applicant on that occasion decisive within the meaning of Section B(b) of the Leniency Notice. The applicant states only that the institution refused to accept further witness testimony at short notice and cites passages of the Scholz statement which do not refer to any type of evidence other than the witness testimony proposed. There is likewise no clarification by the applicant as to the nature of the additional information that its representatives were in a position to provide in that meeting and which they failed to give because of the Commission's staff's alleged requirement that evidence be in writing.

524 It is therefore necessary to examine whether the — undenied — refusal to take up that witness testimony resulted, unlawfully, in another undertaking (Aventis) adducing to the Commission decisive evidence of the infringements in question before the applicant, it being noted that that refusal cannot be the cause of the applicant's failure to adduce decisive evidence at the meeting of 17 May 1999.

525 In that respect, without needing to make a finding on the question whether, as the defendant submits, the oral testimony by witnesses offered by the applicant in the meeting of 17 May 1999 was outside the scope of the Commission's powers under

Regulation No 17 and Regulation No 2842/98, the Court finds that the Commission's refusal to accept such testimony was not unjustified.

526 There was nothing to prevent the applicant itself from hearing the employees in question and providing in writing to the Commission without delay the information thus obtained. The applicant did not need the Commission's cooperation for the purposes of collecting information from its employees, in so far as the Commission in any case had no power to compel those employees to appear in order to give evidence. In those circumstances, the Commission was entitled to request the applicant to proceed in that way so as not unnecessarily to add to the Commission's workload, pursuant to the principle of economy and sound administration. Moreover, since the testimony in question, like the information adduced at the meeting of 17 May 1999, constituted oral disclosure of information to the Commission, it had, for the reasons already set out in paragraph 505 above, to be regarded, contrary to the applicant's contention, as in principle a less rapid means than disclosure in writing, so that the Commission cannot be criticised for having invited the applicant to use that second method.

527 There is therefore nothing in the present case to show that the fact that Aventis disclosed to the Commission decisive evidence of the existence of the cartels in respect of vitamins A and E before the applicant was due to any fault on the part of the Commission.

Conclusion

528 It follows from all of the foregoing that the applicant has not demonstrated that the Commission erred in its assessment when it found, in the Decision, that BASF could not avail itself of Section B of the Leniency Notice as regards the infringements relating to vitamins A and E on the ground that it did not meet the condition referred to in Section B(b) of that notice.

(b) Whether the applicant met the condition set out in Section B(e) of the Leniency Notice as regards the eight infringements relating to which a fine was imposed on it

529 In recital 744 of the Decision, the Commission found that 'Roche and BASF acted as instigators or played a determining role in the illegal activities affecting the vitamin A, E, B2, B5, C, D3, beta-carotene and carotinoids product markets, as described [in recitals 567 to 569 and 584]' and concluded that neither of those two undertakings therefore met the condition set out in Section B(e) of the Leniency Notice.

530 The arguments which the applicant and the defendant devote in their pleadings to that assessment by the Commission, which is challenged in the present plea, merely refer to the arguments set out in those pleadings in the analysis of the fifth plea in order, respectively, to refute or demonstrate BASF's role of leader in or instigator of the cartels, on the basis of which the basic amounts of the fines imposed on that undertaking were increased by 35% (see paragraphs 475 and 482 above).

531 It should, however, be noted that in the Decision (recital 744) the Commission supported its finding that BASF and Roche did not meet the condition referred to in Section B(e) of the Leniency Notice by referring to the fact that those undertakings acted as instigators or played a determining role in the infringements, as described in recitals 567 to 569 and 584 of the Decision, whereas it is in recitals 712 to 718, and without reference to recitals 567 to 569 and 584, that the institution addressed BASF's and Roche's role as leader and instigator as an aggravating circumstance.

532 Recitals 567 to 569 and 584, under the heading 'the nature of the infringements in the present case', in so far as they specifically concern the applicant, contain:

— considerations of a general nature similar to those set out in recitals 713 to 717 (relating to the fact that Roche and BASF were the two main producers of vitamins in the world, the 'common front' formed by Roche and BASF in the development and implementation of the cartels, and their common objective of partitioning all the various markets for vitamins) and other considerations of a general nature (Roche and BASF sold a substantial part of their production in the form of pre-mixes containing several vitamins);

— findings of a general nature on the role of Roche and BASF ('the prime mover and main beneficiary' of the collusive arrangements was Roche; BASF 'assumed a paramount role in following Roche's lead');

— references to facts or considerations connected to facts specifically referred to ('the effective starting point for the worldwide cartel arrangements was the same for vitamins B1, B2, B5, B6, C and folic acid ... namely the visit of senior executives from Roche and BASF to Japan on 30 and 31 January 1991'; 'together [Roche and BASF] secured the recruitment of Eisai to their club in vitamin E').

533 Requested, by way of measures of organisation of procedure, to specify the evidence on which it relied to defend the merits of its finding that BASF did not meet the condition set out in Section B(e) of the Leniency Notice, the defendant referred to various facts, set out in the Decision, on which it based its defence to the fifth plea

and which, it claims, justified the application of the aggravating circumstance of leader and/or instigator to the applicant. By contrast, in its reply to that request, it made no reference to considerations, findings or facts set out in recitals 567 to 569 and 584 of the Decision, to which recital 744 refers.

534 In those circumstances, it must be found that, before the Court, the defendant has put forward a new statement of reasons for its finding that Roche and BASF acted as instigator or played a determining role in the infringements in the present case. The Court will take that new statement of reasons into account only if it finds that that assessment, as supported by the statement of reasons in the Decision, was unlawful and consequently exercises its unlimited jurisdiction.

535 It should be noted that, whilst Section B(e) of the Leniency Notice refers inter alia to the role of instigator or the determining role in the illegal activity, Section 2, third indent, of the Guidelines refers, as an aggravating circumstance, to the role of leader in or instigator of the infringement.

536 It must be found that the terms used in those two provisions essentially have the same scope. When requested to state its views in that regard as part of the measures of organisation of procedure, the defendant stated inter alia that the expressions 'role of leader' and 'determining role' were used synonymously in the Decision and did not answer in the affirmative the Court's question asking whether BASF's role in the infringements in the present case may be regarded as 'determining' within the meaning of Section B(e) of the Leniency Notice even where it could not be regarded as being that of a leader.

537 Similarly to what was held in paragraphs 296 to 300 above, the considerations of a general nature set out in paragraph 532, first indent, above are not sufficient to show that the applicant acted as an instigator of or leader in the infringements in the present case.

538 The same applies in respect of the allegation that BASF 'assumed a paramount role in following Roche's lead', which seems to show that the applicant was not a leader but a follower.

539 As for the observation that 'the effective starting point for the worldwide cartel arrangements was the same for vitamins B1, B2, B5, B6, C and folic acid ... namely the visit of senior executives from Roche and BASF to Japan on 30 and 31 January 1991', not only does it seem to contradict the general approach adopted in the Decision that there was a separate cartel for each vitamin, but it is in any case devoid of meaning in the present context, since the fact that the representatives of Roche and BASF went to Japan in January 1991 does not imply that those undertakings were the instigators of or leaders in the infringements relating to those products. Furthermore, the applicant did not even participate in the cartels in respect of vitamin B6 and folic acid.

540 Lastly, as regards the assertion that Roche and BASF together secured the recruitment of Eisai to the cartel in respect of vitamin E, it has already been found in paragraph 336 above, first, that the Commission did not rely in any way on that assertion in the Decision when it found that the applicant acted as instigator, which justified the increase in the fine in respect of aggravating circumstances, and, second, that, as is plain from recitals 212 and 234 of the Decision, Roche alone made overtures to Eisai with a view to recruiting that undertaking to the cartel.

541 It follows from the foregoing that the statement of reasons on the basis of which the Commission found, in the Decision, that the applicant did not meet the condition in Section B(e) of the Leniency Notice in respect of all the infringements in the present case is flawed and the Decision is therefore vitiated by illegality in that regard.

542 It is therefore in the exercise of its unlimited jurisdiction following that finding of illegality that the Court will consider the facts adduced before it by the defendant to show that the applicant acted as an instigator or played a determining role — or, in other words, was an instigator of or leader in — the infringements in the present case, and that it did not therefore meet that condition.

543 The Court has already examined those facts in its analysis of the fifth plea (see paragraphs 304 to 463 above) and found that they prove to the requisite legal standard that the applicant was a leader in the infringements relating to vitamins A, E and B5, whereas they do not prove to the requisite legal standard that the applicant was a leader in or instigator of the infringements relating to vitamins C, D3, beta-carotene and carotinoids. Furthermore, it is not alleged and is not apparent from the file that the applicant compelled other undertakings to take part in those infringements.

544 The applicant, not denying in the present action that it was a leader in or instigator of the infringement relating to vitamin B2, must therefore be found not to have met the condition referred to in Section B(e) of the Leniency Notice as regards the infringements relating to vitamins A, E, B2 and B5, whereas it did meet that condition as regards the infringements relating to vitamins C, D3, beta-carotene and carotinoids.

545 It follows that the applicant cannot avail itself of Section B of the Leniency Notice in the case of the infringements relating to vitamins A, E, B2 and B5.

546 On the other hand, in the case of the infringements relating to vitamins C, D3, beta-carotene and carotinoids, it is for the Court, in the exercise of its unlimited jurisdiction, to assess whether the applicant also met the other cumulative conditions laid down by Section B of the Leniency Notice in order to benefit from the non-imposition of a fine or a 'very substantial' reduction in its amount under that section.

(c) Whether the applicant satisfies the conditions in Section B(a) to (d) of the Leniency Notice as regards the infringements relating to vitamins C, D3, beta-carotene and carotinoids

The conditions in paragraphs (a), (c) and (d)

547 The condition in Section B(c) of the Leniency Notice is clearly satisfied for the infringements relating to vitamins C, D3, beta-carotene and carotinoids, based on the information concerning the duration of those infringements contained in the Decision. In particular it is clear from Article 1(2)(b) of the operative part of the Decision that those four infringements had all already ceased at the latest in December 1998, that is, before the applicant's cooperation in the Commission's investigation.

548 The defendant stated, in the performance of the measures of organisation of procedure ordered by the Court, that the applicant met the conditions in Section B(a) and (d), in respect of the four infringements in question. There is no evidence in the file to justify the Court departing from that finding.

The condition in paragraph (b)

549 Lastly, concerning the condition in Section B(b) of the Leniency Notice, it should be noted that in the first sentence of recital 743 of the Decision, the Commission found that 'Roche and BASF, through the principal material submitted to the Commission between 2 June 1999 and 30 July 1999, [had been] the first to provide the Commission with decisive evidence of the existence of cartel arrangements affecting the vitamin B2, B5, C, D3, beta-carotene and carotinoids markets'. The wording of that sentence does not allow the Court to ascertain whether the Commission considered that Roche and BASF jointly satisfied the condition in Section B(b) in respect of each of the infringements mentioned. Moreover, that sentence merely aims to justify the conclusion set out in the first sentence of recital 745, which indicates that the other undertakings concerned were precluded from satisfying that condition.

550 Given the wording of Section B(b) of the Leniency Notice, which seeks to reward with a very substantial reduction in the amount of the fine the one undertaking which was genuinely the first to adduce decisive evidence (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraph 70 above, paragraph 365), it cannot be argued that Roche and BASF jointly satisfied the condition in Section B(b) for the infringements relating to each of the vitamins C and D3, beta-carotene and carotinoids, in that it is clear from the file that those undertakings cannot have adduced such evidence at the same time.

551 First, as was held in paragraphs 517 and 518 above regarding the infringements relating to vitamins A and E, based on considerations which are also relevant to the other infringements in the present case, at the meeting on 17 May 1999 at the Commission, at which Roche and BASF appeared together, those undertakings did not adduce decisive evidence of any infringement at all. Second, it is clear from the file that in the period between 2 June and 30 July 1999, referred to in recital 743 of the Decision, BASF and Roche never disclosed information on the same date.

552 It is therefore for the Court to ascertain, in the exercise of its unlimited jurisdiction, who as between the applicant and Roche was the first to adduce decisive evidence of the existence of the infringements relating to vitamins C, D3, beta-carotene and carotinoids.

— Infringement relating to vitamin D3

553 It is clear from the file that the only contribution sent by BASF to the Commission in respect of the vitamin D3 infringement after the meeting of 17 May 1999 at the Commission is set out in its statement of 15 June 1999, received by the Commission on the same date. That contribution consists of a passage identifying the duration of that infringement (1993 to 1997) and of 16 further lines (of which just 9 deal with the cartel) which, in addition to the issue of duration, merely indicate the participants in the cartel and 'the general idea', namely the non-expansion of market shares. The names of the three representatives of the three undertakings involved are set out, but there is no information on the specific facts which might be found to constitute the infringement. Moreover, the account of the facts of that cartel set out in recitals 459 to 483 of the Decision is based essentially on the evidence adduced by Roche and above all by Solvay.

554 In those circumstances, it must be found that the applicant has not shown that, during the administrative procedure, it adduced to the Commission decisive evidence of the existence of the infringement relating to vitamin D3.

555 It must therefore be found that, in relation to that infringement, the applicant did not meet the condition referred to in Section B(b) of the Leniency Notice and cannot therefore avail itself of that section.

— Infringements relating to vitamin C, beta-carotene and carotinoids

556 It should be noted that, after the meeting on 17 May 1999, the applicant wrote for the first time to the Commission on 21 May 1999. As had been agreed at that meeting, that letter, which was received by the institution on the same date, enclosed a copy of the plea agreement (see paragraph 468 above) which it had entered into on 20 May 1999 with the United States Department of Justice and an explanatory memorandum relating to that agreement.

557 By those documents, the applicant did not however adduce to the Commission decisive evidence of the existence of the cartels in respect, in particular, of vitamin C, beta-carotene and carotinoids.

558 First, the letter of 21 May 1999 merely announces that BASF had begun a comprehensive report on the arrangements affecting the European market and that it would contact the Commission again when that report was finished. Second, the plea agreement and its explanatory memorandum — even if they are to be taken into consideration in the present context notwithstanding the publicity given to them by the United States Department of Justice already on 20 May 1999, as is shown by the

press releases disclosed in annexes D 4 and D 5 of the rejoinder — merely indicate, in respect of the collusive arrangements in question in those proceedings, their nature, duration and the vitamin products concerned (which in any event did not include carotinoids), as well as, indirectly, the names of some of BASF's employees involved, without however setting out any specific fact which might be found to constitute an infringement.

559 By contrast, by its next contribution, namely its statement of 15 June 1999, the applicant did adduce to the Commission decisive evidence of the existence of the cartels in respect in particular of vitamin C, beta-carotene and carotinoids, since that evidence concerned not only the members, nature and duration of the infringements but also specific facts constituting the infringement.

560 In the case of the cartel in respect of vitamin C, that statement identifies — in addition to the members of the cartel and the duration of the infringement — a number of meetings, the location and participants in those meetings, contains a description of the development of the cartel and a precise statement of the content of the discussions held during the various meetings listed (with figures for the quotas allocated), and also shows the opposition between Takeda and the European producers.

561 As for the cartels in respect of beta-carotene and carotinoids, the evidence adduced by the BASF statement of 15 June 1999 consists, in respect of both infringements, of a general description of the cartel, with information inter alia on the members and the duration of the cartel, the market situation at the time when the cartel was created, the motivation of the parties, the date, place and participants in the founding meeting of the cartel, the agreement at that meeting as to sales quotas (with detailed figures for the quotas allocated), the frequency, place, brief purpose and participants in subsequent meetings.

562 The voluntary nature of the disclosure of that evidence to the Commission is not disputed by the defendant and indeed cannot be, notwithstanding the request for information from the Commission of 26 May 1999 addressed to the applicant. BASF's statement of 15 June 1999 gave effect to its announcement at the meeting of 17 May 1999, in which the existence of cartels affecting in particular the vitamin C and beta-carotene markets had already been referred to. Moreover, the Commission's request for information of 26 May 1999 did not concern the cartel in carotinoids. As described in paragraph 556 above, in its letter to the Commission of 21 May 1999, BASF confirmed that it had begun to prepare a full report on the infringements affecting the European market and that it would contact the Commission again once that report was completed.

563 It is further clear from the file that Roche's sole contribution after the meeting of 17 May 1999 which was disclosed to the Commission before 15 July 1999 is its statement of 2 June 1999, received at the Commission on 4 June 1999.

564 That statement, a non-confidential version of which was placed in the file by the defendant in its performance of the measures of organisation of procedure ordered by the Court at the hearing, concerns the infringements relating to vitamins A, E and C alone.

565 Thus, since Roche's statement of 2 June 1999 contains no evidence in respect of the cartels in beta-carotene and carotinoids, it must be found that, by its statement of 15 June 1999, the applicant was in fact the first to adduce decisive evidence of the existence of those cartels. Therefore in the case of the infringements relating to those two products, the applicant satisfied the condition under Section B(b) of the Leniency Notice as well.

566 It follows that, as the applicant claims, it should have been accorded the benefit of that section in respect of those infringements.

567 By contrast, as regards the infringement relating to vitamin C, the opposite is the case, since it must be found, in the light of the non-confidential version of Roche's statement of 2 June 1999 disclosed by the defendant, that Roche, by that statement, was the first to adduce decisive evidence of the existence of the cartel in that vitamin.

568 Whilst it is true that, in the case of that cartel, that statement from Roche contains a body of information which is clearly more limited than that contained in BASF's statement of 15 June 1999, it is nevertheless the case that it also identifies a number of meetings, the place and participants in those meetings, with an indication, albeit in very summary form, of the purpose of the meetings. Since the concept of decisive evidence cannot be interpreted as referring to evidence which is sufficient in itself to prove the infringement (see paragraph 492 above), it must be found that, in so far as Roche, by that statement, disclosed specific facts amounting to an infringement, it was the first undertaking to adduce decisive evidence within the meaning of Section B(b) of the Leniency Notice as regards the infringement relating to vitamin C.

569 It should be noted that the applicant itself, in its observations on the documents disclosed by the defendant after the hearing and relating to Roche's cooperation, when dealing, in the alternative, with the possibility that the Court would not accept its primary argument that decisive evidence was supplied jointly by BASF and Roche at the meeting on 17 May 1999, did not include the cartel in respect of vitamin C amongst those for which it should be regarded as having been the first to adduce

decisive evidence, since that cartel was already covered by Roche's statement of 2 June 1999. The applicant does not challenge the voluntary nature of the cooperation provided by Roche in that statement, which, for the same reasons referred to in paragraph 562 above in respect of BASF's statement of 15 June 1999, likewise cannot be affected by the Commission's request for information sent to Roche on 26 May 1999.

570 Consequently, since the applicant does not satisfy the condition in Section B(b) of the Leniency Notice as regards the infringement relating to vitamin C, it cannot avail itself of that section in respect of that infringement.

(d) Application to the applicant of Section B of the Leniency Notice as regards the infringements relating to beta-carotene and carotinoids

571 In order to ensure protection of the legitimate expectation which Section B of the Leniency Notice engendered in the applicant, the Court must, in the exercise of its unlimited jurisdiction, determine the appropriate amount of the reduction in the fine which should be accorded to the applicant under that section for the infringements relating to beta-carotene and carotinoids (see, to that effect, *Tate & Lyle and Others* v *Commission*, paragraph 190 above, paragraphs 162 to 166; *ABB Asea Brown Boveri* v *Commission*, paragraph 192 above, paragraphs 244, 245, 260 and 261; Case T-230/00 *Daesang and Sewon* v *Commission* [2003] ECR II-2733, paragraphs 144 and 145; and *Tokai Carbon and Others* v *Commission*, paragraph 131 above, paragraphs 416 to 418, 440 and 455).

572 The Court notes in that regard that the applicant made its first overtures to the Commission well after the investigation had been initiated by the United States anti-trust authorities into the cartels in the vitamin sector and shortly before the signing of the plea agreement. Thus BASF's cooperation, although voluntary — in that it was not the result of the exercise of the Commission's investigative powers with regard to the applicant — was nevertheless secured as a result of the pressure arising from the signing of the plea agreement and from the risk that the Commission would take action as a result. Whilst it is true that — unlike the cartel arrangements in respect of beta-carotene, which are clearly covered by the American investigation as is apparent from pages 3 and 4 of the explanatory memorandum accompanying the plea agreement — the cartel arrangements in respect of carotinoids did not attract the attention of the United States Department of Justice, their detection in any investigation by the Commission, prompted by the signing and disclosure of the plea agreement, certainly could not be ruled out.

573 Furthermore, for the two infringements in question, account must be taken of the fact that, whilst BASF's role was not such as to preclude that undertaking from satisfying the condition referred to in Section B(e) of the Leniency Notice, its importance, in a cartel of just two undertakings, remains clear. Moreover, BASF's active role in those infringements is apparent in particular from the fact that it made compensatory purchases from Roche when it was found that it had exceeded the overall quota allocated for beta-carotene (see pages 15 and 16 of BASF's statement of 15 June 1999 and recital 521 of the Decision) and from the fact that it had succeeded in negotiating with Roche its entry into the astaxanthin market, a pink carotinoid (see pages 16 and 17 of BASF's statement of 15 June 1999 and recitals 525 and 527 of the Decision).

574 In the light of such circumstances, the Court finds that it is appropriate to accord the applicant a reduction under Section B of the Leniency Notice of 75% of the

amount, calculated before the application of that notice, of the fines which were imposed on it for the infringements relating to beta-carotene and carotinoids.

(e) Conclusion on the sixth plea

575 Following the assessment of the present plea and the exercise of the Court's unlimited jurisdiction to which that assessment has given rise, the Court, first, upholds the applicant's exclusion from the benefit of Section B of the Leniency Notice for the infringements relating to vitamins A, E, B2, B5, C and D3 and, second, accords the applicant a reduction, under that section, of 75% of the amount, calculated before the application of that notice, of the fines imposed on it for the infringements relating to beta-carotene and carotinoids.

F — *Seventh plea: insufficiency, irrespective of the Leniency Notice, of the reduction in the applicant's fines on account of cooperation*

1. *Arguments of the parties*

576 The applicant complains that, irrespective of the Leniency Notice, the Commission did not grant it a greater reduction in its fine on account of its cooperation — which it states was exemplary because it was early, complete, and continuous — with the Commission's investigation.

577 The applicant was the first undertaking to offer to cooperate before the Commission had begun its investigation and it cooperated fully with the Commission throughout the investigation, in particular by offering to make senior BASF executives available

at short notice, by providing the Commission with a complete, detailed account of the illegal activity, by providing extensive useful information and explanations, some of which were not even requested, and by sending the Commission meticulous reports that form the basis of large parts of the Decision. The significance of BASF's evidence is acknowledged at various points in the Decision, which expressly admits in recital 745 that that evidence was decisive for the purpose of establishing the infringements relating to vitamins A, E, B2, B5, C and D3, to beta-carotene and to carotinoids. The applicant went much further than was required under Sections B and C of the Leniency Notice, as it took the unprecedented initiative of dismissing several senior executives with direct responsibility for the cartel and also arranged further competition-law awareness and compliance programmes, going beyond what it claims were the already considerable efforts which it had previously made in that sphere.

578 It observes that the Court of First Instance has unlimited jurisdiction to alter the amount of fines and is not bound by the Guidelines or the Leniency Notice; it refers in that regard, to the judgment in *Tate & Lyle and Others* v *Commission*, paragraph 190 above (paragraph 163), and observes that, in that judgment (paragraph 165), the Court held that a 50% reduction in the fine which would have been imposed on Tate & Lyle in the absence of cooperation was not sufficient in view of the significance and the continuous and complete character of its cooperation, and that the Court allowed a 60% reduction, notwithstanding the significant role which Tate & Lyle had played within the cartel and certain shortcomings in its cooperation. The applicant therefore requests the Court to exercise its discretion to reduce the fines on it still further, on account of the applicant's cooperation with the Commission.

579 The defendant contends that the applicant's claim for a reduction of more than 50% in its fines outside the scope of the Leniency Notice is unfounded, because (i) the Decision has already taken the applicant's behaviour into account in allowing a

reduction under Section D of the Leniency Notice and (ii) in any event the applicant does not deserve a reduction in the fines outside the scope of the Leniency Notice.

2. *Findings of the Court*

580 According to Section A, paragraph 3, first sentence, of the Leniency Notice, the notice 'sets out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them'. Thus Section D, first paragraph, of the notice provides, to the benefit of the undertaking concerned, for a reduction of 10% to 50% of the fine 'that would have been imposed if it had not cooperated'.

581 The applicant, which received a reduction of 50% under Section D of the Leniency Notice in respect of all the infringements for which a fine was imposed on it, is in essence asking the Court to assess and reward its cooperation without reference to the provisions of that notice, which, it claims, are not binding on the Court.

582 It must be observed in that regard that the review which the Court is required to exercise in respect of a Commission decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement and imposing fines is confined to a review of the legality of that decision. It is possible for the Court to exercise its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17 only where it has made a finding of illegality affecting the decision, of which the undertaking

concerned has complained in its action, and in order to remedy the consequences which that illegality has for determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary.

583 However, by its present plea, the applicant is not complaining that the Commission acted unlawfully when assessing, in the light of the Leniency Notice, its cooperation with the investigation, nor does it assert that the notice — it being common ground that the Commission applied it to the applicant — is unlawful.

584 Moreover, the applicant's argument finds no support in the judgment in *Tate & Lyle and Others* v *Commission*, paragraph 190 above. Although in that judgment the Court (see paragraphs 157 to 165) did indeed hold that the 50% reduction in the amount of the fine granted to Tate & Lyle by the Commission was not sufficient in the light of the significance and complete and continuous nature of the cooperation offered by that undertaking and that it was necessary to increase that figure to 60%, it did so on account of an error committed by the Commission when it applied the condition in Section B(d) of the notice. That judgment, in which it was found that the extent of the cooperation provided by the undertaking in question had not been correctly assessed by the Commission under the Leniency Notice, cannot therefore be regarded in any way as a precedent for a departure by the Court from the scope of that notice in order freely to assess and reward that undertaking's cooperation.

585 It should, however, be noted that the possibility of granting, to an undertaking which has cooperated with the Commission during proceedings for infringement of the competition rules, a reduction of the fine outside the framework laid down by the Leniency Notice is recognised by the Guidelines, the sixth indent of Section 3 of which provides for the taking into account, as an attenuating circumstance, of

'effective cooperation by the undertaking in the proceedings, outside the scope of the [Leniency Notice]'.

586 However, even if this plea, notwithstanding its failure to rely expressly on the sixth indent of Section 3 of the Guidelines, could be interpreted as seeking a finding that the Commission should have granted the applicant another reduction of its fine under that provision, it must be pointed out that the infringements in the present case fall well within the scope of application of the Leniency Notice, Section A.1, first subparagraph, of which refers to secret cartels aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports. The applicant cannot therefore validly complain that the Commission failed to take into account the extent of its cooperation as an attenuating circumstance outside the legal framework of the Leniency Notice (see, to that effect, *HFB and Others* v *Commission*, paragraph 227 above, paragraphs 609 and 610, confirmed on appeal, in particular on that point, by the judgment in *Dansk Rørindustri and Others* v *Commission*, paragraph 48 above, paragraphs 380 to 382).

587 Moreover, such a complaint cannot be levelled at the Commission, even if it were necessary to accept that cooperation with an investigation into horizontal cartels which fix prices and share sales is capable of being rewarded under the sixth indent of Section 3 of the Guidelines.

588 If that were to be the case, a reduction under that provision would necessarily mean that the cooperation in question was not capable of reward under the Leniency Notice and that it was effective, that is to say that it would have facilitated the Commission's task of finding and putting an end to infringements of the competition rules (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 269 above, paragraph 300, and *Mannesmannröhren-Werke* v *Commission*, paragraph 95 above, paragraph 308).

589 However, in the present case the applicant relies (i) on circumstances (namely reports, explanations and evidence submitted during the proceedings) which, as the defendant correctly points out, have already produced for it the maximum reduction possible under Section D of the Leniency Notice (50%) and (ii) on circumstances (the dismissal of several senior executives implicated in the cartels and the implementation of further anti-trust compliance and awareness programmes) which were not of such a nature as to facilitate the Commission's task of finding and putting an end to the infringements in question. Besides, no particular significance can be attached to the proposal made to the Commission of placing senior management at its disposal so that they might provide evidence, since it can be considered that the information which they might have been able to supply to the Commission in such a context must have been, or in any event, could have been included by the applicant in the reports which it presented to the Commission during the procedure.

590 In those circumstances, the present plea must be rejected.

G — *Eighth plea: breach of professional secrecy and of the principle of sound administration*

1. *Arguments of the parties*

591 The applicant submits that the Commission breached its obligation of professional secrecy under Article 287 EC and in its duty of sound administration by disclosing to the media, before the adoption of the Decision, important parts of the Decision concerning the overall fine imposed on BASF. An extremely accurate report quoting the record fine later imposed on BASF was published in the *Financial Times* on the morning of 21 November 2001, that is to say, before the meeting of the college of

commissioners. The same article was posted on the *Financial Times* website the previous day. Other similar reports were published on 20 and 21 November 2001.

592 In its judgment in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 281, the Court found that, in proceedings in which a penalty may be imposed, the nature and amount of the penalty proposed are by their very nature covered by business secrecy until the penalty has been finally approved and announced. According to that judgment, moreover, that principle follows, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person and is coterminous not merely with the duty to respect professional secrecy, but also with the duty of sound administration.

593 The applicant observes that, according to settled case-law, premature disclosure of the fine may lead to annulment of the decision in question if it is established that the content of the decision would have been different if that irregularity had not occurred (*Suiker Unie and Others* v *Commission*, paragraph 80 above, paragraph 91; Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 29; and *Volkswagen* v *Commission*, paragraph 592 above, paragraph 283). In the present case, however, to require such proof would place an unreasonable burden on the applicant in so far as it was not present at the meeting of commissioners and does not have access to the minutes or documents summarising the discussions at this meeting. The applicant therefore submits that it is more appropriate to require the Commission to prove that the decision-making process was wholly unaffected by the premature disclosures to the media, as otherwise the case-law of the Community judicature, and ultimately also Article 287 EC and the Commission's duty of sound administration, would be rendered ineffective.

594 In any event, the premature disclosure of accurate details concerning the overall fine to be imposed on BASF constitutes a procedural irregularity which has had the effect of impeding the Commission's proper evaluation and independent review of the case. Such a disclosure made it very difficult for the college of commissioners to impose a lower fine, in so far as a change in the amount of the fine would have required an explanation and would have caused embarrassment to their colleague, the commissioner responsible for competition policy.

595 The defendant observes, first, that extracts from different newspaper reports published on the internet which the applicant has produced in the file do not show that the passages from the Decision relating to the applicant were published prematurely. The extracts gave only an approximate indication of the final amount of the overall fines to be imposed on the two leading producers, Roche and BASF.

596 Second, it is for the applicant to prove, according to the position adopted by the Court in *Volkswagen* v *Commission*, paragraph 592 above (paragraph 283), that the content of the Decision would have been different if the disclosure of information to the media had not occurred. The applicant has not proved that the Commission's decision-making process in the present case was affected by the fact that some rough indications as to the amounts of the fines were published before the Decision was adopted.

597 In its reply, the applicant observes that the press reports annexed to the application are strikingly similar and consistent in their reporting of the overall fine that was to be imposed on it and the result was that the fine was published before the Decision

was adopted. Most of the reports mention a fine of 'nearly EUR 300 million' and one report even mentions the amount of EUR 296 million.

598 In its rejoinder, the defendant contends that, in the reply, the applicant alleges for the first time that it is the disclosure of the proposed fine to the media that constitutes a breach of Article 287 EC and not, as argued in the application, the disclosure of portions of the Decision or important passages in it. In so far as that allegation may be regarded as a new plea, it must be ruled inadmissible under Article 48(2) of the Rules of Procedure.

599 On the substance, the defendant submits in particular that the applicant has been unable to show that the information concerning the fines published in the newspapers originated, as it alleges, from the Commission, whereas in *Volkswagen* v *Commission*, paragraph 592 above, it was clear that the information prematurely disclosed had originated from the Commission.

2. *Findings of the Court*

600 First of all, the Court must reject as manifestly unfounded the plea of inadmissibility raised by the defendant under Article 48(2) of the Rules of Procedure with regard to the applicant's argument that the disclosure to the media of the amount of the likely overall fine constitutes an infringement of Article 287 EC.

601 Contrary to the defendant's submission, that argument was not raised for the first time in the reply. It is true that in its application the applicant occasionally (paragraphs 204 and 205) mentioned the disclosure of 'portions' of the Decision concerning the fine imposed on BASF. However, it is obvious upon reading paragraphs 204 to 208 of the application that, by the present plea, the applicant is referring not so much to the reproduction of passages of the Decision as to the indication of the amount of the overall fine imposed on it (see, in that regard, in particular the heading of the present plea preceding paragraph 204 ('The Commission's disclosure of BASF's fine to the media'), the subtitle preceding paragraph 205 ('The media were in possession of accurate details regarding BASF's fine ...') and the first sentence of paragraph 207 ('The disclosure of accurate details concerning the "record" fine to be imposed on BASF...')).

602 It is also clear, as to the substance, that no consequence can be attached to the defendant's submission that the extracts from press articles produced by the applicant do not show the premature publication of passages from the Decision relating to the applicant but merely the publication of an approximate indication of the final amount of the applicant's fines.

603 As the defendant is not really contesting the fact of the premature disclosure of the likely imposition of a fine on BASF and, with a high degree of precision, of the likely amount of the overall fine, it is necessary to consider the consequences of such a fact.

604 In inter partes procedures liable to result in the imposition of a penalty, the nature and amount of the penalty proposed are by their very nature covered by professional secrecy until the penalty has been finally approved and announced. That principle follows, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person. Moreover, the Commission's duty not to disclose to the

press information on the specific penalty envisaged is coterminous not merely with its duty to respect professional secrecy, but also with its duty of sound administration (*Volkswagen* v *Commission*, paragraph 592 above, paragraph 281, confirmed on appeal in Case C-38/00 P *Volkswagen* v *Commission*, paragraph 394 above).

605 In the present case, it has not been established that the Commission's officials were responsible for the leak of information evidenced by the press articles to which the applicant refers. Nor can such an origin of the leak be presumed.

606 Even if the Commission's officials were responsible for that leak, it is settled case-law that an irregularity of that type may lead to annulment of the decision in question only if it is established that the decision would not have been adopted or its content would have differed if that irregularity had not occurred (*Suiker Unie and Others* v *Commission*, paragraph 80 above, paragraph 91; *Dunlop Slazenger* v *Commission*, paragraph 593 above, paragraph 29; *Cascades* v *Commission*, paragraph 188 above, paragraph 58; *Volkswagen* v *Commission*, paragraph 592 above, paragraph 283; and *HFB and Others* v *Commission*, paragraph 227 above, paragraph 370). Under that same case-law, it is for the applicant to produce at least some indicia to support such a conclusion.

607 Contrary to what the applicant claims, the criterion that an irregularity resulting from premature disclosure of an element of a decision may result in the annulment of the decision only if it is established that, had it not been for that irregularity, that decision would have differed in content, does not have the effect that irregularities of this kind remain practically unpunished. Quite apart from the possibility of securing annulment of the decision in question in the event that the irregularity committed affected the content of the decision, the person concerned is entitled to seek to establish the liability of the institution involved for any harm which he claims to have suffered by reason of that irregularity (Case C-38/00 P *Volkswagen* v *Commission*, paragraph 394 above, paragraph 165).

608 In the present case, the matters adduced by the applicant in its written pleadings, are not sufficient to discharge the burden of proof on it.

609 It submits that the premature disclosure of accurate information concerning the overall fine that was to be imposed on it had the effect of preventing the college of commissioners from assessing the case properly and independently. According to the applicant, such disclosure made it extremely difficult for the college of commissioners to adopt a lower fine, since a change in the amount of the fine would have required explanation and would have been a source of embarrassment for their colleague, the member of the Commission responsible at that time for competition matters.

610 First, however, clearly nothing obliged the commissioners to justify any choice to impose a lower fine than that announced by the press. Second, as the Commission's decisions have to be made in accordance with the principle of collegiality, to which the defendant rightly refers, it cannot be assumed that the commissioners were constrained in their freedom of assessment by a misplaced feeling of solidarity towards their colleague with responsibility for competition matters.

611 Consequently, as there is nothing to suggest that, if the likely amount of the overall fine that was to be imposed on the applicant had not been disclosed, the college of commissioners would have amended the proposed amount of the fine or the content of the Decision, the present plea cannot be upheld.

H — *Conclusion regarding the amount of the applicant's fines*

612 Following its examination of the applicant's pleas and in the exercise of the unlimited jurisdiction to which, in some cases, that examination lead, the Court:

— confirms the amount of the fines imposed on the applicant under Article 3(b) of the Decision in respect of the infringements relating to vitamins A, E, B2 and B5;

— varies the amount of the fines imposed on it in respect of the infringements relating to vitamins C and D3 by setting aside the increase of 35% of the basic amount in respect of aggravating circumstances;

— varies the amount of the fines imposed on it in respect of the infringements relating to beta-carotene and carotinoids by setting aside the increase of 35% of the basic amount for aggravating circumstances and by increasing, from 50% to 75%, the rate of reduction of the fine applied under the Leniency Notice.

613 In consequence of that variation, the amount of the fines imposed on the applicant under Article 3(b) of the Decision in respect of the infringements relating to vitamins C and D3, beta-carotene and carotinoids is reduced as follows:

— infringement relating to vitamin C: EUR 10.875 million;

— infringement relating to vitamin D3: EUR 5.6 million;

— infringement relating to beta-carotene: EUR 16 million;

— infringement relating to carotinoids: EUR 15.5 million.

The confidential nature of certain data in the Decision

614 In the tables included in recital 123 of the published version of the Decision, certain data pertaining to the worldwide turnover in the relevant product in the last full calendar year of the infringement and to market shares throughout the period of infringement are omitted or replaced with value brackets in order to safeguard business secrets. More specifically, the data concerned are those relating to the markets for vitamins A, E, B5, beta-carotene and carotinoids.

615 Initially, neither the applicant nor the Commission asked the Court for those data to be given confidential treatment.

616 Given that Article 17(4) of the Instructions to the Registrar of the Court of First Instance of 3 March 1994 (OJ 1994 L 78, p. 32), last amended on 5 June 2002 (OJ 2002 L 160, p. 1), provides that 'where a party so requests or the Court of its own motion so decides ... information may be omitted from the publications relating to a case if there is a legitimate interest in keeping ... [that] information confidential', the Court requested the parties, in the context of measures of organisation of procedure, to express their views on whether there was still a legitimate interest in the data referred to at paragraph 614 above continuing to be kept confidential in the publications relating to this case.

617 The applicant replied that, in view of their age, the data concerning it no longer required confidential treatment in the Court's publications relating to the present case. The defendant, for its part, whilst agreeing to the publication of data relating to the applicant, in so far as the applicant consented thereto, specified that, in contrast, data relating to other undertakings should not be disclosed, since they constitute business secrets and those undertakings had requested confidential treatment in relation to the publication of the Decision.

618 Since the data at issue relate to periods (lasting until 1998) which had ended at least six years previously and since the data are of no strategic value either, the Court, taking the view that the data were thereafter historical (see, to that effect, the order in Case 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* [1996] ECR II-537, paragraphs 25 and 32) decided that there was no need to give them confidential treatment in the publications relating to the present case. That is why certain data relating to the markets for vitamins A, E, B5, beta-carotene and carotinoids, including those concerning undertakings other than the applicant, may appear in the present judgment or be inferred indirectly from it, making the Court's reasoning relating to the third plea in this case more readily comprehensible.

Costs

619 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared.

620 In the present case, as the applicant has been unsuccessful in a significant part of its pleadings, the Court will make an equitable assessment of the case in holding that the applicant is to bear four fifths of its own costs and pay four fifths of the costs incurred by the Commission and the Commission is to bear one fifth of its own costs and pay one fifth of those incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Sets the amount of the fines imposed on the applicant in respect of the infringements relating to vitamins C and D3, beta-carotene and carotinoids by Article 3(b) of Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) as follows:

— infringement relating to vitamin C: EUR 10.875 million;

— **infringement relating to vitamin D3: EUR 5.6 million;**

— **infringement relating to beta-carotene: EUR 16 million;**

— **infringement relating to carotinoids: EUR 15.5 million;**

2. **Dismisses the remainder of the application;**

3. **Orders the applicant to bear four fifths of its own costs and four fifths of the costs incurred by the Commission and the Commission to bear one fifth of its own costs and to pay one fifth of the costs incurred by the applicant.**

Legal Mengozzi Wiszniewska-Białecka

Delivered in open court in Luxembourg on 15 March 2006.

E. Coulon H. Legal

Registrar President

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