# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
9 July 2003 *

In Case T-220/00,

**Cheil Jedang Corp.**, established in London (United Kingdom), represented by A.R.M. Bell, solicitor, R.P. Gerrits, lawyer, and J. Killick, barrister, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by W. Wils and R. Lyal, acting as Agents, assisted by J. Flynn, barrister, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24) or a reduction in the fine imposed on the applicants,

* Language of the case: English.

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

composed of: M. Vilaras, President, V. Tiili and P. Mengozzi, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2002,

gives the following

## Judgment

### Facts

1 Cheil Jedang Corp. ('Cheil' or 'the applicant'), founded by the Korean group Samsung, is the parent company of a group of undertakings operating in the pharmaceutical products and foodstuffs sector. Cheil entered the lysine market in 1991.

2 Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs, such as cereals, which contain insufficient natural lysine; this enables nutritionists to formulate

protein-based diets which meet the dietary requirements of animals. Feedstuffs to which synthetic lysine is added may also substitute for feedstuffs which do contain a sufficient quantity of lysine in the natural state, such as soybean.

3 In 1995, following a secret investigation by the Federal Bureau of Investigation, searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 Archer Daniels Midland Co. (hereinafter 'ADM Company'), Kyowa Hakko Kogyo Co. Ltd ('Kyowa Hakko Kogyo'), Sewon Corp. Ltd, Cheil and Ajinomoto Co. Inc., were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the American Department of Justice, the companies were fined by the judge in charge of the case. Kyowa Hakko Kogyo and Ajinomoto Co. Inc. were each fined USD 10 million, ADM Company was fined USD 70 million and Cheil USD 1.25 million. The fine imposed on Sewon Corp. was, it says, USD 328 000. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

4 In July 1996, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice'), Ajinomoto Co. Inc. offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area ('EEA').

5 On 11 and 12 June 1997 the Commission carried out investigations at the European premises of ADM Company and Kyowa Hakko Europe GmbH ('Kyowa Europe') pursuant to Article 14(3) 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). Following those investigations, Kyowa Hakko Kogyo and Kyowa Europe informed the Commission of their wish to cooperate and gave it certain information concerning, in particular, a chronology of the meetings which had taken place between lysine producers.

6 On 28 July 1997 the Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to ADM Company and its European subsidiary Archer Daniels Midland Ingredients Ltd (hereinafter 'ADM Ingredients'), to Sewon Corp. and its European subsidiary Sewon Europe GmbH (hereinafter together referred to as 'Sewon') and to Cheil concerning their conduct in the amino acids market and certain cartel meetings specified in the requests for information. Cheil provided an account of what was discussed at those meetings and provided details of meetings not mentioned in the Commission's request for information.

7 On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to the applicant and the other companies concerned, namely ADM Company and ADM Ingredients (hereinafter together referred to as 'ADM'), Ajinomoto Co. Inc. and its European subsidiary Eurolysine SA (hereinafter together referred to as 'Ajinomoto'), Kyowa Hakko Kogyo and its European subsidiary Kyowa Hakko Europe (hereinafter together referred to as 'Kyowa'), Daesang Corp. (formerly Sewon Corp. Ltd) and its European subsidiary Sewon Europe GmbH, for infringement of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area ('the EEA Agreement'). In its statement of objections the Commission charged the companies in question with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes from September 1990 (in the case of Ajinomoto, Kyowa and Sewon), March 1991 (Cheil) and June 1992 (ADM) to June 1995.

8 On 17 August 1999, after a hearing of the companies held on 1 March 1999, the Commission sent them a supplementary statement of objections concerning the duration of the cartel, to which the applicant replied on 7 October 1999.

9 On completion of this administrative procedure, the Commission adopted 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 (COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24, 'the Decision'). The Decision was served on the applicant by letter of 16 June 2000.

10 The Decision includes the following provisions:

'*Article 1*

[ADM Company] and its European subsidiary [ADM Ingredients], Ajinomoto Company Incorporated and its European subsidiary Eurolysine SA, Kyowa Hakko Kogyo Company Limited and its European subsidiary Kyowa Hakko Kogyo Europe GmbH, Daesang Corporation and its European subsidiary Sewon Europe GmbH, as well as [Cheil] have infringed Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement by participating in agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA.

The duration of the infringement was as follows:

(a) in the case of [ADM Company] and [ADM Ingredients] from 23 June 1992 to 27 June 1995;

(b) in the case of Ajinomoto Company Incorporated and Eurolysine SA from at least July 1990 to 27 June 1995;

(c) in the case of Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH from at least July 1990 to 27 June 1995;

(d) in the case of Daesang Corporation and Sewon Europe GmbH from at least July 1990 to 27 June 1995;

(e) in the case of [Cheil] from 27 August 1992 to 27 June 1995.

*Article 2*

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

(a) [ADM Company] and
[ADM Ingredients],
jointly and severally liable, a fine of EUR 47 300 000

(b) Ajinomoto Company, Incorporated and
Eurolysine SA,
jointly and severally liable, a fine of EUR 28 300 000

(c) Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH, jointly and severally liable, a fine of EUR 13 200 000

(d) Daesang Corporation and Sewon Europe GmbH, jointly and severally liable, a fine of EUR 8 900 000

(e) [Cheil], a fine of EUR 12 200 000

...'

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

12 First, the basic amount of the fine, determined by reference to the gravity and duration of the infringement, was fixed at EUR 19.5 million for the applicant, EUR 42 million for Ajinomoto, EUR 21 million for Kyowa, EUR 39 million for ADM and EUR 21 million for Sewon (paragraph 314 of the Decision).

13 In fixing the starting amount of the fines, determined by reference to the gravity of the infringement, the Commission began by finding that the undertakings

concerned had committed a very serious infringement, having regard to its nature, its actual impact on the lysine market in the EEA and the extent of the relevant geographical market. Then, observing that the total turnover figures achieved by each undertaking in the last year of the infringement revealed considerable disparity of size between the undertakings which had committed the infringement, the Commission went on to apply differential treatment. Consequently, the starting amounts of the fines were set at EUR 30 million for ADM and Ajinomoto and EUR 15 million for Kyowa, Cheil and Sewon (paragraph 305 of the Decision).

14 In order to reflect the duration of each undertaking's involvement in the infringement and determine the basic amount of their respective fines, the starting amounts were then increased by 10% per annum, giving an increase of 30% in the case of ADM and Cheil and 40% in the case of Ajinomoto, Kyowa and Sewon (paragraph 313 of the Decision).

15 Secondly, on account of aggravating circumstances, the basic amount of the fines imposed on ADM and Ajinomoto was increased by 50%, that is to say EUR 19.5 million for ADM and EUR 21 million for Ajinomoto, on the ground that each had played a leading role in the infringement (paragraph 356 of the Decision).

16 Thirdly, on account of mitigating circumstances, the Commission reduced by 20% the increase in Sewon's fine on account of the duration of its infringement, on the ground that Sewon had played a passive role in the cartel from the beginning of 1995 (paragraph 365 of the Decision). The Commission also reduced by 10% the basic amount of the fine imposed on each of the undertakings concerned, on the ground that they had all put an end to the infringement as soon as a public authority intervened (paragraph 384 of the Decision).

17 Fourthly, the Commission allowed a 'significant reduction' in the fines, pursuant to section D of the Leniency Notice. The fines on Ajinomoto and Sewon were reduced by 50% of the amount they would have had to pay if they had not cooperated with the Commission, the fines on Kyowa and Cheil were reduced by 30% and, lastly, the fine on ADM by 10% (paragraphs 431, 432 and 435 of the Decision).

## Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 23 August 2000 the applicant brought this action.

19 On 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, asked the Commission to give written replies to a number of questions. The Commission complied with that request within the time allowed.

20 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 24 April 2002.

21 The applicants claim that the Court should:

— annul the Decision, in whole or in part;

— order the Commission to pay the entire costs;

— take such other or further steps as justice may require.

22 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

## Law

23 The action falls into three principal heads of complaint. First, the applicant complains that the Commission calculated the fine on the basis of the criteria laid down by the Guidelines. Secondly, the applicant pleads several breaches of the Guidelines and manifest errors of assessment in the Commission's analysis of the gravity and duration of the infringement and of the mitigating circumstances. Thirdly, the applicant claims that the Decision is insufficiently reasoned on certain points relating to calculation of the fine.

24 It is appropriate to observe at this point that, whilst the applicant has applied for annulment of the Decision 'in whole or in part', the specific complaints just mentioned challenge solely the part of the Decision devoted to the fines, and more particularly Article 2 in which the Commission fixed the amount of the applicant's fine at EUR 12 200 000.

1. *Applicability of the Guidelines*

*Arguments of the parties*

Breach of the principle of the protection of legitimate expectations

25 The applicant contends that the Commission infringed the principle of the protection of legitimate expectation in that it applied the Guidelines for the purpose of calculating the fine without taking account of the situation of companies which, like itself, cooperated with the Commission before the Guidelines were adopted.

26 The applicant observes that, according to case-law, the principle of the protection of legitimate expectations means, amongst other things, that where an existing legal regime is changed, the Commission must take account of the situation of undertakings which have entered into irrevocable commitments on the basis of the rules then in force, by taking transitional measures if necessary (Case 74/74 *CNTA* v *Commission* [1975] ECR 533).

27 In the present case, the method of calculating the fine resulting from the Guidelines differs from the Commission's previous practice, which was to impose fines not exceeding 10% of the turnover achieved from sales of the product in question in the Community. Application of the Guidelines in Cheil's case resulted in it being fined an amount more than seven times greater than it would have been fined if the Commission had used the previous method. In so far as Cheil admitted its guilt and provided the Commission with evidence at a time when adoption of the Guidelines was not envisaged, the Commission's use of the new method of calculating fines was in breach of the legitimate expectation created by Section E.3 of the Leniency Notice and by the Commission's past decisions. Instead of obtaining a reduction in the fine in recognition of its cooperation, Cheil in fact exposed itself to an increase.

Breach of the principle of non-retroactivity of penalties

28 The applicant maintains that, by applying the Guidelines in the present case, the Commission has infringed the principle of non-retroactivity of penalties, which is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950, and takes its place among the general principles of Community law (Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22).

29 On this point, the applicant observes that not only does Article 7(1) of the ECHR prohibit the conviction of a person for an act which was not an offence at the time when it was committed, but also the imposition of a penalty which is more severe than the one applicable at the time the offence was committed. In accordance with the settled case-law of the Court of Justice to the effect that the ECHR has special significance in Community law (see, in particular, the judgment in Case C-260/89 *ERT* [1991] ECR I-2925), it is incumbent upon the Community courts to ensure that the Commission does not infringe the principle of non-retroactivity of penalties or penal provisions.

30 This principle also falls to be applied in the field of Community competition law, the penal or quasi-penal nature of fines imposed pursuant to Regulation No 17 having been recognised in Community law.

31 The applicant concludes from this that the Commission cannot impose on it a fine more severe than that which would have applied at the time of the offence or, at very least, when it admitted its involvement in the offence. According to the applicant, the amount of fines imposed by the Commission at that time was approximately 10% of the turnover achieved from sales of the product concerned in the European Community, which, in Cheil's case, would have amounted to approximately EUR 1.7 million. By applying the Guidelines rather than following its previous decision-making practice, the Commission, as it admits in the Decision (paragraph 318), changed, during the course of the administrative procedure, the normally applicable penalties and, in Cheil's case, increased its fine to EUR 12.2 million.

32 The Commission maintains, essentially, that by applying the Guidelines in the Decision it in no way breached the principles of the protection of legitimate expectations and non-retroactivity of penalties.

*Findings of the Court*

Breach of the principle of the protection of legitimate expectations

33 First of all, the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain legitimate expectations (Case 265/85

*Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26). However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59, and the case-law cited).

34 According to settled case-law (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33, and Case C-1/98 P *British Steel* v *Commission* [2000] ECR I-10349, paragraph 52), traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained.

35 In the field of Community competition rules, it is clear from the case-law (see, *inter alia*, the judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109) that effective application of those rules requires that the Commission may at any time adjust the level of fines to match the needs of Community competition policy. Consequently, the fact that, in the past, the Commission imposed fines at a certain level for certain types of infringements does not preclude it from raising that level, subject to the limits indicated in Regulation No 17.

36 Moreover, according to that same case-law, 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, because that possibility is dependent on general considerations of competition policy having no direct relationship with the particular circumstances of the case at hand (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 22).

37 Given that the adoption of the Guidelines, in which the Commission laid down its new general method for calculating fines, was prior to the statement of objections addressed to each of the members of the cartel and independent of the particular circumstances of the present case, the applicant cannot, *a fortiori*, reproach the Commission for applying those Guidelines in determining the amount of the fine, unless they can show that the authorities caused them to entertain a legitimate expectation to the contrary.

38 On this point, the applicant maintains that the Leniency Notice implied that the method for calculating fines usually employed by the Commission at the time when it decided to cooperate would remain so, in so far as it was concerned.

39 It should be pointed out that, in Section E.3 of the Leniency Notice, the Commission states that it 'is aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission'.

40 However, given that the purpose of the Leniency Notice is, as stated in Section A.3 thereof, to '[set] 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', the only 'legitimate expectation' which the applicant was entitled to entertain was one relating to the conditions under which a reduction would be allowed in recognition of its cooperation, not to the amount of the fine 'which would otherwise have been imposed upon [it]' or to the calculation method that might be used to that end.

41 Moreover, it should be observed that the applicant does not say that it received any precise assurances from Commission staff of such a kind as to cause it to believe that the method for calculating fines allegedly used before publication of the Guidelines would be maintained.

42 That being so, the complaint of breach of the principle of the protection of legitimate expectations must be rejected.

Breach of the principle of non-retroactivity of penalties

43 The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the ECHR. It takes its place among the general principles of law whose observance is ensured by the Community judicature (*Kirk*, cited above, paragraph 22, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 219).

44 Although Article 15(4) of Regulation No 17 provides that Commission decisions imposing fines for infringement of competition law are not of a criminal nature (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235), the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition (see, by analogy, as regards the rights of the defence, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7, and *LR AF 1998* v *Commission*, cited above, paragraph 220).

45 Such observance requires that the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed (*LR AF 1998* v *Commission*, paragraph 221).

46 The fines which the Commission is able to impose for infringement of the Community rules on competition are defined in Article 15 of Regulation No 17, which was adopted before the infringement complained of was committed. The Commission is not empowered to amend Regulation No 17 or to depart from it, even by rules of a general nature which it imposes on itself. Although it is common ground that the Commission assessed the fine imposed on the applicants in accordance with the general method for setting fines set out in the Guidelines, in doing so it remained within the framework of the fines set out in Article 15 of Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 222).

47 Article 15(2) of Regulation No 17 provides that '[t]he Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to 1 000 000..., or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently[,]... they infringe Article [81(1)]... of the Treaty'; and that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement' (*LR AF 1998* v *Commission*, paragraph 223).

48 The first paragraph of Section 1 of the Guidelines provides that, in setting fines, the basic amount is to be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 224).

49 According to the Guidelines, the Commission is to take as the starting point in calculating the amount of the fines an amount determined by reference to the gravity of the infringement ('the general starting point'). 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 (first paragraph of Section 1.A). Within that framework, infringements are to be put into one of three categories: 'minor infringements', for which the likely fines are between EUR 1 000 and EUR 1 000 000, 'serious infringements', for which the likely fines are between EUR 1 million and EUR 20 million, and 'very serious infringements', for which the likely fines are above ECU 20 million (first to third indents of the second paragraph of Section 1.A) (*LR AF 1998* v *Commission*, paragraph 225).

50 Next, according to the Guidelines, within each of these categories, and in particular where 'serious' and 'very serious' infringements are in issue, the proposed scale of fines is designed to make it possible to apply differential treatment to undertakings according to the nature of the infringement committed (third paragraph of Section 1.A). It is also necessary to take into account 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 (fourth paragraph of Section 1.A). Account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (fifth paragraph of Section 1.A) (*LR AF 1998* v *Commission*, paragraphs 225 and 226).

51 It may be necessary, in cases involving several undertakings, such as cartels, to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact on competition of the offending conduct of each undertaking, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. Consequently, it may be necessary to adapt the

general starting point according to the specific nature of each undertaking ('the specific starting point') (sixth paragraph of Section 1.A) (*LR AF 1998* v *Commission*, paragraph 227).

52 As regards the duration of the infringement, the Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the amount determined for the gravity of the infringement should not be increased, infringements of medium duration (in general, one to five years), for which the amount determined for gravity may be increased by 50%, and infringements of long duration (in general, more than five years), for which the amount determined for gravity may be increased by 10% per year (first to third indents of the first paragraph of Section 1.B) (*LR AF 1998* v *Commission*, paragraph 228).

53 The Guidelines then set out, by way of example, a list of aggravating and mitigating circumstances that may be taken into consideration in order to increase or reduce the basic amount, and go on to refer to the Leniency Notice (*LR AF 1998* v *Commission*, paragraph 229).

54 By way of a general comment, the Guidelines state that the final amount calculated according to this method (basic amount increased or reduced by a percentage for aggravating or mitigating circumstances) may not in any case exceed 10% of the worldwide turnover of the undertaking, as laid down by Article 15(2) of Regulation No 17 (Section 5(a)). The Guidelines further provide that, depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and that the fines should be adjusted accordingly (Section 5(b)) (*LR AF 1998* v *Commission*, paragraph 230).

55 It follows that, under the method laid down in the Guidelines, fines continue to be calculated according to the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, subject to the upper limit determined by reference to the turnover of each undertaking, as laid down in that provision (*LR AF 1998* v *Commission*, paragraph 231).

56 Consequently, the Guidelines do not go beyond the legal framework for fines set out in Article 15(2) (*LR AF 1998* v *Commission*, paragraph 232).

57 Nor, contrary to what the applicant claims, does the change to the Commission's administrative practice brought about by the Guidelines constitute an alteration of the legal framework determining the level of fines which can be imposed that is contrary to the principle of non-retroactivity of penalties (*LR AF 1998* v *Commission*, paragraph 233).

58 First, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 234).

59 Secondly, having regard to the wide discretion which Regulation No 17 leaves the Commission, the fact that the latter introduces a new method of calculating fines, which may, in certain cases, lead to an increase in the general level of fines but does not exceed the maximum level established by that regulation, cannot be regarded as an aggravation, with retroactive effect, of the fines as legally provided for by Article 15(2) of Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 235).

60 It is of no avail to argue that, if fines are set according to the method described in the Guidelines, in particular on the basis of an amount determined, in principle, according to the gravity of the infringement, the Commission will then impose higher fines than previously. It is settled case-law that under Regulation No 17 the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). Furthermore, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 109, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309, and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). The proper application of the Community competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique diffusion française and Others* v *Commission*, paragraph 109, and *LR AF 1998* v *Commission*, paragraphs 236 and 237).

61 Lastly, as regards the applicant's complaint that the Commission failed to set the amount of the fine by reference to turnover generated from sales of lysine in the EEA, that is to say sales of the product concerned by the infringement in the geographical market in question, it should be borne in mind that the only express reference to turnover in Article 15(2) of Regulation No 17 concerns the upper limit which a fine may not exceed. Moreover, according to settled case-law, turnover is to be understood as meaning the total turnover of the undertaking concerned (*Musique diffusion française and Others* v *Commission*, paragraph 119, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 160, and Case T-144/89 *Cockerill Sambre* v *Commission* [1995] ECR II-947, paragraph 98). According to case-law predating adoption of the Guidelines, the Commission may, in fixing a fine, have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and

imperfect, of its size and economic power, and to the proportion of that turnover accounted for by the goods in relation to which the infringement was committed, which gives an indication of the scale of the infringement. However, it is important not to attribute to either of those figures a significance which is disproportionate to the other factors relevant to an assessment and, consequently, an appropriate fine cannot be fixed merely by a simple calculation based on the total turnover (*Musique diffusion française and Others* v *Commission*, paragraphs 120 and 121, Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176).

62 Again, according to case-law predating adoption of the Guidelines, the Commission may calculate a fine without taking into account the respective turnover figures of the undertakings concerned, provided that Article 15(2) of Regulation No 17, which sets the upper limit of any fine that may be imposed, is applied. The Court of Justice has held that the Commission may determine in advance the total amount of the fine to be imposed and then apportion it between the undertakings concerned according to their respective average market shares and any mitigating or aggravating circumstances relating to each of them individually (Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraph 55, 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, paragraphs 51 to 53).

63 It is clear from the case-law just mentioned that, irrespective of the method laid down in the Guidelines, the applicant in any event had no ground to claim that the final amount of the fine imposed on it should be calculated as a percentage of its turnover in the market in question.

64 It follows from the foregoing that the plea alleging infringement of the principle of non-retroactivity of penalties must be rejected.

2. *The gravity of the infringement*

*Arguments of the parties*

Breach of the principle of proportionality

65 The applicant contends that the Commission breached the principle of proportionality in that it fixed the starting amount of the fine, determined by reference to the gravity of the infringement, on the basis of its total turnover, rather than its turnover from sales of lysine in the EEA.

66 The applicant observes, first of all, that although the 10% limit laid down in Article 15(2) of Regulation No 17 certainly refers to the worldwide turnover of the undertakings concerned, it is nevertheless clear from the case-law that the Commission must not attach disproportionate importance to that figure, particularly where the goods concerned account for only a small part of that figure (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 121). In addition, until the Guidelines were published, it had been the Commission's practice not to impose fines exceeding 10% of the turnover achieved by the undertaking from sales of the product concerned in the Community. The Commission itself has acknowledged that this was its practice.

67 In the present case, the differential treatment applied by the Commission in paragraph 304 of the Decision, based on the total turnover of the undertakings concerned, leads to a disproportionate result. In Cheil's case, the starting amount of EUR 15 million (for total turnover of EUR 1.5 billion) was almost as much as its turnover from sales of lysine in the EEA (EUR 17 million). Even if the fine had

been calculated on the basis of worldwide turnover for lysine, amounting to EUR 40 million, the maximum fine would have been EUR 4 million. Consequently the starting amount of EUR 15 million is disproportionate.

68 The Commission replies that the fine must be proportionate to the gravity and duration of the infringement, in accordance with Article 15 of Regulation No 17. Moreover, irrespective of any previous practice which it may or may not have had, the Commission submits that it may at any time increase the level of fines in pursuance of a policy of more effective deterrence, so that there is not necessarily any relationship of proportionality between fines imposed at different times. Finally, Cheil's lysine turnover in the EEA was in any event the highest among the smaller producers, for whom the starting amount of the fine, determined for gravity, was set at EUR 15 million.

Breach of the principle of equal treatment

69 The applicant contends that the Commission made a manifest error of assessment and disregarded the sixth and seventh paragraphs of Section 1.A of the Guidelines and infringed the principle of equal treatment underlying those provisions, in that it set the starting amount of the fine on account of the gravity of the offence at the same level for Sewon, Kyowa and itself, without taking into account Cheil's much smaller size.

70 On this point, the applicant argues that, according to case-law (*Musique diffusion française and Others* v *Commission*, cited above, paragraph 120), the size and economic power of the undertaking concerned are factors which must be taken into account in assessing the gravity of the infringement, and observes that, according to the provisions of the Guidelines just mentioned, the specific weight and therefore the real impact of the offending conduct of each undertaking on

competition must be taken into account. Furthermore, the principle of equal treatment requires that different situations be treated differently, including in relation to setting the amount of a fine (see judgment in Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813).

71 In the present case, it is clear from the Decision itself that Cheil was by far the least powerful member of the cartel and the smallest producer of lysine. In particular, the parties are agreed that the quantitative allocation plan based on each undertaking's market power gave Cheil sales volumes two or three times smaller than those of Kyowa and Sewon (paragraphs 77, 78 and 104 of the Decision) and that in 1994 its market share was only 7 or 8%, compared with 19% for Kyowa and 14% for Sewon (paragraphs 154 and 267 of the Decision).

72 Given those circumstances, the Commission's comparison based on the total turnover of those undertakings in the last year of the infringement (paragraph 304 of the Decision) is too simplistic because it takes account neither of Cheil's limited influence on competitive conditions nor of the fact that Kyowa and Sewon had already been present in the market for many years. Moreover, Cheil's turnover itself shows that Cheil was approximately half the size of Kyowa.

73 Cheil's small size in comparison with the other companies is also borne out by the fact that, in the United states, Kyowa was fined USD 10 million compared with a fine of USD 1.25 million for Cheil.

74 As regards the Commission's argument that, compared with Kyowa and Sewon, Cheil had the biggest lysine turnover in the EEA in the last year of the infringement, this argument is an *ex post facto* justification, as it is not mentioned anywhere in the Decision.

75 The Commission contends that its approach was entirely in accordance with the Guidelines, which, moreover, are not legislation and leave it a broad discretion. Furthermore, the basic amount of the fine determined by reference to the gravity of the infringement is neither disproportional nor discriminatory.

*Findings of the Court*

Breach of the principle of proportionality

76 As was stated in paragraph 60 of the present judgment, it is settled case-law that under Regulation No 17 the Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules. The proper application of those rules requires that the Commission be at liberty to adjust at any time the level of fines to the needs of Community competition policy, increasing them if necessary (*Musique diffusion française and Others* v *Commission*, paragraph 109).

77 In setting the amount of the fine which it imposed on the applicant in the Decision the Commission used the calculation method which it imposed on itself in the Guidelines. According to settled case-law, the Commission may not depart from rules which it has imposed on itself (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 53, confirmed on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, and the case-law cited). In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion, there arises a self-imposed

limitation of that discretion inasmuch as it must then follow those guidelines (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89).

78 Under the Guidelines, the gravity of an infringement is established by reference to a number of factors, some of which the Commission must now imperatively take into account.

79 The Guidelines provide that, apart from the specific nature of the infringement, its actual effect on the market and its geographical extent, it is necessary also 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 (fourth paragraph of Section 1.A).

80 Account may also be taken of the fact that large undertakings are usually better able to recognise that their conduct constitutes an infringement and more aware of the consequences stemming from it (fifth paragraph of Section 1.A).

81 In cases involving several undertakings, such as cartels, it may be necessary to apply weightings to the general starting point in order to take account of the specific weight and, therefore, the real impact on competition of the offending conduct of each undertaking, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. Consequently, it may be necessary to adapt the general starting point according to the specific nature of each undertaking (sixth paragraph of Section 1.A).

82 It is appropriate to observe that the Guidelines do not provide that fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover in the relevant market. However, nor do they preclude the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances demand it. In particular, turnover may be relevant when considering the various factors mentioned in paragraphs 79 to 81 of the present judgment (*LR AF 1998* v *Commission*, cited above, paragraphs 283 and 284).

83 Furthermore, it should be borne in mind that, according to settled case-law, the criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and that the fixing of an appropriate fine cannot be the result of a simple calculation based on total turnover (*Musique diffusion française and Others* v *Commission*, cited above, paragraphs 120 and 121, *Parker Pen* v *Commission*, cited above, paragraph 94, and *SCA Holding* v *Commission*, cited above, paragraph 176).

84 In the present case, it is clear from the Decision that, in order to determine the starting point for the fine, the Commission first considered the specific nature of the infringement, its actual effect on the market and its geographic extent. The Commission then stated that it was important, given the need to treat each firm individually, to take account of the 'effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA', the dissuasive effect of the fine and the relative size of each undertaking. In order to assess these factors the Commission chose to refer to the total turnover of each of the undertakings concerned in the last year of the infringement, on the view that

that figure would enable it 'to assess the real resources and importance of the undertakings concerned in the markets affected by their illegal behaviour' (paragraph 304 of the Decision).

85 The Commission's reliance on total turnover rather than turnover from the sale of the products in issue in the EEA is precisely what the applicant complains of.

86 It is important to emphasise at this stage that a certain degree of ambiguity arises when the Decision is read alongside the Commission's pleadings in the present case and that the Commission, on being questioned on the point by the Court at the hearing, stated that it took account of not only the total turnover of the undertakings concerned, that is to say turnover from all their activities, but also their worldwide turnover in the lysine market. The two sets of figures are given in a table appearing in paragraph 304 of the Decision. In addition, it should be noted that, according to paragraph 318 of the Decision, 'the Commission has taken due account of the economic importance of the particular activity concerned by the infringement in its conclusions of gravity'.

87 Nevertheless, it is established that the Commission did not take account of the turnover of each undertaking from sales in the market concerned by the infringement, namely the lysine market in the EEA.

88 Now, for the purposes of assessing the 'effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA' (paragraph 304 of the Decision), which implies an assessment of the real importance of the undertakings on the market affected by their unlawful conduct, that is to say their influence on that market, total turnover is an imprecise guide. It is of course possible for a powerful undertaking with a multitude of different

business activities to have only a very limited presence in certain specific markets, such as the lysine market. Similarly, an undertaking with a strong position in a geographical market outside the Community may have only a weak position in the Community or EEA market. In such cases, the mere fact that the undertaking in question has a high total turnover does not necessarily mean that it has a decisive influence in the market affected by the infringement. That is why the Court emphasised in paragraph 139 of its judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 that although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market. In the present case, however, the Commission took no account of the undertakings' market shares in terms of volume in the market affected by the cartel (the EEA lysine market) or even of their turnover in that market, although, given the absence of any other producers, that would have enabled it to establish the relative importance of each of the undertakings in the market in that the Commission would have obtained an indirect indication, in value terms, of their respective market shares (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 99).

89 Moreover, it is clear from the Decision that the Commission made no explicit reference to taking account of the 'specific weight and, therefore, the real impact on competition of the offending conduct of each undertaking', which, under the Guidelines, it must now do where it considers, as it did in the present case, that the starting amounts of the fines must be weighted because the infringement is one that involves several undertakings (a cartel) among which there is considerable disparity in size (see the sixth paragraph of Section 1.A of the Guidelines).

90 The Commission's reference in the last sentence of paragraph 304 of the Decision to 'the real... importance of the undertakings' does not remedy that omission.

91 An assessment of the specific weight, that is to say of the real impact of the infringement committed by each of the undertakings, in fact involves establishing the scale of the infringement committed by each of them, rather than the importance of the undertaking in question in terms of its size or economic power. Now, as is clear from settled case-law (*Musique diffusion française* v *Commission*, cited above, paragraph 121 and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 369), the proportion of turnover derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the scale of the infringement on the relevant market. In particular, as the Court of First Instance has emphasised, the turnover in products which have been the subject of a restrictive practice constitutes an objective criterion which gives a proper measure of the harm which that practice causes to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

92 It follows from the foregoing that, by relying on the applicant's worldwide turnover, without taking into consideration its turnover in the market affected by the infringement, the EEA lysine market, the Commission disregarded the fourth and sixth paragraphs of Section 1.A of the Guidelines.

93 That being so, it is incumbent on the Court to consider whether the Commission's failure to take account of turnover in the relevant market and its consequential disregard of the Guidelines have led it in this case to breach the principle of proportionality in setting the fine. It must be remembered in this connection that assessing the proportionality of a fine with regard to the gravity and duration of an infringement, which are the criteria referred to in Article 15(2) of Regulation No 17, falls within the unlimited jurisdiction conferred on the Court of First Instance by Article 17 of that regulation.

94 In the present case, the applicant argues, essentially, that the specific starting point of the fine, set at EUR 15 million, is disproportionate in that it is almost identical to its turnover in the EEA lysine market in the last year of the infringement, which was EUR 17 million.

95 First of all, it is appropriate to state that the fact that the specific starting point is almost the same as the turnover achieved in the relevant market is not, of itself, conclusive. Indeed, that figure of EUR 15 million is merely an intermediate figure which, in accordance with the method laid down in the Guidelines, is then adapted to reflect the duration of the infringement and any aggravating and mitigating circumstances.

96 Secondly, an intermediate figure such as that may be justified by the very nature of the infringement, its actual effect, the geographical extent of the market affected, the fact that the fine must have a deterrent effect and the size of the undertaking in question, all of which were taken into account by the Commission in this case. The Commission was right to classify the infringement as 'very serious' in that the applicant participated in a horizontal agreement the object of which was to set price objectives and sales quotas and to establish a system for exchanging information on sales volumes. Moreover, that agreement had a real effect on the lysine market in the EEA, causing an artificial price increase and a restriction of sales volumes. As regards the size of the undertakings and the deterrent effect of the fines, the Commission was entitled to have regard to the total turnover of the undertakings concerned. According to case-law, total turnover is in fact the figure which gives an indication of the size of the undertaking (see, to that effect, *Musique diffusion française and Others* v *Commission*, cited above, paragraph 121) and of its economic power, which must be known in order to assess whether a fine will deter it.

97 Thirdly, it is important to emphasise that the figure of EUR 15 million adopted in respect of the applicant is significantly lower than the minimum threshold of EUR 20 million laid down in the Guidelines as standard for 'very serious' infringements (see the third indent of the second paragraph of Section 1.A of the Guidelines).

98 Referring expressly to paragraph 121 of the judgment in *Musique diffusion française and Others* v *Commission*, the applicant also argues that the

Commission must not, when determining the amount of a fine, attribute disproportionate significance to total turnover where the goods concerned account for only a small fraction of that figure. In this connection, it should be remembered that, in *Parker Pen* v *Commission*, cited above, the Court of First Instance upheld a plea of infringement of the principle of proportionality on the ground that the Commission had failed to take into consideration the fact that the turnover accounted for by the product to which the infringement related was quite low in comparison with the turnover resulting from the undertaking's business as a whole and that this justified a reduction in the fine (paragraphs 94 and 95).

99 It should first be observed, however, that the case-law just mentioned relates to determination of the final amount of a fine, not, as in this case, the starting amount in light of the gravity of the infringement.

100 Next, even if the authority of that case were applicable to the present case, it must be pointed out that the Court has power to assess, in the context of its unlimited jurisdiction, whether or not the amount of a fine is reasonable. That assessment may justify the production and taking into account of additional information (see, to that effect, case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 53 to 55) such as, in this case, the applicant's turnover in the EEA lysine market, which was not taken into account in the Decision.

101 In this connection, it is important to point out that a comparison of the applicant's various turnover figures for 1995 reveals two things. First, turnover from sales of lysine in the EEA, amounting to EUR 17 million, can indeed be regarded as small in comparison with total turnover, whether it be EUR 1.5 billion, as given in paragraph 304 of the Decision and taken up by the applicant in its pleadings, or EUR 1.9 billion, as mentioned in paragraph 18 of the

Decision. Secondly, it appears, by contrast, that turnover from lysine sales in the EEA represents a significant proportion of Cheil's sales in the worldwide lysine market, representing either 42.5% or 32.7%, depending on whether it is estimated at EUR 40 million, as stated in paragraph 304 of the Decision and taken up by the applicant in its pleadings, or EUR 52 million, as indicated in paragraph 18 of the Decision.

102 Since sales of lysine in the EEA therefore represent not a small fraction but a significant proportion of worldwide turnover from lysine sales, it cannot validly be argued that the principle of proportionality has been infringed, *a fortiori* because the starting amount of the fine was not set on the mere basis of a simple calculation based on total turnover, but also by reference to sectoral turnover and other relevant factors such as the nature of the infringement, its actual effect on the market, the extent of the market affected, the necessary deterrent effect of the sanction and the size and power of the undertaking.

103 In light of those reasons, the Court, in the exercise of its unlimited jurisdiction, finds that the starting amount of the fine, determined by reference to the gravity of the infringement committed by Cheil, is appropriate and that, since the Commission's failure to adhere to the Guidelines has not, in the present case, led it to breach the principle of proportionality, the applicant's complaint in this regard must be rejected.

Breach of the principle of equal treatment

104 When determining the amount of a fine, the Commission must not infringe the principle of equal treatment, a general principle of Community law which, according to settled case-law, is infringed only where comparable situations are

treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309, and the case-law cited).

105 In accordance with this principle, the sixth paragraph of Section 1.A of the Guidelines provides that, in the case of an infringement involving several undertakings, it might be necessary to apply weightings to the starting amounts of the fines 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.

106 Thus, under the seventh paragraph of Section 1.A of the Guidelines, 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 arithmetic calculation.

107 In the Decision (paragraphs 303 and 304) the Commission noted that there was considerable disparity between the sizes of the undertakings which committed the infringement. Consequently, it took the view that, in order to take account of the effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA and the need to ensure that the amount of the fine has a sufficiently deterrent effect, it was appropriate to divide the parties into two groups according to size, the first including Ajinomoto and ADM, for whom the starting amount of the fine was set at EUR 30 million, and the second Kyowa, Cheil and Sewon, for whom the starting amount was set at EUR 15 million.

108 By contrast with the reasoning which it propounds in the context of its plea of infringement of the principle of proportionality, the applicant does not point out that account was not taken of turnover in the lysine market in the EEA. It relies, amongst other things, on a comparison of the worldwide turnover figures of the undertakings involved in the cartel to justify its assertion that the starting amount of its fine is discriminatory.

109 However, whilst the applicant's total turnover in 1995, whether it be EUR 1.5 billion or EUR 1.9 billion (paragraphs 304 and 18 of the Decision), does indeed appear significantly lower than that achieved by Kyowa and significantly higher than that achieved by Sewon, the undertakings with which it was grouped, it cannot be concluded from that fact that there has been any breach of the principle of equal treatment in this case.

110 Indeed, a comparison of the turnover achieved in the world lysine market by Cheil, Kyowa and Sewon, as set out in the second column of the table appearing in paragraph 304 of the Decision, reveals that the Commission was quite right to group those undertakings together and to take the same specific starting point for the fines imposed on them.

111 The applicant's turnover in 1995 in the world lysine market was EUR 40 million (or EUR 52 million, according to paragraph 18 of the Decision). That turnover, whether it be 40 million or 52 million, is relatively close to Sewon's turnover of EUR 67 million and slightly lower that Kyowa's turnover of EUR 73 million. The Court points out that the Commission was entitled in this case to take their relative size into account in its reasoning, in accordance with the seventh paragraph of Section 1.A of the Guidelines.

112 In addition, the Commission maintains that a comparison of the turnover achieved in the EEA lysine market by each undertaking justifies its dividing them into two groups.

113 It is established that, in the present case, the Commission did not take account of those turnover figures and that it thereby infringed the sixth paragraph of Section 1.A of the Guidelines (see paragraph 92 of the present judgment). Nevertheless, it should be borne in mind that, as indicated in paragraph 93 of the present judgment, the Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amount of the fines. That assessment may justify the production and taking into account of additional information such as, in this case, the turnover achieved by the undertakings in question in the EEA lysine market (see, to that effect, C-297/98 P *SCA Holding* v *Commission*, cited above, paragraphs 53 to 55).

114 If the turnover achieved by the applicant in the EEA lysine market is considered, it becomes clear that it is in an almost identical position to that of the other two 'small' producers Sewon and Kyowa. Whilst, in 1995, Ajinomoto and ADM achieved turnover in that market of EUR 75 million and EUR 41 million (paragraphs 5 and 10 of the Decision), Cheil, Kyowa and Sewon achieved only EUR 17 million, EUR 16 million and EUR 15 million respectively. Thus, it appears that the applicant's influence in the market affected by its unlawful conduct was, contrary to its assertions, comparable to that of the other two 'small' producers Sewon and Kyowa. Since those undertakings all participated in the same infringement, it is right that the starting amount of the fine imposed on them should be the same.

115 It follows that the starting amount of EUR 15 million set by the Commission is not discriminatory and the applicant's arguments concerning its weak market share and the modest fine imposed by the American authorities, which, it alleges, reflect its small size, cannot throw doubt on that conclusion.

3. *The duration of the infringement*

*Arguments of the parties*

The excessive increase

116 The applicant disputes the 30% increase in the fine on account of the duration of the infringement because, according to Article 1(e) of the Decision, the infringement, in its case, went on from 27 August 1992 to 27 June 1995, that is to say two years and ten months. Such an increase constitutes a manifest error of assessment and is inconsistent with the Guidelines.

117 On this point, the applicant observes that, according to paragraph 313 of the Decision, the starting amount determined by reference to the gravity of the infringement was increased by 10% per year. Also, it is clear from the first indent of the first paragraph of Section 1.B of the Guidelines that there can be no increase in the case of an infringement of less than one year's duration. Finally, the Commission increased the starting amount of the fine for Ajinomoto, Sewon and Kyowa by only 40%, although their infringement went on for at least five years. Consequently the applicant has been treated in an illogical fashion.

118 The applicant takes the view that, as exemplified in the cases of Ajinomoto, Sewon and Kyowa, the system laid down by the Guidelines implies that the

annual 10% increase applies only after the first year. In any event, only a total increase of 18%, or at the most 20%, ought to have been applied.

119 The Commission observes that the second indent of the first paragraph of Section 1.B of the Guidelines provides that the increase in the amount of a fine determined by reference to gravity may be up to 50% for infringements lasting between one and five years. The Guidelines do not therefore require that any increase be proportional to the actual duration of the infringement or calculated as a fixed percentage for each year of its duration. Admittedly, paragraph 313 of the Decision states that the starting amounts of the fines determined for the gravity of the infringement were increased by 10% per year. However, to treat a period of two years and ten months as in fact a period of three years for this purpose cannot be regarded as a manifest error of assessment. It would be excessively pedantic to suggest that the increase in Cheil's fine should have been 28.33%.

120 The fact that a 40% increase was applied in the cases of Ajinomoto, Kyowa and Sewon for an infringement lasting five years is of no consequence. First, the Commission submits that it was exercising the discretion conferred on it by the Guidelines. Secondly, even if this amounts to treating Cheil differently from the other producers, the only logical conclusion is that their fines ought to have been higher, with an increase of 50%, not that the increase in Cheil's fine ought to have been less.

121 Finally, the Commission contends that there is no foundation for the assumption that under the Guidelines the first year of any infringement must not be taken into account. In fact, it is only where an infringement lasts for less than one year that the fine may not be increased.

The exclusion of Cheil from cartel meetings for four months and the non-participation of Cheil in the agreements on quantities and information exchange for eighteen months

122 The applicant submits, first of all, that the Commission ought to have taken account of the fact that it did not attend any cartel meetings between 8 December 1993 and 10 March 1994 after being excluded by the other members of the cartel. The Commission ought, in the applicant's submission, to have reduced the duration of the infringement by four months or, at least, to have regarded its passive role during that period as a mitigating factor.

123 According to the applicant, it is clear from the file that it was excluded from the meeting of 8 December 1993 by Ajinomoto, Kyowa and Sewon and was not readmitted until the afternoon session of the meeting in Honolulu on 10 March 1994, having been excluded from the morning session because of its opposition to any limitation of production.

124 Next, the applicant contends that the Commission made a manifest error of assessment in failing to take account of the fact that, between August 1992 and March 1994, it did not participate either in the quota agreements or in the exchange of information on sales volumes.

125 Firstly, as regards the quota agreements, the applicant states that it did not agree to individual allocation of sales volumes until 10 March 1994, the day of the meeting in Honolulu. The American authorities also reached that conclusion in the criminal proceedings there.

126 Secondly, as regards the agreement for the exchange of information on sales volumes, the Commission likewise took no account of the fact that Cheil was party to that agreement only from 10 March 1994 to 27 June 1995. It is illogical not to give Cheil credit for not subscribing to the agreement until after it had come into effect, as is acknowledged in paragraph 224 of the Decision, while at the same time giving credit to Sewon for subscribing to the agreement initially and subsequently abandoning it.

127 The Commission disputes the merits of Cheil's reasoning, but admits that the undertaking did not join in the information exchange agreement until 10 March 1994 and that the agreement had come into effect earlier, at the meeting which Cheil did not attend. However, that does not justify a smaller increase in respect of the duration of the infringement.

*Findings of the Court*

128 Under Article 15(2) of Regulation No 17, the duration of an infringement is one of the factors that must be taken into account when determining what fine should be imposed on undertakings which infringe the competition rules.

129 As far as this factor is concerned, the Guidelines establish a distinction between infringements of short duration (in general, less than one year), for which there should be no increase in the starting amount determined for gravity, infringements of medium duration (in general, one to five years) for which there may be an increase of 50% of that amount, and infringements of long duration (in general, more than five years), for which the amount determined for gravity may be increased by 10% per annum (first to third indents of the first paragraph of Section 1.B of the Guidelines).

130 In paragraph 313 of the Decision the Commission states:

'[i]n the present case, the undertakings concerned have committed an infringement of medium duration (between three and five years). The starting amounts of the fines determined for gravity (see paragraph 305) are therefore increased by 10% per year, i.e. as to ADM and Cheil by 30% and Ajinomoto, Kyowa and Sewon by 40%.'

131 As far as the increase in the fine imposed on Cheil is concerned, it must be pointed out that, according to Article 1(e) of the operative part of the Decision, Cheil's infringement went on from 27 August 1992 to 27 June 1995, that is to say two years and ten months.

132 The applicant maintains, essentially, that by treating the period of the infringement as being three full years, the Commission made a manifest error of assessment and infringed the Guidelines, and that the increase applied ought to have been 20% at the very most.

133 The applicant's submission that it is clear from Section 1.B of the Guidelines that the first year of an infringement should not be taken into account must be rejected. The provision merely states that, in the case of short-term infringements (in general less than one year) there should be no increase. On the other hand, there will be an increase for longer-term infringements. That increase may be as high as 50% where, as in the present case, the infringement has gone on for between one and five years.

134 Moreover, the second indent of the first paragraph of Section 1.B does not provide that there should be an automatic increase of 10% a year in the case of medium-term infringements but leaves the Commission a margin of discretion. The same may be said of the third indent of the first paragraph of Section 1.B, concerning long-term infringements, which merely provides for a possible increase of 10% per year.

135 Nevertheless, on applying the Guidelines in the Decision, the Commission adopted the principle of a 10% per annum increase for all the undertakings involved in the infringement which, rightly, it classified as being of medium-term duration.

136 However, it is clear that, when it applied that principle, it in fact increased the starting amounts of the fines imposed on Sewon, Kyowa and Ajinomoto by 40%, not 50%, even though their infringing conduct went on for five years (see Article 1(b), (c) and (d) of the Decision, which states that these undertakings were involved in the infringement 'from at least July 1990 to 27 June 1995') and increased the starting amount of the fine imposed on Cheil by 30%, even though its infringement went on for less than three years.

137 It must, therefore, be held that the increase of 30% applied in Cheil's case, whilst not in itself contrary to the Guidelines, is nevertheless manifestly wrong in light of the approach which the Commission adopted in paragraph 313 of the Decision and purportedly implemented when applying to the undertakings concerned the various increases on account of the duration of the infringement.

138 Moreover, the Commission has offered no explanation for the 30% uplift applied in Cheil's case or for the 40% uplift applied in the case of the three large undertakings, notwithstanding its stated adoption of the principle of applying an increase of 10% per annum.

139 Given that the duration of Cheil's infringement was less than three full years and that the Commission in fact applied an increase of less than 10% per annum in the cases of Sewon, Kyowa and Ajinomoto, there are clearly grounds for the Court, in the exercise of its discretion, to reduce to 20% the increase in the starting amount of Cheil's fine, thereby reducing the basic amount of the fine to EUR 18 million.

140 On the other hand, the Court must reject the arguments which Cheil puts forward in relation to its exclusion from the cartel for a period of four months as a result of its disagreement with the other members of the cartel regarding the apportioning of sales volumes and the fact that it did not participate in the agreements relating to sales volumes and the exchange of information until March 1994. First, it is not disputed that, from 27 August 1992 to June 1995, Cheil participated in the principal aspect of the infringement, namely the agreement on prices (see, in particular, paragraphs 79, 81, 90 and 92 of the Decision). Secondly, it is clear from the Decision (see paragraphs 77, 78, 87, 104, 116, 118, 126 and 128 in particular) that, as far as sales volumes are concerned, Cheil did not voice its disagreement with the need to apportion volumes between producers in order to keep prices high, but, on the contrary, it asked for a larger share for itself. It thereby accepted the principle of restricting the sales made by each producer and that remained its position until 10 March 1994, the day on which it accepted the offer made to it. As is clear from case-law (see, to that effect, Case T-7/89 *Hercules Chemicals* v *Commission*, cited above, paragraph 232, confirmed on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission*, cited above), factors such as those are sufficient to establish that Cheil participated in the quotas system, even during the period from December 1993 to March 1994.

141 Furthermore, the Commission was careful to state in the Decision (paragraph 224) that it was on 10 March 1994 that the applicant entered into the agreement for the exchange of information on sales volumes, which the other members of the cartel had entered into on 8 December 1993, with implementation of the agreement scheduled for the beginning of 1994.

142 In view of those dates, it cannot be held that the applicant delayed becoming a party to the agreement, as it claims. The short lapse of time between the conclusion of the agreement — or its implementation — and the applicant's participation in it in no way indicates that the Commission made a manifest error of assessment as regards the increase which it applied on account of the duration of the infringement, such as might warrant a reduction of that increase.

143 In so far as the applicant claims that the brevity of its participation in the agreement for the exchange of information on sales volumes 'was not taken into account in the Commission's decision which penalised Cheil for one overall infringement of three years' duration', it should be borne in mind that the Commission rightly took the view that the agreements concluded by the undertakings in question were in fact a series of anti-competitive agreements concluded in the context of a single, common plan to regulate prices and supply on the lysine market. The applicant has put forward no argument capable of showing that the Commission erred in concluding that the actions of the undertakings, including their agreement on the exchange of information, constitute a single, continuing infringement.

144 Lastly, although the parties are agreed that the applicant was indeed involved in the infringement from 27 August 1992 to 27 June 1995, the questions whether that involvement was active or merely passive and whether the agreements were actually implemented must be considered in the Court's examination of the issue of whether the Commission failed to take account of certain mitigating circumstances.

4. *Mitigating circumstances*

*Arguments of the parties*

The passive role played by Cheil

145 The applicant maintains that its peripheral role in the cartel's activity justified a reduction in its fine in accordance with the first indent of Section 3 of the Guidelines. It adds that past decisions of the Commission (Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81] of the EEC Treaty (Case IV/31.865 — PVC) (OJ 1989 L 74, p. 1) and the case-law (Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 411) confirms that.

146 In the present case, it is not disputed that the 'Asian/European' cartel referred to in paragraphs 50 to 68 of the Decision was formed before Cheil entered the lysine market and before it joined the cartel on 27 August 1992. Even after that date, Cheil's role remained a passive one. For example, it did not attend the meeting of 27 May 1993 at which Ajinomoto and Kyowa asked Sewon to persuade Cheil to agree to adjust sales volumes. Cheil's peripheral role, attributable to its small size, is also clear from the meeting in Vancouver on 24 June 1993, at which all the companies except Cheil agreed to form an official corporation of lysine producers (paragraph 110 of the Decision). Furthermore, Cheil was never described by the other companies as a leader or active member, in spite of their attempts to shift the blame to other participants. Lastly, the Commission based its findings on the mere fact that Cheil had attended meetings, without mentioning the low profile it adopted at those meetings or its exclusion from some of them. That kind of approach, which does not take into account Cheil's less important role and causes it to be treated in the same way as a large producer, like Kyowa, has already been criticised by the Court of First Instance in its judgment in *BPB de Eendracht* v *Commission*, cited above.

147 The Commission states that, in determining the duration of the infringement, it took account of the fact that Cheil was a late entrant in the market but that that circumstance does not warrant the inference that Cheil played a passive role, for the reasons set out in paragraphs 361 to 364 of the Decision.

Non-implementation in practice of the agreements

148 The applicant maintains that the Commission ought, pursuant to the second indent of Section 3 of the Guidelines, to have reduced the basic amount of its fine by reason of the fact that it did not in practice implement any of the infringing agreements.

149 The Commission's view that the provision in question refers only to cases where a cartel as a whole is not put into effect is mistaken for two reasons. First, it would be unfair not to reward a company that has not implemented a cartel in practice and has therefore not injured the interests of consumers. Secondly, all the other mitigating circumstances referred to in Section 3 of the Guidelines describe the individual actions of each company.

150 The Commission submits that the expression 'non-implementation in practice of offending agreements or practices' used in the Guidelines refers to situations where a cartel as a whole remains unimplemented or is inoperative for a given period. It does not refer to the individual position of members of an active cartel, especially where an undertaking actively participates in discussions and in no way dissociates itself from the cartel, as in Cheil's case. That view is confirmed by case-law, in particular Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230, in which it was held that the fact that an undertaking did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating

circumstance because the undertaking may simply be trying to exploit the cartel for its own benefit.

— The price agreements

151 The applicant points out that, according to the Decision itself, the prices successively agreed upon at the meetings of the cartel members were never matched by the prices which, according to the table in paragraph 47 of the Decision, were charged by the applicant.

152 Furthermore, it is clear from the graph submitted by the applicant in reply to the statement of objections (annex 12 to the application) that the prices which it charged were on average 25% lower than the target prices agreed upon at cartel meetings.

153 Consequently, the Commission made a manifest error of assessment and breached the Guidelines by failing to allow Cheil a reduction in its fine by reason of its non-implementation in practice of the price agreements.

154 The Commission replies that the applicant's figures do not invalidate the findings in the Decision, in particular those in paragraphs 376 and 377, which state that implementation of an agreement on target prices does not necessarily mean that those prices will actually be charged in the market, but rather that the undertakings will endeavour to achieve them.

155 In addition, it is common ground that Cheil was present at most of the meetings at which pricing was discussed. It is therefore incumbent on Cheil to prove that, notwithstanding that acknowledged fact, its pricing policy was the result of free and full competition. Moreover, the facts set out in paragraph 47 of the Decision show that Cheil's prices were not the lowest in the market and that they mirrored the changes in prices charged by the other members of the cartel.

— The quota agreements

156 The applicant maintains, first of all, that the Decision itself shows that the applicant did not implement the volume sharing agreement (paragraph 214) and that, on the contrary, it called for an increase in production (paragraphs 108 and 116), which is also borne out by the fact that it was excluded from the morning session of the meeting in Honolulu on 10 March 1994, which was devoted to quotas.

157 Moreover, the Commission did not expressly reject the evidence which the applicant adduced to show that it had conducted feasibility studies and placed orders for equipment with a view to doubling its production capacity (annex 13 to the application). The Commission simply assumed that the agreements were implemented by each of the companies which attended the meetings (paragraph 380 of the Decision). However, by ignoring the evidence which Cheil adduced to show a wide discrepancy between the agreed prices and the prices which it actually charged, the Commission has in fact treated it in the same way as the other companies which have been unable to adduce such evidence.

158 Thus, the Commission has not only manifestly erred in its assessment and breached the Guidelines, but also infringed the principle of equal treatment.

159 The argument that the agreement concerned minimum quantities is, according to the applicant, illogical. If this were correct, neither Cheil nor Sewon would have called for a larger quota.

160 The Commission replies that Cheil was a willing party to an arrangement under which quotas would be allocated and its sole disagreement with the other cartel members arose from the fact that it wanted a larger quota.

161 The fact that Cheil could have sold greater quantities than the other companies sought to impose on it is not a mitigating circumstance because the quotas fixed were only minimum quantities (paragraph 378 of the Decision). That conclusion is not inconsistent with the fact that the producers imposed sales limits on themselves because the cartel members, unable to agree on fixed quotas, were able to agree only on the minimum market shares which they were to preserve. In this connection, it is significant that the share of the world market allocated to Cheil was 7% and that its actual share remained at 8% (paragraph 267 of the Decision).

162 Any plans for increasing production capacity are, according to the Commission, irrelevant because they do not equate with sales volumes.

— The agreement for the exchange of information on sales volumes

163 The applicant maintains that it systematically gave the other cartel members inaccurate information. It claims that there must be a point beyond which the provision of inaccurate information amounts to non-implementation in practice of such an agreement. Indeed, in such a case the infringing conduct will affect the market to a lesser degree.

164 The Commission urges the Court to reject the argument that actively participating in a cartel whilst at the same time trying to mislead its members is a laudable practice justifying a lower fine. During the administrative procedure, moreover, Cheil claimed that it joined the cartel only to obtain information on the lysine market, an argument which is refuted in paragraph 364 of the Decision.

*Findings of the Court*

The passive role played by Cheil

165 As is clear from case-law, where an infringement is committed by several undertakings, the relative gravity of the participation of each of them must be examined (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 623, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 150) so that it may be established whether aggravating or mitigating circumstances are applicable to them.

166 Sections 2 and 3 of the Guidelines provide for the basic amount of fines to be varied in accordance with certain aggravating and mitigating circumstances.

167 In particular, in accordance with the first indent of Section 3 of the Guidelines, 'an exclusively passive or "follow-my-leader" role in the infringement' will, where it is established, constitute a mitigating circumstance. A passive role implies that the undertaking will adopt a 'low profile', that is to say not actively participate in the creation of any anti-competitive agreements.

168 It is clear from case-law that one circumstance that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the 'ordinary' members of the cartel (see, to that effect, *BPB de Eendracht* v *Commission*, cited above, paragraph 343); another is where it enters the market affected by the infringement late, regardless of the length of its involvement in the infringement (see, to that effect, *Stichting Sigarettenindustrie* v *Commission*, cited above, paragraph 100); another is where a representative of another undertaking which has participated in the infringement makes an express declaration to such effect (see, to that effect, Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 264).

169 In the present case, Cheil pleads, in substance, its late entry on the market, the fact that it did not attend certain meetings concerning sale quotas or the institution of an official lysine corporation, the company's small size and the fact that it was not cited by the other members as having been an active member.

170 The argument that Cheil was not cited as an active member by the other undertakings involved must immediately be rejected. Whilst account may certainly be taken of any express declarations concerning the role played by an undertakings within a cartel, provided that they emanate from representatives of other undertakings (see, to that effect, *Weig* v *Commission*, cited above, paragraph 264), there is no probative force in the circumstance that no such declarations have been made.

171 Similarly, the Commission's argument that it took account of Cheil's late entry on the market when determining the duration of the infringement must also be rejected as irrelevant because the question of calculating the duration of an infringement committed by an undertaking is distinct from that of its active or passive role.

172 As regards specifically Cheil's entry on the lysine market, that occurred, as in ADM's case, in 1991, that is to say at a time when the Asian/European agreement between Ajinomoto, Sewon and Kyowa had already been in effect for some months, since July 1990 in fact (paragraphs 50 to 68 of the Decision). Moreover, by contrast with ADM, Cheil did not attend the meeting in Mexico on 23 June 1992, which marks one of the crucial periods for the cartel in that its purpose was to put in place a new mechanism for controlling prices and quantities in view of the new producers' entry on the market (paragraphs 72 to 75 of the Decision).

173 It is established that, on 27 August 1992, the Asian producers attended a meeting at Cheil's premises in Seoul during which they agreed on the price increase proposed by ADM (paragraph 79 of the Decision). That date marks the beginning of Cheil's participation in the cartel, a fact not in dispute, like that of its continual attendance at meetings concerning collusion on prices. Moreover, it is clear from the Decision that, although a late entrant on the market, Cheil was quick to ask for a larger quota than that offered it (paragraphs 77 and 78 of the Decision), something it continued to do until 10 March 1994 when it accepted the quota proposed.

174 Whilst Cheil's attitude might not exactly fit the definition of a passive role on the part of an undertaking, the consequences of the company's late entry on the market and of its attitude towards the other producers on the subject of sales volumes must be assessed in light of the other factors which it pleads, namely the infrequency of its attendance at meetings and its small size.

175 The frequency of Cheil's attendance at meetings of producers concerning sales volumes, during the first phase of its involvement in the cartel (from 27 August 1992 to 10 March 1994) is certainly less than that of the other participants.

176 It is clear from the Decision that, leaving aside the meetings during that period between the two ringleaders, which it obviously did not attend, and the other meetings devoted to prices, which, on the other hand, it did attend (paragraphs 79, 81, 90 and 94 of the Decision), Cheil was absent from several meetings of producers devoted to the problem of sales quotas, namely the meetings of 29 October and 2 November 1992 (paragraphs 86 and 87), of 27 May 1993 (paragraph 102) and, most importantly, of 8 December 1993 (paragraphs 119 and 122) and lastly the meeting on the morning of 10 March 1994 (paragraphs 126 and 127). By contrast, it participated fully at the meetings of 18 June 1993 (paragraph 104 of the Decision), 24 June 1993 (paragraph 108) and 5 October 1993 (paragraph 116).

177 Cheil's very attitude at one of those meetings attests to the fact that it played a passive role in relation to the agreements on sales volumes until 10 March 1994. It is clear from the Decision (paragraph 110) that, at the meeting on 24 June 1993, all the participants except Cheil agreed to form an official lysine corporation, to be managed by Ajinomoto and ADM. That decision led to the creation, within an existing professional association (Fefana), of a working group of producers whose meetings proved decisive in enabling the producers to exchange information and to ensure compliance with the allotted quotas (see, in particular, paragraphs 122, 125, 133, 139, 150, 158 and 165 of the Decision).

178 It therefore appears that, between 27 August 1992 and 10 March 1994, Cheil participated fully in only three of the eight meetings devoted to sales volumes and that, significantly, it was not present at the meetings held on 8 December 1993 and on the morning of 10 March 1994, which were the most important in so far as sales volumes are concerned. Indeed, it was at those latter meetings that the other producers agreed a more refined and definitive allocation of sales quotas for 1994 and Ajinomoto was given the task of maintaining centrally the turnover figures communicated by the other members of the cartel.

179 In addition to its absence from those two strategic meetings on sales volumes, it should be mentioned that, in the afternoon of 10 March 1994, Cheil finally accepted a sales quota fixed by the other producers at 17 000 tonnes, an amount

appreciably smaller than that which it had asked for, namely 22 000 tonnes (paragraph 116 of the Decision).

180 Lastly, Cheil's small size is an important factor to be taken into consideration in assessing the real impact of its late entry on the lysine market and its conduct in relation to the other producers. Whilst Cheil initially opposed the quota offered it, the fact remains that the quota proposed by the ringleaders of the cartel was always significantly smaller than that which they proposed to the other undertakings of similar size, Kyowa and Sewon. In particular, in the case of Sewon, an undertaking whose total turnover is admittedly much lower than Cheil's but whose total turnover in the lysine sector was higher, it is significant to note that the quotas proposed varied between 32 900 tonnes (paragraph 104 of the Decision) and 37 000 tonnes (paragraph 121 of the Decision), in comparison with the 17 000 tonnes finally allotted to Cheil (paragraph 128 of the Decision). Moreover, the worldwide market shares allotted in 1994 to each producer pursuant to the agreements concluded (see paragraph 267 of the Decision) indicate that Cheil (with 7%) had a much smaller market share than that allotted to Sewon (14%) and Kyowa (19%), even though they are regarded as undertakings of comparable size. Thus, it is clear that Cheil was put at a disadvantage by comparison with the other producers within the cartel as far as sales quotas are concerned. That may be interpreted as a direct consequence of its more sporadic attendance at meetings and its late entry on the market. Against that background, the fact that Cheil claimed a larger quota than that proposed is of limited significance and does not necessarily indicate that it played an active role.

181 That being so, it must be concluded that Cheil played a passive role in the arrangement concerning sales quotas between 27 August 1992 and 10 March 1994, or half of the time during which it participated in the cartel. On the other hand, after 10 March 1994, it attended and actively participated in various cartel meetings, a fact which it does not dispute.

182 As regards the amount of the reduction which the Court, in the exercise of its unlimited discretion, should allow the applicant, it is appropriate to observe that the Commission granted Sewon a reduction of 20% of the increase applied on account of duration, equating to a reduction of 5.71% of the basic amount of the fine, on the ground that it had played a passive role in connection with the agreements on sales quotas only from 1995 onwards, that is to say for a period of six months out of the five years during which it was involved in the cartel.

183 Taking account both of that fact and of the need to ensure equality of treatment as between the parties to the cartel as well as of Cheil's active participation in the price agreements, a reduction of 10% of the basic amount of the fine appears to be justified in that Cheil's passive role in the arrangements relating to sales volumes continued for a longer period.

Non-implementation in practice of the agreements

184 As stated in paragraph 165 of the present judgment, it is clear from case-law that, where an infringement is committed by several undertakings, the relative gravity of the participation of each of them must be examined so that it may be established whether aggravating or mitigating circumstances are applicable to them.

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

186 Sections 2 and 3 of the Guidelines provide for the basic amount of fines to be varied in accordance with certain aggravating and mitigating circumstances particular to each undertaking concerned.

187 In particular, Section 3 of the Guidelines lays down, under the heading 'attenuating circumstances', a non-exhaustive list of circumstances which may lead to a reduction in the basic amount of a fine. Reference is made to the passive role of undertakings, to non-implementation in practice of agreements, to termination of the infringement as soon as the Commission intervenes, to the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement, to infringements committed by negligence and to effective cooperation by the undertaking in the proceedings, outside the scope of the Leniency Notice. Those circumstances are thus all particular to the individual conduct of each undertaking concerned.

188 It follows that the Commission is clearly wrong to interpret the second indent of Section 3, which speaks of 'non-implementation in practice of the offending agreements', as referring only to cases where a cartel as a whole is not implemented and not to the individual conduct of each undertaking.

189 The Commission is in fact confusing its appraisal of the actual effect of an infringement on the market, which it must carry out in order to assess the gravity of the infringement (first paragraph of Section 1.A of the Guidelines) and in the context of which it must consider the effects arising from the infringement as a whole rather than the actual conduct of each undertaking, with its appraisal of the individual conduct of each undertaking, which it must carry out in order to

assess any aggravating or mitigating circumstances (Sections 2 and 3 of the Guidelines), in the context of which it must, in accordance with the principle of the individual application of penalties and sanctions, examine the relative gravity of the undertaking's individual involvement in the infringement.

190 Moreover, the Commission referred in its defence to the judgment in *Cascades* v *Commission*, cited above, in which the Court of First Instance held that the fact that an undertaking which has been proved to have participated in a cartel did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed (paragraph 230).

191 It should be observed that, in *Cascades* v *Commission*, the Court was reviewing a Commission decision in which the Guidelines — which make express provision for non-implementation in practice of an infringing agreement to be taken into account as a mitigating circumstance — had not been applied because the decision preceded their adoption. However, as the Court has already stated in paragraph 77 of the present judgment, according to settled case-law, the Commission may not depart from rules which it has imposed on itself. In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion, there arises a self-imposed limitation of that discretion inasmuch as it must then follow those guidelines (*AIUFFASS and AKT* v *Commission*, cited above, paragraph 57, and *Vlaams Gewest* v *Commission*, cited above, paragraph 89).

192 In the present case it remains to be established whether the Commission was entitled to conclude that the applicant could not claim, under the second indent of Section 3 of the Guidelines, the benefit of the mitigating circumstance that the agreements were not implemented in practice. To that end it is necessary to ascertain whether the circumstances which the applicant pleads are capable of

showing that during the period in which it was party to the infringing agreements it actually avoided applying them by adopting competitive conduct in the market (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 4872 to 4874).

193 As regards, first of all, the applicant's claim that it did not implement the price agreements, the Commission observed in paragraph 376 of the Decision that the agreements in question related to price objectives (or 'target prices'). Consequently, their implementation implies not that prices corresponding to the agreed price objective be applied, but that the parties endeavour to approach their price objectives. The Commission also indicated that '[f]rom the information in its possession it [was] clear that, in the present case, after most of the price agreements, the parties fixed their prices in accordance with their agreements'.

194 In reply to a written question of the Court, the Commission stated that the abovementioned information is in fact the information on prices charged by the undertakings set out in paragraph 47 of the Decision and used again in the graph illustrating the movement of target prices and of the prices charged by each of the undertakings concerned (annex 1 to the rejoinder).

195 In light of that document, it may be observed, first, that whilst Cheil's prices, rather than matching the target prices, were regularly lower, the same may be said of the prices charged by the other lysine producers, with the exception of ADM, from March 1992 to the end of the period of the infringement in June 1995.

196 Next, it is apparent that, whilst Cheil's prices were much the same as Sewon's (being sometimes slightly higher, sometimes slightly lower) and regularly lower than those charged by the other producers, the differences cannot be regarded as significant and as revealing any really independent or competitive conduct in the market.

197 Lastly, and above all, throughout the period of the infringement, Cheil's prices changed in line with the changes in the price objectives agreed between the cartel members, a fact which, moreover, supports the conclusion that the cartel produced injurious effects on the market (see, to that effect, Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 340). That correlation in prices, over such a long period of time, demonstrates that Cheil had no desire actually to avoid applying the price agreements.

198 In this connection, it should be observed that, in June 1993, the five lysine producers agreed to set the price of lysine at DEM 3.20 per kilogram (paragraphs 104 and 198 of the Decision), at the same time contemplating staged increases in that price. The price of lysine subsequently underwent a steep rise and was finally set at DEM 5.30 per kilogram pursuant to an agreement concluded in October 1993 (paragraphs 114 and 199 of the Decision). From August 1993 onwards, Cheil participated fully in that price increase, in which all the producers were involved, increasing its prices from DEM 3.04 per kilogram in July 1993 to DEM 3.77 in August, then to DEM 3.95 in September and, lastly, DEM 4.23 in October 1993. During this important phase of the cartel Cheil in no way sought to distance itself from the other producers by adopting a truly competitive pricing policy.

199 It follows that Cheil has failed to show that it did not implement the price agreements in practice. A difference in the degree to which it implemented the agreements cannot be regarded as a real failure to implement them.

200 Secondly, with regard to the alleged non-implementation of the agreements on sales quotas, it should be pointed out at the outset that the Commission states in paragraph 378 of the Decision that the cartel members considered the quantities allocated to them as 'minimum quantities' and that '[a]s long as every party was able to sell at least the quantities allocated it, the agreement was respected'.

201 The undertakings in question have all emphasised, quite rightly, that that assertion is, to say the least, inconsistent with the alleged facts because the objective of raising prices, which was the cartel members' principal aim, necessarily implied limiting lysine production and, therefore, allocating maximum sales quotas. That is confirmed, *inter alia*, by paragraph 221 et seq. of the Decision, devoted to the quota agreements' compatibility with Article 81(1) EC, in which reference is made to the limitation of sales. The Commission's assertion must therefore be treated as wholly irrelevant.

202 Next, Cheil's argument concerning 1992 and 1993 that it called for an increase in production and was consequently excluded from meetings must also be rejected. Indeed, it is clear from the Decision that, far from calling for a general increase in production, it merely sought to obtain an increase in the quota suggested to it by the cartel. That cannot be equated with non-implementation in practice of the infringing agreements.

203 Furthermore, the argument that no account was taken of internal documents attesting to the fact that Cheil endeavoured to develop its production capacity is irrelevant because the documents fail to establish any actual increase in production and still less in sales volume. In this regard, the applicant's unsupported allegation of a breach of the principle of equal treatment must be rejected as groundless.

204 Also, it is apparent that implementation in practice of the agreements on sales volumes may be regarded as having been proved to the requisite legal standard in view of the table appearing in paragraph 267 of the Decision, which compares the worldwide market shares allotted to each cartel member under the agreements with actual market shares at the end of 1994. Indeed, as the Commission has observed, the worldwide market share of each producer, with the exception of Sewon, was largely comparable to the share which it was allotted as a member of the cartel.

205 Lastly, as regards application of the quota agreements in 1995, it is clear from the meetings held by the cartel members in that year, mentioned in paragraphs 153 to 166 of the Decision, that Cheil continued applying the quotas which had been applied the preceding year.

206 Thirdly, as regards the agreement to exchange information, it is established that on the morning of 10 March 1994 Cheil agreed that it would make known its figures for sales of lysine, in accordance with the agreement concluded by the other producers on 8 December 1993.

207 As far as implementation of that agreement is concerned, suffice it to observe that it is clear from the Decision (paragraphs 134, 141, 145, 150, 155, 160, 164 and 165) that Cheil did indeed communicate its sales figures. Unlike Sewon, which at the beginning of 1995 ceased informing the other producers about its sales volumes, which hampered operation of the cartel, Cheil thus regularly sent the agreed information and received in return information on the sales made by the other cartel members, which was likely to influence its conduct within the cartel and on the market. By so doing, Cheil implemented the agreement in question, irrespective of whether the information supplied was incorrect, as alleged.

208 It follows from all the foregoing considerations that the Commission was right to find no mitigating circumstance in Cheil's favour in so far as concerns the non-implementation in practice of the agreements.

*5. The statement of reasons for the Decision*

*Arguments of the parties*

209 The applicant begins by stating that the Commission must give a full and clear statement of the reasons for decisions imposing fines, so that undertakings are able to determine in detail the method of calculation of the fine imposed on them, without being obliged to bring court proceedings against the Commission decision (see Case T-147/89 *Société métallurgique de Normandie* v *Commission* [1995] ECR II-1057, Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, and Case T-151/89 *Société des treillis et panneaux soudés* v *Commission* [1995] ECR II-1191).

210 In the present case, the Decision is, according to the applicants, insufficiently reasoned in several respects.

211 First, the Decision does not enable the applicant to ascertain in detail the reasons why the starting amount of the fine, determined according to the gravity of the infringement, was set at EUR 15 million, that is at the same level as for Sewon and Kyowa, despite its small size and limited influence on the market. The Decision (paragraph 304) merely states the amount, with no further explanation,

and takes no account of the fact that Cheil's turnover from lysine sales in the EEA was approximately half that of its closest competitor.

212 Secondly, the Decision does not enable the applicant to ascertain the reasons why the Commission failed to take account of the various mitigating circumstances which it pleaded in its defence.

213 In so far as non-implementation of the agreements in practice is concerned, the applicant claims that the Commission did not reply, in paragraphs 376 to 378 of the Decision, to the submission that Cheil's prices were consistently lower than the agreed prices or the submission that the agreement on quotas was not implemented. Also, as regards Cheil's passive, peripheral role, the Commission did not reply, in paragraphs 363 and 364 of the Decision, to the submission that Cheil was excluded or absent from meetings or adopted a low profile when present.

214 The Commission denies any such lacuna in the statement of reasons, having regard, in particular, to the explanation in the Guidelines.

*Findings of the Court*

215 The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. First, under Article 230 EC, it has the task of

reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 253 EC, infringement of which renders a decision liable to annulment. Secondly, the Court of First Instance has power to assess, in the exercise of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which the duty to state reasons does not as such require to be set out in the decision (see, *inter alia*, Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraphs 38 to 40).

216 As regards review of compliance with the duty to state reasons, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. 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 (see, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law cited).

217 As regards the scope of the duty to state reasons for the calculation of the amount of a fine imposed for infringement of the Community competition rules, it should be borne in mind that the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. In this connection, the Guidelines and the Leniency Notice indicate what factors the Commission takes into consideration in measuring the gravity and duration of an infringement (see, by analogy, *AIUFFASS and AKT* v *Commission*, cited above, paragraph 57, and *Vlaams Gewest* v *Commission*, cited above, paragraph 79).

218 That being so, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine.

219 In the present case the Commission has satisfied that requirement.

220 Paragraphs 250 to 445 of the Decision set out the factors which the Commission took into consideration, in accordance with all the rules just mentioned, in calculating the amount of the fine imposed on each of the undertakings concerned. As regards, in particular, differential treatment of the undertakings in setting the starting amount of the fines, paragraphs 303 to 305 of the Decision set out the factors on which the Commission based its division of the undertakings into two groups according to size. Similarly, as regards assessing the relative gravity of the infringement committed by each of the undertakings, paragraphs 357 to 396 set out the factors taken into account as mitigating circumstances and, in particular, the reasons for which the Commission decided that Cheil had not played a passive role in the infringement but had instead implemented the agreements.

221 The fact that the Commission's assessment is not necessarily well founded on all those points is a matter falling under the Court's separate review of the legality of the Decision, which has been carried out above. As far as the statement of reasons is concerned, the Decision is, by contrast, free of defects in that it enabled the applicant to identify the factors which the Commission took into consideration concerning the various matters which it raised and enabled the Court to exercise its power of review.

222 Consequently, the statement of reasons for the Decision must be regarded as sufficient in law.

**The method employed in calculating the final amount of the fine**

223 In the Decision the Commission gave the applicant the benefit of a single mitigating circumstance, namely the fact that it terminated the infringement as soon as the first public authority to do so intervened (paragraph 384). That justified a reduction in the basic amount of 10%.

224 It should be observed that, in the Decision, the Commission did not apply reductions on account of mitigating circumstances in the same way to all the undertakings concerned. It allowed Sewon the benefit of two mitigating circumstances: first, for its passive role in 1995 in connection with the sales quotas, which led to a reduction of 20% of the increase applied in that undertaking's case on account of the duration of the infringement (paragraph 365 of the Decision); secondly, for termination of the infringement as soon as a public authority intervened (paragraph 384 of the Decision), warranting a reduction of 10% of the figure derived from the first reduction. It is plain that, in those two cases and by contrast with the case of Cheil, the reductions to reflect mitigating circumstances were not applied by the Commission to the basic amount of the fine, determined by reference to the gravity and duration of the infringement.

225 By a written question sent on 7 February 2002 the Court called upon the Commission, *inter alia*, to explain in detail and justify the method which it used to calculate the fines.

226 In its reply of 27 February 2002 the Commission stated that the proper way to calculate the increases and reductions intended to reflect aggravating and mitigating circumstances was to apply a percentage to the basic amount of the fine. It also acknowledged that it did not consistently follow that method in the Decision, especially in the case of Ajinomoto and ADM.

227 At the hearing the applicant stated that it had no objection to the method used to calculate the fines which the Commission described in its letter of 27 February 2002.

228 Against that background, it is important to point out that, according to the Guidelines, the Commission must, once it has determined the basic amount of the fine to take account of the gravity and duration of the infringement, increase and/or reduce that figure to reflect aggravating or mitigating circumstances.

229 Given the wording of the Guidelines, the Court takes the view that any percentage increases or reductions decided upon to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement, not to the amount of any increase already applied for the duration of the infringement or to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances. As the Commission rightly noted in its reply to the Court's written question, the method for calculating fines just described may be inferred from the wording of the Guidelines; it ensures equal treatment between the various undertakings involved in a cartel.

230 In the exercise of its unlimited jurisdiction, the Court therefore finds that, to the 10% reduction granted on account of the fact that the applicant terminated the infringement as soon as a public authority intervened, there should be added a further reduction of 10% on the ground that Cheil adopted a passive role in the arrangements relating to sales volumes from 27 August 1992 to 10 March 1994 (see paragraph 183 of the present judgment). That gives a total reduction of 20% on account of mitigating circumstances, which should be applied to the basic amount of the fine, EUR 18 million (see paragraph 139 of the present judgment), giving EUR 14.4 million before application of the provisions of the Leniency Notice.

231 In this connection, it must be remembered that, pursuant to Section D of the Leniency Notice, the Commission allowed Cheil a 30% reduction in the fine which would have been imposed on it had there been no cooperation. That now equates to a reduction of EUR 4 320 000. The final amount of the fine imposed on the applicant must, consequently, be EUR 10 080 000.

## Costs

232 Under Article 87(3) of its Rules of Procedure, the Court of First Instance may, where each party succeeds on some heads and fails on others, order that the costs be shared. In this case, it is appropriate to order the applicant to bear its own costs and two thirds of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Cheil Jedang Corp. at EUR 10 080 000;**

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

3. **Orders Cheil Jedang Corp. to bear its own costs and to pay two thirds of the Commission's costs and orders the Commission to bear one third of its own costs.**

Vilaras Tiili Mengozzi

Delivered in open court in Luxembourg on 9 July 2003.

H. Jung M. Vilaras

Registrar President

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