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

In Case T-224/00,

Archer Daniels Midland Company, established in Decatur, Illinois (United States of America),

Archer Daniels Midland Ingredients Ltd, established in Erith (United Kingdom), represented by L. Martin Alegi and E.W. Batchelor, solicitors, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by R. Lyal and W. Wils, 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

* Language of the case: English.

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, and counterclaim by the Commission for an increase in the amount of that fine,

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 25 April 2002,

gives the following

Judgment

Facts

1 The applicants, Archer Daniels Midland Company (hereinafter 'ADM Company') and its European subsidiary Archer Daniels Midland Ingredients Ltd

(hereinafter 'ADM Ingredients'), operate in the cereals and oil seed processing sector. They 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 (FBI), searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 ADM Company, together with Kyowa Hakko Kogyo Co. Ltd ('Kyowa Hakko Kogyo'), Sewon Corp. Ltd, Cheil Jedang Corp. ('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 Corporation Ltd 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 ADM Ingredients, to Sewon Corp. Ltd 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. Following a letter from the Commission dated 14 October 1997, reminding them they had not answered, ADM Ingredients replied to the Commission's request for information concerning the lysine market. ADM Company offered no reply.

7 On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to ADM Company and ADM Ingredients (hereinafter together referred to as 'ADM') and the other companies concerned, namely, Ajinomoto Co. Inc. and its European subsidiary Eurolysine SA (hereinafter together referred to as 'Ajinomoto'), Kyowa Hakko Kogyo and Kyowa Europe (hereinafter together referred to as 'Kyowa'), Daesang Corp. (formerly Sewon Corp.) and its European subsidiary Sewon Europe GmbH, and Cheil, 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. On receiving the

statement of objections, the applicants informed the Commission that they did not substantially contest the facts.

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, in which it alleged that Ajinomoto, Kyowa and Sewon had taken part in the cartel since at least June 1990, Cheil since at least the beginning of 1991 and the applicants since 23 June 1992. The applicants replied to this supplementary statement of objections on 6 October 1999, confirming that they did not substantially contest the facts.

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 applicants 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 on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines') and the Leniency Notice.

12 First, the basic amount of the fine, determined by reference to the gravity and duration of the infringement, was fixed at EUR 39 million for ADM Company, EUR 42 million for Ajinomoto Co. Inc., EUR 21 million for Kyowa Hakko Kogyo, EUR 19.5 million for Cheil 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 Company and Ajinomoto Co. Inc. and EUR 15 million for Kyowa Hakko Kogyo, 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 Company and Cheil and 40% in the case of Ajinomoto Co. Inc., Kyowa Hakko Kogyo and Sewon (paragraph 313 of the Decision).

15 Secondly, on account of aggravating circumstances, the basic amount of the fines imposed on ADM Company and Ajinomoto Co. Inc. was increased by 50%, that is to say EUR 19.5 million for ADM Company and EUR 21 million for Ajinomoto Co. Inc., 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 Co. Inc 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 Hakko Kogyo and Cheil were reduced by 30% and, lastly, the fine on ADM Company 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 Court Registry on 25 August 2000 the applicants brought the present 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 25 April 2002.

21 The applicants claim that the Court should:

— annul the provision of the Decision imposing a fine on them or reduce the fine;

— order the Commission to pay the entire costs;

— order the Commission to reimburse them for all the costs of providing security for the payment of the fine.

22 The Commission contends that the Court should:

— dismiss the application as unfounded;

— increase the fine imposed on the applicants;

— order the applicants to pay the entire costs.

The principal claim for annulment of the provision of the Decision imposing a fine on ADM Company or for reduction thereof

I — *Applicability of the Guidelines*

23 The applicants complain that the Commission calculated the fines on the basis of the criteria laid down in the Guidelines even though the cartel complained of was brought to an end before the Guidelines were published. The applicants conclude that the Commission infringed, first, the principles of legal certainty and of the protection of legitimate expectations and the principle that legislation should not have retroactive effect and, secondly, the principle of equal treatment.

Arguments of the parties

1. Infringement of the principles of legal certainty, the protection of legitimate expectations and non-retroactivity of penalties

Admissibility of the plea

24 The Commission contends that, to the extent that it alleges infringement of the principle of non-retroactivity, this plea is inadmissible. The applicants provide no

legal reasoning at all on this point and, in particular, they fail to explain whether and, if so, how the concept of 'non-retroactivity' should be distinguished from the concepts of legal certainty and of the protection of legitimate expectations.

25 The applicants insist that breach of the principle of 'non-retroactivity' is clearly pleaded in their application.

Merits

26 The applicants submit that the method of calculating fines laid down in the Guidelines differs radically from the Commission's past practice which, as it admitted in the Decision (paragraph 318), consisted in determining the fine according to a base rate representing a certain percentage of sales in the relevant Community market. In contrast, the Guidelines introduced a fixed-rate fine, for example EUR 20 million for a very serious infringement, irrespective of the volume of sales of the product concerned. Therefore the applicants contend that, because the previous method of calculating fines had been amply brought to the attention of operators and was still in force at the time of the infringement, the Commission could not give retroactive effect to the Guidelines without infringing the principles of legal certainty and the protection of legitimate expectations.

27 On this point the Commission's argument in paragraph 317 of the Decision, based on the judgment in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 666, is, the applicants submit, clearly incorrect. Unlike the undertaking in point in that judgment, which was fined in accordance with the rules in force at the time of the infringement, ADM's fine was calculated according to a method not even contemplated at the time when its infringement was committed.

28 The applicants also contend that retroactive application of the Guidelines finds no justification in the degree of latitude enjoyed by the Commission in adapting its general policy on fines. The case-law constituted by 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 108, and the judgment of the Court of First Instance in Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907 is not applicable to the present case because in those cases the changes in the level of the fines were not due to a complete change in methodology but merely to increases in the percentages applied to the relevant product turnover figure. Furthermore, by contrast with the changes in policy in issue in those cases, the objective of deterrence was sufficiently well served by the time the Decision was adopted because the Guidelines had already been published by then, and thus it was clearly disproportionate to apply the Guidelines retroactively. In any case, the degree of latitude enjoyed by the Commission in fixing the level of fines could not under any circumstances result in the imposition of fines 15 or 20 times greater than would have been imposed in accordance with its practice at the time of the infringement. By imposing such fines, the Commission therefore infringed the principles of legal certainty, the protection of legitimate expectation and non-retroactivity.

29 The applicants contend that there is no foundation for the argument that in the United States it is also usual for sentencing for a crime to be based on sentencing practice at the date of the decision and not on the practice at the time of commission of the crime. The Guidelines Manual of the Sentencing Commission of the United States (paragraph 1B1.11(b)(1)) and the case-law of the United States Court of Appeals (*USA* v *Kimler* 167 F. 3d 889 (5th Circ. 1999)) show that retroactive application of new sentencing guidelines is prohibited by the *ex post facto* clause of the United States Constitution if it would result in a more severe punishment than the punishment assigned by law at the time of the offence.

30 The Commission contends that there has been no retroactive penalisation in this case in that the Guidelines in no way changed the penalties applicable under

Article 15 of Regulation No 17. They merely indicate the way in which the Commission proposes to exercise its discretion in imposing fines, having regard to the gravity and the duration of the infringement.

31 The Commission also asserts that whilst, before adopting the Guidelines, it frequently took an approach based on turnover, that was in no way standard practice.

32 Lastly, the Commission submits that case-law clearly shows that it may adjust the level of fines at any time, even after issuing a statement of objections (*Musique diffusion française and Others* v *Commission*, cited above, paragraphs 22 and 109). In the present case the Guidelines had been published in the *Official Journal* almost a year before the statement of objections was sent to the undertakings concerned.

2. Infringement of the principle of equal treatment

33 The applicants submit that application of the Guidelines infringes the principle of equal treatment because it leads to differentiation between undertakings not on the basis of the date on which they committed the infringement but on the basis of the date on which the Commission adopted the decision, which will be arbitrary. By way of example, the applicants state that the undertaking mentioned in Commission Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article [82] of the EC Treaty (IV/34.621, 35.059/F-3 — Irish Sugar plc) (OJ 1997 L 258, p. 1) was fined an amount equivalent to only 6.8% of total sales in the relevant market, although the offence in question was contemporaneous with the lysine cartel. Contrary to what the Commission maintains, the fact that the Guidelines have been published since that decision provides no objective justification for treating ADM differently.

34 The Commission contends that two undertakings which have committed identical infringements contemporaneously but which are fined at different times are placed in a different situation if a new policy on fines is introduced in the meantime. The principle of equal treatment would be breached if different policies were applied simultaneously.

35 In response to the argument that it arbitrarily determines when to finalise its decisions, the Commission states that the duration of a procedure depends on certain contingencies such as the complexity and extent of the cartel and the need to ensure that the rights of the defence are fully observed. It adds that undertakings which conceal their cartel activities more successfully and are detected later than others should not be able to benefit from their success by claiming that they should be fined an amount similar to that imposed on undertakings committing contemporaneous offenses.

Findings of the Court

1. Infringement of the principles of legal certainty, the protection of legitimate expectations and non-retroactivity of sanctions

Admissibility of the plea

36 In accordance with Article 44(1) of the Rules of Procedure of the Court of First Instance, an originating application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to

enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, and a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333).

37 In the present case, the applicants clearly complain, in the application and on several other occasions, that the Commission applied the Guidelines retroactively and they explicitly argue that the Commission thereby infringed the principle of 'non-retroactivity'. Moreover, those arguments were sufficiently clear and precise, as they did not inhibit the Commission in replying to them, either in its defence or thereafter, and enabled the Court to exercise its judicial review.

38 The Commission's argument must therefore be rejected and the plea held admissible in its entirety.

Merits

— Infringement of the principles of non-retroactivity of penalties and legal certainty

39 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 European Convention for the Protection of Human Rights and

Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950. It takes its place among the general principles of law whose observance is ensured by the Community judicature (Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 219).

40 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).

41 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).

42 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 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).

43 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).

44 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).

45 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 EUR 20 million (first to third indents of the second paragraph of Section 1.A) (*LR AF 1998* v *Commission*, paragraph 225).

46 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 to 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).

47 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).

48 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 up to 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).

49 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).

50 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).

51 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).

52 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).

53 Nor, contrary to what the applicants claim, 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 principles of non-retroactivity of penalties and legal certainty (*LR AF 1998* v *Commission*, paragraph 233).

54 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).

55 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).

56 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, *Solvay* v *Commission*, cited above, 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).

57 Furthermore, the restrictive interpretation of that case-law which the applicants propose and on the basis of which they dispute its applicability to the present case cannot be accepted. The authorities in question are formulated in general terms which do not rule out the possibility of an increase in the level of fines imposed resulting from the introduction by the Commission of a new method for calculating the fines provided for by Article 15(2) of Regulation No 17.

58 Lastly, as regards the applicants' 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 (see, in particular, *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).

59 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).

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

61 It follows from the foregoing that the plea alleging infringement of the principles of non-retroactivity of penalties and legal certainty must be rejected.

— Infringement of the principle of the protection of legitimate expectations

62 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).

63 In the present case, it is sufficient to observe that the applicants do not point to any conduct on the part of the Community authorities that might have caused them to harbour the expectation that the old method, which, they allege, was the Commission's standard practice, would be retained. Their sole argument consists in asserting that the Commission's previous decision-making practice had to be followed. However, undertakings involved in an administrative procedure that can result in the imposition of a fine cannot have a legitimate expectation that the Commission will continue with what they allege to have been its previous decision-making practice in the matter of calculating fines.

64 Indeed, 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.

65 In the field of Community competition rules, it is clear from the case-law (see, *inter alia*, *Musique diffusion française and Others* v *Commission*, cited above, 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.

66 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).

67 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 applicants cannot, *a fortiori*, reproach the Commission for applying those Guidelines in determining the amount of the fine, unless they can show, *quod non*, that the authorities caused them to entertain a legitimate expectation to the contrary.

68 That being so, the allegation of infringement of the principle of the protection of legitimate expectations must be rejected.

2. Infringement of the principle of equal treatment

69 In accordance with settled case-law, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309, and the case-law cited).

70 In so far as concerns combating infringements of the competition rules, the principle of equal treatment undoubtedly requires that undertakings guilty of infringements of a similar nature, committed at a similar time, should be liable to the same legal penalties irrespective of the date — which will necessarily vary — on which a decision is adopted against each of them. To that extent, the principle is closely connected with the principle of the non-retroactivity of penalties, in accordance with which penalties imposed on undertakings for infringement of the competition rules must correspond to the penalties contemplated at the time when the infringement was committed.

71 However, in the instant case, the applicants cannot validly argue infringement of this principle on the sole ground that, in calculating the amount of their fine, the Commission applied the Guidelines rather than the method which it had employed in certain other decisions, such as Decision 97/624, which it had adopted prior to the Guidelines' entry into force whereby it fixed the final amount of the fine by selecting a percentage of the turnover achieved from the sale of the goods in relation to which the infringement was committed in the relevant geographical market.

72 As the Court has already emphasised, the change in the Commission's administrative practice brought about by adoption of the Guidelines did not amount to an alteration of the legal framework for determining the amount of the fines which may be imposed for infringement of the Community competition rules, that framework being defined solely by Regulation No 17. Using the method laid

down in the Guidelines, fines continue to be calculated according to the two criteria mentioned 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. Thus, the fact that the Guidelines establish a new method for calculating fines, which lists the factors to be taken into account in assessing the gravity and duration of the infringement, has no bearing on the level of fines which undertakings risked incurring before the Guidelines were adopted.

73 It follows that application of the method set out in the Guidelines in calculating the fine imposed on ADM does not constitute discriminatory treatment of ADM by comparison with undertakings which infringed the Community competition rules at the same time but, for reasons pertaining to the time when the infringement was discovered or to the conduct of the administrative procedure initiated against them, were sanctioned before the Guidelines entered into force. In both cases, in fact, the fines which the undertakings risked incurring at the time of committing the infringement remained within the limits laid down in Article 15(2) of Regulation No 17.

74 Moreover, even if the Commission had adopted the Decision sooner and had been unable to apply the Guidelines, it is clear from the case-law cited in paragraphs 58 and 59 of the present judgment, which predates adoption of the Guidelines, that the applicants would have had no right to have their fine fixed by reference to turnover achieved from the sale of the goods in relation to which the infringement was committed in the geographical market in question simply because fines imposed on other undertakings infringing the Community competition rules at the same time were calculated according to that method.

75 That being so, the plea alleging infringement of the principle of equal treatment must be rejected.

II — *The relevance of fines imposed in other countries*

76 The applicants complain that the Commission determined the amount of the fine without taking account of the fines already imposed on ADM Company in other countries for the same offences. In support of that complaint, they allege breach of the principle that a second penalty may not be imposed for the same offence, and argue that the Commission failed to take into account the deterrent effect of the fines already imposed.

Arguments of the parties

1. The principle that a second penalty may not be imposed for the same offence and the Commission's obligation to take account of fines already imposed

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

78 In this connection, the applicants contest the assertion made in the Decision that the fines imposed by the United States and Canadian authorities took account of

the anti-competitive effects of the cartel only in the area of their jurisdictions (paragraph 311 of the Decision). On the contrary, according to the applicants, it is clear from the judgment delivered against ADM Company in the United States on 15 October 1996 that the cartel sanctioned therein was worldwide in scope and affected trade 'in the United States and elsewhere'. Moreover, the fine was particularly large because of the geographical extent of the offence. In the case brought in Canada, specific account was taken also of the worldwide scope of the cartel.

79 In any event, even if the Commission's assertion were correct, the fact that other authorities took into account only the local effects of an offence is irrelevant for the purpose of applying the principle that a second penalty may not be imposed for the same offence. According to the judgment in Case 7/72 *Boehringer* v *Commission*, cited above, the sole determining factor in this respect is whether or not the acts complained of are identical. That is confirmed by the Commission's own decision-making practice: in a 1983 decision it set off against the fines which it imposed on undertakings participating in a cartel fines imposed by the German authorities, although it was ruling only on the aspects of the cartel outside Germany (see Decision 83/546/EEC of 17 October 1983 relating to a proceeding pursuant to Article [81] of the Treaty establishing the European Economic Community (IV/30.064 — Cast iron and steel rolls) (OJ 1983 L 317, p. 1)).

80 This past practice of the Commission's means that, by refusing to take account of the fines already imposed on ADM, the Commission has infringed not only the principle that a second penalty may not be imposed for the same offence, but also the principle of equal treatment.

81 Finally, the applicants submit that the Commission also infringed this principle by taking account of ADM's global turnover, including turnover achieved in the

United States, which had already been taken into account by the American, Canadian and Mexican authorities as the basis for extremely large fines. According to the applicants, therefore, in order to avoid a double penalty the Commission ought to have taken into account only the proportion of their turnover resulting from sales of lysine in the EEA.

82 The Commission argues, essentially, that fines imposed by authorities in non-member States penalise infringements only of those countries' domestic competition law; such authorities have no jurisdiction to punish breaches of Community competition law. It is of no relevance that various authorities have examined the same facts: a single act can constitute a violation of several legal systems. Its decision-making practice relates to fines imposed not by the authorities of non-member States but by the authorities of the Member States and was intended precisely to avert the possibility that anticompetitive conduct could be sanctioned twice within the Community itself.

2. The deterrent effect of the fines already imposed

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

84 The Commission replies that, when exercising its power to impose fines, it takes into account the need for deterrence with regard to the situation in the European Community. An undertaking which takes part in a worldwide cartel cannot expect more lenient treatment than one which takes part in a cartel that is confined to Europe. The objective of deterring companies such as ADM would

not be achieved if the Commission had to refrain from imposing large fines for flagrant violations of Community competition law where the offender has already been fined for infringing competition law in other jurisdictions. The level of damages in civil actions has no connection with what is appropriate in the field of administrative penalties.

Findings of the Court

1. Breach of the principle that a second penalty may not be imposed for the same offence and the Commission's alleged obligation to take account of fines already imposed

85 It is clear from case-law that the principle of *non bis in idem*, enshrined also in Article 4 of Protocol No 7 to the ECHR, is a general principle of Community law upheld by the Community judicature (Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 103, 119, and Case 7/72 *Boehringer* v *Commission*, cited above, paragraph 3, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 96, confirmed on this point by the judgment of the Court of Justice in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P [2002] ECR I-8375, paragraph 59).

86 In the field of Community competition law, the principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is not amenable to challenge.

87 In addition, the Court of Justice has held that the possibility of concurrent sanctions, one a Community sanction, the other a national one, resulting from two sets of parallel proceedings, each pursuing distinct ends, is acceptable because of the special system of sharing jurisdiction between the Community and the Member States with regard to cartels. However, a general requirement of natural justice demands that, in determining the amount of a fine, the Commission must take account of any penalties that have already been borne by the undertaking in question in respect of the same conduct where these were imposed for infringement of the law relating to cartels of a Member State and where, consequently, the infringement was committed within the Community (Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 11, Case 7/72 *Boehringer* v *Commission*, cited above, paragraph 3, Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 191, and Case T-149/89 *Sotralentz* v *Commission* [1995] ECR II-1127, paragraph 29).

88 The Court cannot therefore uphold the applicants' argument that, by imposing a fine on them for their involvement in a cartel already sanctioned by the American and Canadian authorities, the Commission infringed the principle of *non bis in idem*, according to which a second penalty may not be imposed on the same person in respect of the same infringement.

89 In this connection, suffice it to recall that the Community judicature has held that an undertaking may be made the defendant to two parallel sets of proceedings concerning the same infringement and, thus, incur concurrent sanctions, one imposed by the competent authority of the Member State in question, the other a Community sanction. That possibility is justified where the two sets of proceedings pursue different ends (*Wilhelm and Others*, cited above, paragraph 11, *Tréfileurope* v *Commission*, cited above, paragraph 191, and *Sotralentz* v *Commission*, cited above, paragraph 29).

90 That being so, the principle *non bis in idem* cannot, *a fortiori*, apply in the present case because the procedures conducted and penalties imposed by the Commission on the one hand and the American and Canadian authorities on the other clearly

pursued different ends. The aim of the first was to preserve undistorted competition within the European Union and the EEA, whereas the aim of the second was to protect the American and Canadian markets.

91 That conclusion is supported by the scope of the principle that a second penalty may not be imposed for the same offence, as laid down in Article 4 of Protocol 7 to the ECHR and applied by the European Court of Human Rights. It is clear from the wording of Article 4 that the intended effect of the principle is solely to prevent the courts of any given State from trying or punishing an offence for which the person concerned has already been acquitted or convicted in that same State. On the other hand, the *non bis in idem* principle does not preclude a person from being tried or punished more than once in two or more different States for the same conduct (see Eur. Court HR *Krombach* v *France* judgment of 29 February 2000, unpublished).

92 It is also important to emphasise that, at present, there is no principle of public international law that prevents the authorities or courts of different States from trying and convicting the same person on the basis of the same facts. Such a rule could arise today only through very close international cooperation leading to the adoption of common rules such as those contained in the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelex Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19) signed in Schengen (Luxembourg) on 19 June 1990. The applicants have not pointed to any binding agreement between the Community and third countries such as the United States or Canada that lays down such a prohibition.

93 Admittedly, Article 50 of the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) proclaimed in Nice on 7 December 2000 provides that no one may be tried or punished again in criminal proceedings for an offence

of which he has already been finally acquitted or convicted within the Union in accordance with the law. However, independently of the question whether that provision has binding legal force, it is clearly intended to apply only within the territory of the Union and the scope of the right laid down in the provision is expressly limited to cases where the first acquittal or conviction is handed down within the Union.

94 It follows that the Court must reject the applicants' allegation of infringement of the *non bis in idem* principle on the ground that the cartel in question was also penalised outside the Community or that the Commission, in its Decision, took account of the worldwide turnover of ADM, including turnover achieved by ADM Company in the United States and in Canada already taken into consideration by the American and Canadian authorities in fixing their fines.

95 In so far as the applicants allege that, by refusing to deduct from the fine fixed in the Decision the fines already imposed on ADM Company in the United States and Canada, and by taking account, in the Decision, of ADM's worldwide turnover, the Commission misconstrued the ruling in Case 7/72 *Boehringer* v *Commission*, cited above, according to which the Commission has a duty to set off a penalty imposed by the authorities of a non-member country if the actions alleged against the applicant by the Commission are the same as those alleged by those authorities, that argument cannot be upheld by the Court either.

96 It should be remembered that, in paragraph 3 of its judgment in Case 7/72 *Boehringer* v *Commission*, the Court held that

'[i]t is only necessary to decide the question whether the Commission may also be under a duty to set a penalty imposed by the authorities of a third State against

another penalty if in the case in question the actions of the applicant complained of by the Commission, on the one hand, and by the American authorities, on the other, are identical'.

97 The applicants infer from that passage of the judgment, *a contrario*, that the Commission had a duty to take into account the penalties imposed by the American and Canadian authorities on ADM Company for its involvement in the worldwide lysine cartel, that cartel being the same, in its object, location and duration, as that sanctioned by the Commission in its Decision imposing a fine of EUR 47.3 million on them.

98 First of all, it should be observed that it is clear from the wording of paragraph 3 of the judgment in Case 7/72 *Boehringer* v *Commission* that the Court did not decide the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member country where the facts with which the Commission charges an undertaking are the same as those alleged by the first authorities. The passage makes clear that the Court merely regarded the identity of the facts alleged by the Commission and by the authorities of the non-member country as being a precondition of the said question.

99 Secondly, it was in view of the particular situation which arises from the close interdependence between the national markets of the Member States and the common market and from the special system for the division of jurisdiction between the Community and the Member States with regard to cartels on the same territory, namely the common market, that the Court, having acknowledged the possibility of dual sets of proceedings and having regard to the possibility of double sanctions flowing from them, held it to be necessary, in accordance with a requirement of natural justice, for account to be taken of the first decision imposing a penalty (*Wilhelm and Others*, cited above, paragraph 11, and the Opinion of Advocate General Mayras in Case 7/72 *Boehringer* v *Commission*, cited above, pp. 1293, 1301 to 1303).

100 The circumstances of the present case, however, are obviously different and given that the applicants point to no express provision of a convention requiring the Commission, when determining the amount of a fine, to take into account penalties already imposed on the same undertaking in respect of the same conduct by the authorities or courts of a third country, such as the United States or Canada, they cannot validly complain that, in the present case, the Commission failed to satisfy any such alleged obligation.

101 In any event, even if it could be inferred *a contrario* from the judgment in Case 7/72 *Boehringer* v *Commission* that the Commission is in fact required to set off any penalty imposed by the authorities of a non-member country where the facts alleged against the undertaking in question by the Commission are the same as those alleged by the first authorities, it remains for the applicants to prove that the facts are indeed the same (Case 7/72 *Boehringer* v *Commission*, paragraph 5), which, in the present case, they have failed to do.

102 As regards the penalty imposed on ADM Company in the United States, it is clear from the judgment delivered on 15 October 1996 by the United States District Court, following an agreement with the American Department of Justice, that ADM Company was ordered to pay a fine of USD 70 million for its involvement in the lysine cartel and a fine of USD 30 million for its involvement in a cartel pertaining to citric acid. It is clear from the documents produced by the applicants that ADM Company was also ordered, in Canada, to pay a fine of CAD 16 million for its involvement in two cartels relating to lysine and citric acid. It is therefore apparent that the judgments delivered in the United States and Canada related to a larger group of agreements and concerted practices. It should be noted, in particular, that, in deciding the amount of the fine, the American court took account of the volume of commercial transactions carried out 'in both the lysine market and the citric acid market' (paragraph 7 of the judgment).

103 Even if that judgment could be regarded as divisible into distinct parts, one concerning the lysine cartel, another concerning the citric acid cartel, and

notwithstanding that the United States judgment states that the purpose of the lysine cartel was to limit lysine production and increase lysine prices 'in the United States and elsewhere', it has in no way been shown that the penalty imposed in the United States related to application of the cartel or its effects other than in the United States (see, to that effect, Case 7/72 *Boehringer* v *Commission*, cited above, paragraph 6) and in the EEA in particular, an extension which, moreover, would have clearly encroached on the territorial jurisdiction of the Commission. That observation applies equally to the judgment handed down in Canada. It is clear from submissions made at the hearing that the fines imposed by the American and Canadian courts were calculated on the basis of turnover achieved by ADM Company in the United States and Canada. Moreover, it cannot be denied that the Commission conducted its own investigation (paragraphs 167 to 175 of the Decision) and made its own assessment of the evidence submitted to it (see, in that regard, *Krombach* v *France*, cited above).

104 That being so, the Court must reject the applicants' complaint that the Commission failed to fulfil an alleged obligation to set off the fines imposed earlier by the authorities of non-member countries and its further complaint, raised incidentally, of breach of the principle of equal treatment. The applicants' reference to the Commission's prior decision-making practice is irrelevant in this regard because that practice addressed situations quite different from that of ADM. Different treatment is thus warranted.

2. The deterrent effect of the fines already imposed

105 According to case-law, the Commission's power to impose fines on undertakings which, intentionally or negligently, infringe the provisions of Article 81(1) EC or Article 82 EC is one of the means conferred on the Commission to enable it to carry out the task of supervision entrusted to it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the

conduct of undertakings in the light of those principles (*Musique diffusion française* v *Commission*, cited above, paragraph 105).

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

107 In this connection, the fourth paragraph of Section 1.A of the Guidelines provides that, when assessing the gravity of an infringement and setting the starting amount of a fine, the Commission must set the fine 'at a level which ensures that it has a sufficiently deterrent effect'.

108 The applicants cannot validly argue that there was in their case no such deterrent effect because ADM Company had already been sanctioned on the basis of the same facts by the courts of non-member countries.

109 First of all, that argument is in fact a restatement of the applicants' argument concerning breach of the *non bis in idem* principle, which the Court rejected in paragraphs 85 to 104 of the present judgment.

110 Next, as is clear from the case-law mentioned, the objective of deterrence which the Commission is entitled to pursue when setting fines is intended to ensure that undertakings comply with the competition rules laid down in the Treaty when

conducting their business within the Community or the EEA. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of the undertaking sanctioned or by reference to whether it has complied with the competition rules in non-member countries outside the EEA.

111 In the instant case, which presents a classic type of infringement of competition law and conduct whose illegality has been confirmed by the Commission on numerous occasions since its earliest intervention in such matters, the Commission was, moreover, entitled to regard it as necessary to set the fine at a sufficiently deterrent level, albeit subject to the limits laid down in Regulation No 17.

112 Consequently the Court must reject the applicants' complaint that, when setting the fine, the Commission failed to take account of the fact that ADM has already been punished enough to dissuade it from infringing Community competition law anew.

III — *The gravity of the infringement*

The nature of the infringement

Arguments of the parties

113 The applicants contend that the Commission contravened the Guidelines by describing the infringement in question as 'very serious', rather than merely 'serious'. The lysine cartel did not entail the partitioning of national markets and

therefore did not jeopardise the functioning of the single market as prices were fixed for the whole of Europe and there was no partitioning of national markets as between the undertakings concerned.

114 According to the applicants, a literal interpretation of the third indent of the second paragraph of Section 1.A of the Guidelines, which defines 'very serious infringements', indicates that, in order for an infringement to be classified as very serious, it must jeopardise very seriously the proper functioning of the single market, given that, according to the terms of that provision, such infringements are 'generally horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market'. If putting the single market in jeopardy had not been required in the case of price cartels or market-sharing quotas, the word 'other' would have been omitted.

115 In addition, defining the present infringement as very serious is not consistent with the Commission's decision-making practice in this area. The decisions cited in paragraph 258 of the Decision to prove the allegedly very serious nature of the infringement in question all relate to cartels involving the partitioning of national markets. Horizontal agreements without partitioning restrictions, on the other hand, are punished less severely, as is shown by Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd, Case IV/F-3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1), Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/F-34.466 — Greek Ferries) (OJ 1999 L 109, p. 24) and Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (IV/35.814 — Alloy Surcharge) (OJ 1998 L 100, p. 55), all of which related to price cartels which, involving no market partitioning, were merely described as 'serious' infringements. This distinction, normally observed by the Commission, is consistent with the judgment of the Court of First Instance in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, in which it was

held that an infringement segregating a market 'is by its nature alone particularly serious'. The applicants conclude from this that, by departing from its customary practice in this area, the Commission has also infringed the principle of equal treatment.

116 The Commission disputes the merits of the applicants' argument.

Findings of the Court

117 According to settled case-law, the gravity of an infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 246, and the case-law cited therein).

118 The cartel in the present case consisted in particular in setting price objectives for lysine in the EEA and fixing sale quotas for that same market. It is therefore important to remember that the first examples of agreements given in Article 81(1)(a) and (b) EC, expressly declared to be incompatible with the common market, are precisely those which:

'(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

...'.

119 That is why infringements of this type, particularly where they concern horizontal agreements, are classified in case-law as being 'particularly serious' (*Thyssen Stahl*, cited above, paragraph 675) or 'clear infringements of the Community competition rules' (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and *BPB de Eendracht* v *Commission*, cited above, paragraphs 303 and 338).

120 Specifically, the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants in a cartel to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 21). More generally, such cartels involve direct interference with the essential parameters of competition on the market in question (*Thyssen Stahl* v *Commission*, cited above, paragraph 675). By expressing a common intention to apply a given price level for their products, the producers concerned cease independently determining their policy in the market and thus undermine the concept inherent in the provisions of the Treaty relating to competition (*BPB de Eendracht* v *Commission*, cited above, paragraph 192).

121 It is in light of those considerations that the third indent of the second paragraph of Section 1.A of the Guidelines, headed 'very serious infringements', for which the likely fine on account of the gravity of the infringement is 'above [EUR] 20 million', is to be understood.

122 Indeed, these infringements are described as generally being 'horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly' (see Decisions 91/297/EEC,

91/298/EEC, 91/299/EEC, 91/300/EEC and 91/301/EEC (Soda Ash), 94/815/EC (Cement), 94/601/EC (Cartonboard), 92/163/EC (Tetra Pak II), and 94/215/ECSC (Steel beams).

123 Contrary to the applicants' allegations, the cartel in which it has been proved that they participated and which involved, amongst other things, the setting of price objectives cannot escape classification as a very serious infringement on the simple ground that it was a worldwide cartel which involved no partitioning of national markets within the common market.

124 First, a literal interpretation of the third indent of the second paragraph of Section 1.A of the Guidelines does not lead to the conclusion that an infringement cannot be classified as very serious unless the practice in question involves partitioning of the market. On the contrary, it is clear from that provision that horizontal agreements relating to price cartels or market-sharing quotas are presumed to jeopardise the proper functioning of the internal market and, in addition, that other practices likely to have the same effect, such as partitioning of the markets, for example, may also be classified as very serious infringements. Moreover, the fact that partitioning is not a *sine qua non* of an infringement being treated as very serious is equally clear from the fact that the provision also classifies as a very serious infringement any clear-cut abuse of a dominant position by an undertaking holding a virtual monopoly, that too being a practice which does not necessarily involve partitioning of markets.

125 Secondly, a more systematic interpretation of the relevant provisions leads to the same conclusion. As has been observed, two of the practices to which the cartel related are expressly prohibited by Article 81(1) EC because they entail intrinsic restrictions of competition within the common market. Now, as is clear from Article 3(1)(g) EC, one of the fundamental objectives of the Community is to put in place 'a system ensuring that competition in the internal market is not distorted'. Contrary to what the applicants appear to allege, the general objective of 'the proper functioning of the single market', which the practices just

mentioned are, according to the third indent of the second paragraph of Section 1.A of the Guidelines, presumed to jeopardise, means ensuring not only that national markets are not partitioned, but also that undistorted competition within the common market is maintained.

126 In light of those considerations, the applicants' complaint that the infringement committed was not, by its nature, a very serious infringement must be rejected.

127 As regards the allegation that the Commission violated the principle of equal treatment, the applicants claim that classifying the infringement in the present case as 'very serious' was inconsistent with the Commission's decision-making practice in the area, that description having been reserved to cartels involving partitioning of national markets.

128 However, it is clear from the considerations set out in paragraphs 117 to 125 of the present judgment that that argument is, in any event, irrelevant, because partitioning of national markets is not a precondition of an infringement being classified as very serious.

129 It must be remembered that it is for the Commission, in the exercise of its discretion and in light of the terms of the third indent of the second paragraph of Section 1.A of the Guidelines, to determine whether the circumstances of the case before it enable it to classify the infringement as very serious.

130 Moreover, it is clear from the Commission's decision-making practice that that classification has not, as the applicants allege, been reserved to cartels involving partitioning of national markets.

131 The Commission in fact classified as very serious a restriction of competition that involved no partitioning of national markets in Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles [81] and [82] of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1). In that case, having regard to the relevant provisions of the Guidelines, the Commission regarded as a 'very serious' infringement of Article 82 EC (paragraph 593 of Decision 1999/243/EC) measures adopted by undertakings to eliminate competition in the maritime transport sector and thereby damage the structure of the market.

132 Furthermore, it should be recalled that the cartel in which ADM participated involved not only fixing real price objectives but also other restrictions consisting in fixing sale quotas and the establishment of a system for exchanging information on sales volumes. In those circumstances, the applicants' position cannot be regarded as comparable to that of the undertakings concerned by the Commission decisions mentioned in paragraph 115 of the present judgment, which related solely to collusion on prices.

133 It follows that the plea of violation of the principle of equal treatment must be rejected.

The actual effect of the cartel on the market

134 The applicants maintain that, in evaluating the severity of the infringement, the Commission erred in its assessment of the actual effect of the cartel on the market.

135 The applicants' argument falls into five complaints which, albeit distinct one from the other, have a number of points in common.

Arguments of the parties

136 First of all, the applicants complain that the Commission failed to furnish the necessary proof that the cartel actually affected the market, relying instead upon mere presumptions. In so doing it confused the possibility of presuming the existence of a concerted practice — without having to prove any restriction of competition because its object is anti-competitive — with the significance of an assessment of the effects of an infringement when these are taken into account in order to evaluate the infringement's gravity. The evidence on which the Commission relied in the Decision relates to phenomena observed in the market but not to what would have occurred in the absence of a cartel. The only economic analysis produced in this connection, the report of Professor Connor, is irrelevant in that it concerns the United States market and was not disclosed to ADM during the administrative procedure.

137 Secondly, the applicants submit that the Commission failed to take account of the positive effects of ADM's entry into the lysine market in 1992, which doubled production capacity and led to lower prices.

138 Thirdly, the applicants argue that the Commission failed to take account of objective constraints on price-fixing arising from the existence of substitute products made from natural lysine and the potential entry of new competitors in the market.

139 Fourthly, according to the applicants, the Commission in any event wrongly assessed the evidence on which it relied: the price fluctuations which it noted were, leaving aside two meetings, due to other factors (the price of substitute products, the trend in the number of animals that consume lysine, and so on); ADM's price announcements had no effect and it charged its customers lower prices than those announced; any similarity between market shares and agreed quotas is purely coincidental, the quotas having been expressed in absolute terms; statements made by participants in the cartel attesting to the success of their agreements are simply anecdotal, as other participants were concerned about non-compliance with those agreements; the fact that many meetings were held is no indication that the cartel had any effect on the market.

140 Fifthly, the Commission was wrong to dismiss the economic studies produced by ADM, which were based upon Cournot's oligopoly model and did not show that the prices charged by ADM, which differed from the agreed prices, were higher than the prices that would have been applied in the context of a non-cooperative oligopoly. The Commission was also wrong to reject the argument that the agreement for the exchange of information in fact had a positive effect on competition.

141 The Commission rejects each of these allegations for the reasons set out in the Decision. As regards the argument that the increase in prices was, leaving aside two meetings, due to other factors, the Commission argues that the applicants are in fact seeking to contest a body of facts, the substantive truth of which they have already admitted, which supports its finding of an infringement. That justifies its application for the fine to be increased.

Findings of the Court

142 First of all, in paragraphs 228 to 230 of the Decision, the Commission concluded that the agreements in issue infringed Article 81(1) EC and found that, because they fixed prices, established sales quotas and instituted a system for the exchange of information, they had an anticompetitive object. The Commission did not, in the context of this assessment, go on to examine any restriction on competition that might have been brought about by the agreements, as was its right (see, for example, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 99).

143 Nevertheless, in assessing the gravity of the infringement, the Commission did rely on the actual impact of the cartel on the lysine market in the EEA (paragraphs 261 to 296 of the Decision), as it is required to do by the first paragraph of Section 1.A of the Guidelines, in cases where it appears that this can be measured.

144 Thus, in paragraph 261 of the Decision, the Commission expressed its view that the infringement, committed by undertakings that were practically the only lysine producers in the world, 'had the effect of raising prices higher than they would otherwise have been and restricting sales quantities, and therefore had an actual impact on the lysine market in the EEA'.

145 As regards the effect the cartel is alleged to have had on sales volumes, the Commission observed, in paragraph 267 of the Decision, on the basis of a table illustrating the producers' market shares worldwide in 1994, that the shares actually achieved were almost identical to what had been allocated to each of them under their quota agreements. The applicants say that this is pure

coincidence because the production quota agreements were expressed in terms of volume; they emphasise that in 1994 ADM's total sales exceeded the quota allotted to it.

146 That argument is not sufficient to rebut the Commission's evidence that the quotas allotted were complied with, evidence which is corroborated in paragraph 269 of the Decision by the fact that, at their meeting in Atlanta on 18 January 1995, the producers concluded that the difference between allocated quotas and actual sales of each company was not excessive and therefore the price level could be maintained (see also paragraphs 153 to 156 of the Decision).

147 That being so, it must be held that the Commission has proved to the requisite legal standard that the quotas agreement had the effect of limiting sales and preserving market shares.

148 Nevertheless, in reviewing the Commission's appraisal of the actual impact of the cartel on the market, it is particularly important that the Court examine the Commission's assessment of the cartel's effect on prices (see, to that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 173, and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 225). As was emphasised in the judgments just mentioned, with regard to a cartel that had a similar purpose, and as is confirmed by the statements made by the producers at their meeting on 18 January 1995, the object of the collusion on market shares was to ensure the success of the concerted price initiatives.

149 In the present case, the Commission formed the view that the infringement constituted by the agreement on prices had the effect of raising prices higher than they would otherwise have been (paragraph 261 of the Decision).

150 In so far as concerns the particular effect of causing price increases, it should be recalled that, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 612, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 38). It is clear from case-law that, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, cited above, paragraphs 619 and 620, *Mayr-Melnhof* v *Commission*, cited above, paragraph 235, and *Thyssen Stahl* v *Commission*, cited above, paragraph 645).

151 It follows, first, that in the case of price agreements, there must be a finding by the Commission that such agreements have in fact enabled the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel.

152 Secondly, it follows that, in making its assessment, the Commission must take into account all the objective conditions in the relevant market and have regard to the economic context and, if appropriate, also the legislative background. It is clear from the judgments of the Court of First Instance in the cartonboard cartel case that account should be taken of the existence of any 'objective economic factors' which indicate that, had there been a 'free play of competition', prices would not have developed in the same way as the prices which were actually charged (*Cascades* v *Commission*, cited above, paragraphs 183 and 184, and *Mayr-Melnhof*, cited above, paragraphs 234 and 235).

153 It is clear from the Decision in the present case that the Commission took into account four factors in reaching its conclusion that the effect had in fact been to increase prices.

154 First of all, the Commission noted that ADM Company's entry into the market in 1991 initially put significant downward pressure on prices, causing them to fall by 50% during the summer of 1992 and that, following the conclusion of the agreements between the undertakings concerned, lysine prices in Europe rose significantly and within six months were brought back to approximately 80% of their price at the beginning of 1991 (paragraph 262 of the Decision). That factor, the relevance of which is clear, is not really in dispute. Nevertheless, the applicants argue, in their second complaint, that ADM Company's entry into the market had a positive effect. However, as the Commission rightly points out, any positive effect that might have been expected to arise from this new competitor's entry into a previously closed lysine market was completely cancelled out by the cartel in which it then participated.

155 Secondly, the Commission pointed to the increase in lysine prices which occurred in July 1993 after ADM Company had lowered its prices and the lysine producers had concluded a new agreement in June of that year (paragraph 263 of the Decision).

156 Thirdly, the Commission observed that the price agreements concluded after the loss of American soybean crops in the Mississippi flood in the summer of 1993 (see the agreement signed in Paris on 5 October 1993, paragraph 112 et seq. of the Decision) enabled prices to be kept relatively high (approximately DEM 5 per kilogram) until the beginning of 1995, even though production capacity had doubled and demand had risen by only 60% (paragraph 264 of the Decision).

157 The applicants maintain that that conclusion is incorrect. On the contrary, it was the paucity of substitutes for synthetic lysine brought about by the Mississippi flood that caused prices to increase.

158 On this point it should be emphasised that the loss of a large proportion of American soybean crops, from which natural lysine — a substitute for synthetic

lysine — is derived, could certainly have caused an increase in the price of the cereals to which, in the case of animal foodstuffs, synthetic lysine is added, but it could also have led to the creation of excess stocks of lysine. It was on the basis of those considerations, aired at their meeting in Paris on 5 October 1993, that the producers expressed their concern that prices could fall significantly and decided to reduce their supply by almost half (paragraph 114 of the Decision). The Commission was thus entitled to deduce from this circumstance, taken together with the doubling of production capacity between 1993 and 1995 and a lesser increase in demand, that prices were artificially high. The applicants' argument, mentioned in paragraph 157 of the present judgment, must therefore be rejected.

159 The fourth and last factor mentioned in the Decision is the Commission's assertion that '[i]t is inconceivable that the parties would have repeatedly agreed to meet in locations across the world to fix prices... over such a long period without there being an impact on the lysine market' (paragraph 286 of the Decision). As the applicants maintain, this assertion has no probative force because it is based on pure conjecture rather than objective economic factors. It must therefore be rejected.

160 It must be observed that the applicants do not really dispute the correlation which the Commission finds between the price initiatives and the prices actually charged in the market by the cartel members (paragraphs 262 to 264 of the Decision). They merely say that the prices which ADM's clients were charged were on occasion lower than the agreed prices. In this connection, it should be observed that, since this was an agreement relating to price objectives, rather than to fixed prices, it is clear that implementation of that agreement simply meant that the parties would endeavour to achieve those objectives. Moreover, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, cited above, paragraphs 150 and 152).

161 On the other hand, the applicants maintain that the Commission omitted to take into account other relevant factors capable of countering those on which it based its conclusion that price increases were brought about, namely:

— the constraints on price-fixing arising from the existence of substitute products and the potential entry of new competitors in the market,

— the oligopolistic structure of the market, which, according to two economic studies, explains ADM's conduct (application of the game theory inspired by Cournot's oligopoly model).

162 First of all, the Commission was, according to the applicants, wrong to take the view that the constraints just mentioned did not keep lysine prices at the level they would have been absent any collusion.

163 As far as the substitutability of products is concerned, it is clear from paragraphs 43 to 48 and 274 to 276 of the Decision that the Commission did indeed take account of that factor as a determinant of lysine prices. After observing that it is technically possible to substitute natural lysine for synthetic lysine, provided other substances are added to obtain the proper protein balance, the Commission acknowledged (in paragraph 275 of the Decision), in response to a similar argument put forward by Ajinomoto during the administrative procedure, that where the price of soybean meal (from which natural lysine is derived) is sufficiently low, natural lysine may then be substituted for synthetic lysine, the price of soybean meal providing a price ceiling for the producers in question. However, the Commission then went on to emphasise (in paragraph 276 of the Decision) that the price of soybean meal remained sufficiently high during the period of the infringement to enable the parties involved in the cartel to increase their prices.

164 The applicants do not explicitly contest this conclusion but merely call into question the probative value of the extract from an economic report set out in paragraph 276 of the Decision. In this connection, they maintain that the report related to the American market and that it was not disclosed to them during the administrative procedure. The content of the report may undoubtedly be regarded as irrelevant to the conclusion drawn in paragraph 276 of the Decision because it is not evidence as such but a theoretical explanation of the phenomenon observed using data gathered in the United States. Moreover, the Commission itself indicates that it has not relied on the report as evidence. It should be remembered in this connection that the Commission was here merely replying to an argument put forward during the administrative procedure by Ajinomoto, not ADM. The question of non-disclosure of the studies in issue will be considered in paragraph 327 of the present judgment.

165 As regards the potential entry of new competitors in the market during the period of the infringement, the applicants offer no information, such as the names of undertakings that might have been inclined to enter the market, that might lend credence to its argument. It is not disputed that the production of synthetic lysine requires substantial investments to be made and relies on advanced technology (paragraphs 29 and 30 of the Decision) and this explains why the market remained particularly closed.

166 Secondly, as regards specifically the oligopolistic nature of the market, the applicants complain that the Commission dismissed the two economic studies relied on by ADM during the administrative procedure, which in fact tend to show that ADM had behaved as a 'cheat' within the cartel. On the basis of a model of a game theory inspired by Cournot's oligopoly model, which gave rise to the notion of oligopoly, they seek to show that the Commission has failed to prove that prices actually charged were higher than those which would have been charged in the context of a non-cooperative oligopoly.

167 It must be observed that, by this argument, the applicants seek only to allege that ADM's conduct within the cartel was that of a 'cheat'. The argument must

therefore be held to be inoperative. Indeed that also applies to the argument that the agreement for the exchange of information increased competition and the assertion that ADM provided incorrect information. In fact, as was stated in paragraph 160 of the present judgment, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, cited above, paragraphs 150 and 152).

168 It must also be observed that a concerted increase in prices has an even more deleterious effect on a market that is already oligopolistic. Such a structure is an objective economic factor likely to attenuate the effects of competition between producers. Conduct on the part of undertakings like that of ADM definitively reduces competition even further, particularly where there is price-fixing. Consequently, the applicants cannot rely on the oligopolistic nature of the market to justify their assertion that the infringement had no actual effect on the market (see, to that effect, *Thyssen Stahl* v *Commission*, cited above, paragraph 302).

169 In addition to the fact that ADM itself admits that two of the meetings of lysine producers, those of 8 December 1993 and 10 March 1994, had a statistically significant positive effect in raising lysine prices (paragraph 284 of the Decision), the applicants have failed to produce any specific evidence capable of countering the evidence put forward by the Commission and the necessary conclusion is therefore that the Commission has proved to a sufficient legal standard that the cartel had an adverse effect on the market.

170 The Commission's argument that, by disputing the causal link between the cartel and the increase in prices, the applicants are calling into question the substantive truth of the facts and thus justifying its application for the fine to be increased should be examined in the context of the Commission's counterclaim for the fine to be increased.

171 It follows from all the foregoing considerations concerning the nature of the infringement and its actual effects that the Commission was entitled, particularly in view of the extent of the geographical market in question (the EEA), to conclude that the cartel constituted a 'very serious infringement' within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines.

The turnover figure taken into account

172 The applicants complain that the Commission set the fine by reference to worldwide turnover, rather than turnover in the market concerned from the sale of the products which were the subject of the infringement, that is to say sales of lysine in the EEA. In this connection, they argue breach of the principle of proportionality and of the Guidelines and breaches of the principle of equal treatment.

Arguments of the parties

Breach of the principle of proportionality and of the Guidelines

173 The applicants contend that the failure to take account of sales in the relevant market constitutes a breach of the principle of proportionality because the amount of the fine represents over 115% of ADM's total lysine sales in the EEA in 1995.

174 The Commission was wrong to take the view that the only constraints on its discretion are the thresholds indicated in Article 15(2) of Regulation No 17, which refer in particular to the total turnover of the undertakings concerned (paragraph 318 of the Decision). In doing so, the Commission infringed the principle of proportionality, which governs the setting of fines.

175 According to the applicants, it is clear both from the Commission's decision-making practice and from the case-law of the Court of First Instance that a fine must be proportionate to the level of sales of the product which is the subject of the infringement. In its judgment in *Parker Pen* v *Commission*, cited above, in circumstances identical to those of the present case, the Court of First Instance reduced the fine by reason of the low turnover of the product in question in comparison with the total sales of the undertaking.

176 The applicants contend that the Commission's failure to take account of turnover in the relevant market is contrary to the fourth and sixth paragraphs of Section 1.A of the Guidelines, which refer to 'the effective economic capacity' of the undertakings 'to cause significant damage to other operators' and to 'the real impact of the offending conduct of each undertaking on competition'.

177 The Commission disputes these arguments, insisting that it complied with the Guidelines. Moreover, the principle of proportionality merely requires that the final amount of the fine be proportionate to the gravity and duration of the infringement, in accordance with Article 15(2) of Regulation No 17. Furthermore, the judgment in *Parker Pen* v *Commission*, a case concerning a vertical arrangement, where the turnover of the offending undertaking corresponded to the turnover in the relevant market, offers no authority for a case concerning a horizontal agreement.

Breaches of the principle of equal treatment

178 The applicants submit that taking account of total turnover rather than turnover achieved from sales of lysine in the EEA amounts to discriminatory treatment by comparison both with undertakings concerned by other Commission decisions prior to and subsequent to publication of the Guidelines and with the other undertakings concerned by the present Decision. It was wrong of the Commission to compare ADM with Ajinomoto, given that ADM had only a 20% share of the EEA lysine market whereas Ajinomoto had the lion's share of 48%.

179 The Commission acknowledges that application of the Guidelines may lead to higher fines being imposed than in the past. That is because the objective of the Guidelines is to achieve more effective deterrence. Thus it may well be that an infringement will be more severely punished now than it would have been under the Commission's earlier practice. Nevertheless, any increase in the general level of fines over the last 10 years is merely the result of the Commission's legitimate exercise of its discretion. The comparisons made by the applicants are thus both questionable and irrelevant.

180 The Commission also argues, essentially, that ADM and Ajinomoto are undertakings of comparable size.

Findings of the Court

Breach of the principle of proportionality and of the Guidelines

181 As was stated in paragraph 56 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 (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 109).

182 In setting the amount of the fine which it imposed on the applicants 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).

183 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.

184 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).

185 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).

186 In cases involving several undertakings, such as cartels, weightings may be applied to the general starting point in order to arrive at a specific starting point that takes account of the 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 (sixth paragraph of Section 1.A).

187 It is appropriate to observe that the Guidelines do not provide that fines are to be calculated according to the overall turnover of undertakings or their turnover in the relevant market. However, nor do they preclude the Commission from taking 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 184 to 186 of the present judgment (*LR AF 1998* v *Commission*, cited above, paragraphs 283 and 284).

188 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 Case T-327/94 *SCA Holding* v *Commission*, cited above, paragraph 176).

189 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).

190 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 applicants complain of.

191 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'.

192 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.

193 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 on 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).

194 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).

195 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.

196 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 *Mayr-Melnhof* v *Commission*, cited above, 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).

197 It follows from the foregoing that, by relying on ADM'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, as the applicants have argued.

198 That being so, it is incumbent on the Court to consider whether, as the applicants claim, 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.

199 In the present case, the applicants first of all argue, essentially, that the final amount of the fine, set at EUR 47.3 million, is disproportionate in that it represents 115% of ADM's turnover in the EEA lysine market in the last year of the infringement.

200 The Court cannot accept that argument. Indeed, it is clear from case-law that the limit established by Article 15(2) of Regulation No 17 relating to the overall turnover of an undertaking, is precisely intended to prevent fines from being disproportionate in relation to the size of the undertaking (*Musique diffusion française* v *Commission*, cited above, paragraph 119). Provided that the final amount of the fine does not exceed 10% of ADM's total turnover in the last year of the infringement, it cannot, therefore, be regarded as disproportionate simply because it is higher than the turnover which ADM achieved in the relevant market. It should be observed that the applicants have referred to the judgment of the Court of Justice in Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, in paragraph 61 of which the Court stated, *obiter dictum*, as follows: 'Article 15(2) of Regulation No 17... aims to ensure that the penalty is proportionate to the undertaking's size on the product market in respect of which the infringement was committed'. In addition to the fact that, in the same paragraph, the Court went on to refer expressly to paragraph 119 of the judgment in *Musique diffusion française*, it must also be emphasised that this formula of words, not taken up in subsequent case-law, belongs in the particular context of the case which gave rise to the judgment in *KNP BT* v *Commission*. In that case, the applicant essentially complained that the Commission took account

of the value of sales internal to the group in order to determine its market shares. Nevertheless, the Court held that to be valid for the reasons stated. Therefore it cannot be inferred from this that the penalty imposed on ADM is disproportionate.

201 The applicants also refer explicitly to the judgment in *Parker Pen* v *Commission*, cited above, in which 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). The applicants say that they are in precisely the same position as the undertaking in that case.

202 It should be observed, first of all, that the solution adopted by the Court in *Parker Pen* v *Commission* related to the final amount of the fine rather than the starting amount in light of the gravity of the infringement.

203 Next, even if the approach in that case were applicable to the present case, it must be pointed out at this stage 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 applicants' turnover in the EEA lysine market, which was not taken into account in the Decision.

204 In this connection, it is important to point out that a comparison of the various turnover figures of the applicants for 1995 reveals two things. First, turnover from sales of lysine in the EEA can indeed be regarded as small in comparison

with total turnover, the first representing only 0.3% of the second. Secondly, it appears, by contrast, that turnover from lysine sales in the EEA (EUR 41 million, as mentioned in paragraph 5 of the Decision) represents a relatively significant proportion — 20% in fact — of ADM's sales in the worldwide lysine market (EUR 202 million, as mentioned in paragraph 5 of the Decision, rather than the incorrect figure of EUR 154 million given in paragraph 304).

205 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 in this case 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 undertakings.

206 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 ADM, 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 applicants' complaint in this regard must be rejected.

Breach of the principle of equal treatment

207 When determining the amount of a fine, the Commission must not infringe the principle of equal treatment, a general principle of Community law which, as

stated in paragraph 69 of the present judgment, 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.

208 As regards, first of all, the allegation of discrimination by comparison with undertakings the subject of decisions prior to publication of the Guidelines, from which it appears that fines were set at between 5% and 10% of turnover in the relevant market, suffice it to recall settled case-law according to which, when assessing the general level of fines, the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect (see, for example, Case T-327/94 *SCA Holding* v *Commission*, cited above, paragraph 179).

209 As regards, secondly, discrimination by comparison with undertakings which were the subject of decisions after publication of the Guidelines, it is important to observe at the outset that in several recent decisions applying the Guidelines the Commission has, when evaluating the gravity of the infringement, indeed taken account of turnover achieved in the market affected by the infringement (see, in particular, Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (Case No IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24) and Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81] of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1)).

210 Be that as it may, due to the particular circumstances of the present case, no direct comparison can be made between the present Decision and other decisions also applying the Guidelines. As has already been emphasised, the Guidelines do not explicitly provide that fines must be calculated by reference to specific turnover figures, merely that they should take account of various factors (the effective economic capacity of offenders to cause damage, the size of the undertaking, the

specific weight and real impact of the offending conduct of each undertaking, and so on) in regard to which turnover may be relevant. Thus, in each individual case it is for the Commission to decide, subject to review by the Court of First Instance, whether reference should be made to one or other relevant turnover figure or to other factors such as market share. Consequently, the fact that the Commission did not take account of turnover achieved in the relevant market does not, in itself, constitute discrimination by comparison with the undertakings concerned by other decisions.

211 Thirdly and lastly, the Court must reject the applicants' argument that they have been the subject of discrimination by comparison with Ajinomoto.

212 Admittedly, the turnover achieved in 1995 by ADM in the relevant market (EUR 41 million) is lower than that achieved by Ajinomoto in the same year (EUR 75 million, as indicated in paragraph 10 of the Decision). Nevertheless, ADM remains, in this regard, a much more important operator than the group of three 'small' producers, to which it cannot be compared, Sewon's, Kyowa's and Cheil's turnover in 1995 from the sale of lysine in the EEA being EUR 15, 16 and 17 million respectively (paragraphs 13, 16 and 18 of the Decision). Furthermore, ADM's total turnover, which remains an indicator of the size and economic power of the undertaking, clearly shows that ADM is twice as large as Ajinomoto, which both compensates the fact that it has a lesser influence in the EEA lysine market than Ajinomoto and explains why the starting amount of the fines is set at a sufficiently dissuasive level.

213 That being so, the Commission was entitled to take the view that it was appropriate to set the starting amount of the fines imposed on ADM and Ajinomoto at the same level.

214 It follows that the plea alleging infringement of the principle of equal treatment must be rejected.

IV — *The duration of the infringement*

Arguments of the parties

215 The applicants challenge the 10% per annum increase in the amount of the fine as calculated to reflect the severity of the offence, giving a total increase of 30% on account of the duration of the infringement.

216 They contend, first, that ADM never considered itself party to any agreement whatsoever prior to December 1993 and that no agreement implicating ADM in a cartel was concluded before that date. Secondly, the Commission itself has accepted that, during certain periods, the agreements in question were not implemented, or at least not substantially, and it should have taken this into account. Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60) shows that in such a case the increase in the fine on account of the duration of the infringement should be smaller, in accordance with the general principle that the fine must be proportionate to the damage caused. Imposing the maximum possible increase in the present case is therefore contrary to the principle of equal treatment in that it marks a departure from the Commission's past practice in the matter.

217 The Commission contends, first, that the Decision correctly took June 1992 as the starting point for ADM's infringement and that a reply has already been given to ADM's arguments in paragraphs 209 and 210 of the Decision. In particular,

the Commission notes that the assertion that the price agreement at the meeting in Mexico was only conditional is irrelevant. Conditional agreements remain 'agreements' within the meaning of Article 81(1) EC. In any event, the necessary condition in the present case, namely the conclusion of a volume-sharing agreement, was fulfilled and, furthermore, ADM expressed its willingness to participate in production quotas immediately after the meeting in June 1992 (see paragraph 76 of the Decision). Finally, the applicants do not challenge the evidence adduced in paragraphs 376 and 377 of the Decision concerning the strict application by ADM of the price agreements, even during the period prior to December 1993.

218 Second, with regard to the argument that the agreements were not applied during certain periods, the Commission contends that the applicants are seeking to call into question the facts stated in the Decision, although they did not substantially contest those facts.

219 Finally, the Commission emphasises that the 30% increase in this case could not be described as excessive because the Guidelines propose an increase of up to 50% for infringements of medium duration.

Findings of the Court

220 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.

221 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 up to 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 up to 10% per annum (first to third indents of the first paragraph of Section 1.B of the Guidelines).

222 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%.'

223 As far as the increase in the fine imposed on ADM is concerned, it should be remembered that, according to Article 1(a) of the operative part of the Decision, ADM's infringement lasted from 23 June 1992 to 27 June 1995, that is to say three whole years, which fully justifies the 30% increase.

224 The applicants challenge this increase on the ground that ADM never regarded itself as a party to the agreements before December 1993. The Court cannot accept that argument.

225 First of all, it must be observed that the applicants have not applied for annulment of Article 1 of the Decision, which specifies the duration of ADM's involvement in the cartel.

226 Next, it should be pointed out that, by this argument, the applicants call into question the substantial truth of the facts admitted during the administrative procedure, given that, in paragraph 206 of the statement of objections, as further particularised in the supplementary statement of objections, the Commission clearly indicated that ADM's involvement in the cartel began on 23 June 1992. In its replies to those statements of objections, ADM expressly indicated that it did not dispute the facts set out therein (paragraph 1.1 of ADM's reply, annexes 7 and 9 to the application, volumes 3 and 4 of the annexes), an admission which, taken with other factors, enabled the Commission to conclude that ADM had infringed Article 81 EC.

227 According to the settled case-law of the Court of Justice, '[w]here the undertaking involved does not expressly acknowledge the facts, the Commission will have to prove those facts and the undertaking is free to put forward, at the appropriate time and in particular in the procedure before the Court, any plea in its defence which it deems appropriate' (C-297/98 P *SCA Holding* v *Commission*, cited above, paragraph 37). Clearly, that is not, by contrast, the case where the undertaking in question acknowledges the facts. Thus, where, as in the present case, the undertaking expressly admits, during the administrative procedure, the substantive truth of the facts which the Commission alleges against it in its statement of objections, those facts must thereafter be regarded as established and the undertaking barred from disputing them during the procedure before the Court.

228 Lastly, even if their arguments were not tantamount to the applicants calling into question the substantive truth of the facts, there is no dispute that the participants at the meeting in Mexico on 23 June 1992, including ADM, agreed price objectives for lysine (paragraph 75 of the Decision). The Commission was therefore entitled to conclude that ADM participated in the infringement from that date onwards. The applicants' argument that no agreement on prices was concluded on 23 June 1992 because any such agreement was conditional on the conclusion of an agreement on sales volumes cannot be accepted. First of all, it should be observed that it is clear from paragraph 75 of the Decision that, at the meeting in Mexico on 23 June 1992, Kyowa, ADM and Ajinomoto agreed the prices to be charged for lysine until October that year, without making that agreement conditional in any way. It was only their agreement concerning prices

to be charged after October 1992 that was concluded subject to agreement on sales volumes. Next, it is settled case-law that, in order for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings concerned express their common intention to adopt conduct in the market in a specific way (see, in particular, *Commission* v *Anic Partecipazioni*, cited above, paragraph 130, and Case T-7/89 *Hercules Chemicals* v *Commission*, cited above, paragraph 256). In so far as there was a concurrence of wills on the part of the undertakings regarding, at very least, price initiatives, the Commission was entitled to treat it as an agreement within the meaning of Article 81(1) EC. Lastly, the fact that actual implementation of an agreement on prices may be conditional upon an agreement on sales volumes is also irrelevant in that regard, because, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement (*Commission* v *Anic Partecipazioni*, cited above, paragraph 99).

229 The argument that, during certain periods, the agreements were not implemented, or at least not substantially, will fall to be considered when the Court examines the allegation that the Commission failed to take account of the fact that the agreements were not in fact implemented, which the applicants put forward as a mitigating circumstance.

230 Consequently, the Commission was entitled, in application of the Guidelines, to increase by 10% per annum the starting amount of the fine as calculated to reflect the severity of the infringement and to arrive at a total increase of 30% corresponding to the actual duration of the infringement.

V — *Aggravating circumstances*

231 The applicants complain that the Commission increased the basic fine by 50% on the ground that, according to paragraphs 329 to 356 of the Decision, ADM and

Ajinomoto were the leaders of the cartel. In support of this complaint, the applicants argue that the Commission erred in its assessment of ADM's role and plead infringement of the principles of equal treatment and proportionality.

Arguments of the parties

1. Error in the assessment of ADM's role

232 The applicants contend that the Commission's conclusion that ADM acted as leader of the cartel is based on several errors of assessment. It makes the following points in support of that argument:

— the Commission failed to take account of the views expressed by the other members of the cartel to the effect that Ajinomoto alone was the leader of the cartel;

— threatening 'cheating' members and summary price-cutting are common to all the participants in a cartel, unlike the actions alleged against Ajinomoto;

— price reductions before June 1992 are not indicative of leadership;

— price-cutting between January and June 1993 was not intended to compel other participants to reach agreement on sales volumes;

— the threats of sanctions by one of ADM's directors cannot be attributed to the company because the person in question was acting on the orders of the FBI;

— at the meeting in Irvine on 25 October 1993 it was Ajinomoto, not ADM, that was given the task of persuading the other producers to accept a sales allocation scheme;

— the fact that directors of ADM attended meetings with Ajinomoto is of no probative value;

— at the meeting in Mexico on 23 June 1992 ADM was not in a position to establish the future structure of the cartel.

233 The Commission disputes the validity of each of these arguments.

2. Infringement of the principles of equal treatment and proportionality

234 The applicants contend, first, that the 50% increase in the basic amount of ADM's fine is disproportionate and discriminatory by comparison with the treatment of Ajinomoto.

235 Even assuming the Commission's analysis of ADM's role in the cartel to be correct (*quod non*) it is clear from paragraphs 330, 331 and 353 of the Decision, relating to Ajinomoto's role, that ten indicia were found showing that the latter had a leading role whereas, according to paragraphs 331, 332 and 339, only four indicia were found against ADM. In spite of this significant disparity, the increase in ADM's fine was the same as that in Ajinomoto's.

236 Secondly, that increase is likewise disproportionate and discriminatory in that it is contrary to the Commission's practice. In accordance with that practice the standard increase in the fine for a leading role is usually 25% of the basic amount. A 50% increase is applied only where there is a combination of aggravating circumstances, including leadership (see the Pre-Insulated Pipe Cartel case, cited above), but that is not the situation in this case.

237 The Commission asserts that the increase in the fine was neither discriminatory nor disproportionate.

Findings of the Court

1. Error in the assessment of ADM's role

238 As is clear from case-law, where an infringement has been committed by several undertakings, it is necessary, when fixing the amount of the fines, to examine the relative gravity of the participation of each of them (*Suiker Unie and Others* v *Commission*, cited above, paragraph 623). In particular, that implies establishing their respective roles in the infringement during the period of their participation in it (*Commission* v *Anic Partecipazioni*, cited above, paragraph 150, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 264).

239 If follows, in particular, that where one or more undertakings acts as 'ringleader' of a cartel, that should be taken into account in determining the amount of the fine, because undertakings which play that role must accordingly bear special responsibility in comparison with the other undertakings (Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 45; *Mayr-Melnhof* v *Commission*, cited above, paragraph 291, and *IAZ and Others* v *Commission*, cited above, paragraphs 57 and 58).

240 In accordance with those principles, Section 2 of the Guidelines sets out a non-exhaustive list of aggravating circumstances which may lead to an increase in the basic amount of the fine. Among them is the 'role of leader in, or instigator of, the infringement'.

241 In the present case, it is clear from the Decision that the Commission took three essential factors into consideration before concluding that ADM had acted as ringleader in the infringement: the sales at low prices which it made until June 1992 and again at the beginning of 1993, the threats which it made on a number of occasions to smaller producers and lastly its attendance at several bilateral

meetings with Ajinomoto the purpose of which was to discuss the strategic direction of the cartel and to have the other producers agree to price and quota initiatives. In addition, it has been asserted that ADM was the inspiration behind the structure of the cartel, drawing on its past experience in another cartel concerning citric acid. Those factors must be assessed in the particular context of the present case and especially in light of the market position enjoyed by the undertakings and the resources at their disposal.

242 The sales at low prices made temporarily by ADM are a factor on which the Commission was entitled to rely. Indeed, although it did not enter the lysine market until 1991, ADM was already a formidable operator given not only its overall size and the financial resources at its disposal but also, and above all, because of its production capacity. In this connection it is particularly significant that when it entered the market in 1991, at which time there were still only three lysine producers in the world, ADM's factory practically doubled worldwide lysine production capacity (paragraphs 32, 69 and 70 of the Decision). It is apparent that ADM began by launching large-scale sales operations at low prices, at the same time informing the other producers of the seriousness of its intentions and its preference for achieving market share by coordination (paragraphs 69 and 70 of the Decision) and subsequently concluding price agreements with the other producers. Against that background it is clear that ADM's objective in selling at low prices between 1991 and June 1992 was to demonstrate to the other producers already present in the market that failure to create a price cartel would be detrimental to them. ADM employed that strategy again in 1993 in order to obtain an agreement on sales quotas commensurate with its own ambitions. Since ADM did not merely lower prices but did so with the aim of achieving anti-competitive agreements, the applicants' arguments denying the probative value of ADM's price policy must be rejected.

243 Next, the applicants do not directly dispute the fact that explicit threats were made to the other producers at a meeting on 23 August 1994 (paragraph 143 of the Decision) and, in particular, to Sewon in November 1992 (paragraph 89 of the Decision) and again in May (paragraph 134 of the Decision) and August 1994 (paragraph 143 of the Decision). They argue either that those threats were made

by a director of ADM working covertly for the FBI or that they are a means employed by all participants in cartels. In this connection it is sufficient to observe that the director in question was president of the ADM subsidiary active in the lysine sector, that he reported directly to ADM's vice-president who was also implicated in the cartel and that he was acting in accordance with ADM's general policy, even if he was an informant for the FBI. Moreover, it is not alleged that the threats were made on the instructions of the FBI. As regards other participants in the cartel, they were not, except for Ajinomoto, in a position to make good any threats of reprisals.

244 Lastly, the Commission has demonstrated, by reference to documents produced by the parties themselves in an act of cooperation with the Commission, that several bilateral meetings between the senior management of ADM and Ajinomoto — which company the Commission also regards as ringleader — were held in order to discuss the general strategy and form of the cartel. These meetings were held on 30 April 1993 at ADM's head offices, on 14 May 1993 in Tokyo and on 25 October 1993 in Irvine (paragraphs 98 to 101 and 117 of the Decision).

245 Given those circumstances, the Commission was entitled to draw the conclusion that ADM acted as ringleader in the infringement, together with Ajinomoto, the applicants having failed to show that that conclusion was incorrect.

2. Infringement of the principles of equal treatment and proportionality

246 It should be pointed out that, in addition to Ajinomoto's attendance at bilateral meetings with ADM, the Commission took the following factors into account in forming the view that that company acted as ringleader:

— until ADM entered the market in 1991, it was Ajinomoto that established the prices for lysine, which the other members of the cartel agreed to follow (paragraph 330);

— Ajinomoto was the prime mover in ensuring that the other Asian producers agreed to cooperate with ADM (paragraph 330);

— together with ADM it threatened Sewon in 1992;

— it took on the role of coordinator of the cartel by manning and organising the secretariat of the quality monitoring system (paragraphs 330 and 353).

247 Simple arithmetic reasoning, such as that of the applicants, does not give a fair impression of the roles played by ADM and Ajinomoto in the cartel. Nor does it support the conclusion that there has been inequality of treatment. It is clear from the Decision and from the facts of the case that those two undertakings, of relatively similar size and having a similar degree of power in the market, together acted as leaders by defining the strategic direction of the cartel and the reprisals that could be made against the other producers. Those circumstances remain decisive in treating those two undertakings as ringleaders. Whilst it is established that Ajinomoto indeed physically acted as coordinator, it is nevertheless sufficiently clear from the Decision that the structures for which Ajinomoto was responsible were the fruit of and inspired by the experience which ADM gained in the citric acid cartel in particular (paragraphs 74 and 339 of the Decision). That being so, the Commission was not bound to give ADM the benefit of a smaller increase in its fine.

248 The argument that an increase of 50% is higher than that generally applied in other Commission decisions is not capable of proving an infringement of the principle of proportionality or of the principle of equal treatment.

249 In this connection, it is sufficient to recall that, according to settled case-law, when determining the amount of each fine, the Commission has a discretion and is not required to apply any particular arithmetical formula (*Martinelli* v *Commission*, cited above, paragraph 59, *Mo och Domsjö* v *Commission*, cited above, paragraph 268, confirmed on appeal in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47).

250 In those circumstances, the allegation of infringement of the principles of equal treatment and of proportionality must be rejected.

251 It follows from the whole of the foregoing considerations that the Commission was entitled to increase the basic amount of the fine imposed on ADM by 50% on account of aggravating circumstances.

VI — *Mitigating circumstances*

Arguments of the parties

1. Non-implementation in practice of the agreements

252 The applicants maintain that the Commission ought, pursuant to the second indent of Section 3 of the Guidelines, to have reduced the basic amount of ADM's fine by reason of the fact that it did not in practice implement the offending

agreements, there being no presumption in law that a cartel is implemented even where the parties meet regularly.

253 The applicants contend that ADM did not implement the price agreements in that it allowed its customers large discounts and therefore did not invoice the officially agreed prices, as shown by the economic analysis produced by ADM in response to the statement of objections (annex 7 to the application). In so far as the second indent of Section 3 of the Guidelines, relating to mitigating circumstances, refers to the non-implementation 'in practice' of an agreement, the internal working of the undertaking is immaterial. The Commission's approach is also inconsistent with its past decision-making practice. In the Greek Ferries decision, for example, the Commission accepted that price competition by means of discounting was a mitigating circumstance.

254 The applicants submit that implementation of the quota agreements has not been proved. The Decision refers to minimum quotas, which are irrelevant in the context of a cartel which sought to raise prices. With regard to the exchange of information, ADM states that it supplied incorrect information.

255 The Commission submits, generally, 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.

256 The Commission emphasises that ADM's implementation of the price agreements was not presumed but was proven, *inter alia*, by the instructions which it gave to

its sales team. As far as quotas are concerned, the Decision shows that worldwide market shares were retained. The fact of supplying incorrect information is simply cheating and does not indicate that ADM distanced itself from the agreement.

2. ADM's adoption of a code of conduct

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

258 In addition, the adoption of the compliance programme, the change of management and the departure of the senior executives involved in the infringement shows genuine corporate contrition.

259 The Commission contends that, welcome though future compliance would be, it is not relevant to the assessment of the fine.

Findings of the Court

1. Non-implementation in practice of the agreements

260 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 (*Suiker Unie and Others* v *Commission*, cited above, paragraph 623, *Commission* v *Anic Partecipazioni*, cited above, paragraph 150) so that it may be established whether aggravating or mitigating circumstances are applicable to them.

261 That conclusion follows logically from the principle that penalties and sanctions 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).

262 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.

263 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.

264 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.

265 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 individuality of penalties and sanctions, examine the relative severity of the undertaking's individual involvement in the infringement.

266 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).

267 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. As the Court has already stated in paragraph 182 of the present judgment, 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*, cited above, paragraph 53, 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 (*AIUFFASS and AKT* v *Commission*, cited above, paragraph 57, and *Vlaams Gewest* v *Commission*, cited above, paragraph 89).

268 In the present case it remains to be established whether the Commission was entitled to conclude that ADM 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 applicants plead are capable of showing that during the period in which they were party to the infringing agreements they 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).

269 As regards, first of all, the claim that ADM did not implement the price agreements, it is sufficient to observe that the Commission was entitled to conclude, in paragraph 377 of the Decision (see also paragraphs 265 and 266) that that claim is belied by the instructions that were given to its sales teams, which were clearly designed to serve as a basis for negotiations with customers (see, to that effect, *Enichem Anic* v *Commission*, cited above, paragraph 280, and Case T-7/89 *Hercules Chemicals* v *Commission*, cited above, paragraph 341). The fact that selective discounts might subsequently have been granted to customers, resulting in individual transaction prices specific to the customer, cannot undo that conclusion.

270 Furthermore, a comparison of the prices set by ADM, as set out in paragraph 47 of the Decision, and the prices agreed between the members of the cartel, as recorded in paragraphs 186 to 210 of the Decision, throughout the infringement, reveals that ADM did apply the price agreements.

271 It should be pointed out in this connection first of all that the Commission rightly observed 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 (paragraph 376 of the Decision). The Commission also indicated that 'from 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'.

272 Next, it is apparent that the prices set by ADM were often very close to the target prices, sometimes slightly higher, and even matched the price objectives agreed in June and September 1994 (paragraphs 137 and 145 of the Decision).

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

274 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'.

275 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.

276 However, 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. 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 member of the cartel. It is appropriate to observe that the applicants have proffered no evidence to show that the information given in that table is incorrect.

277 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 ADM continued applying the quotas which had been put into effect the preceding year.

278 Thirdly, as regards the agreement to exchange information, it is established that on 8 December 1993 ADM, Ajinomoto, Kyowa and Sewon agreed that from January 1994 all companies would give Ajinomoto monthly reports of lysine sales. Cheil entered into that agreement on 10 March 1994.

279 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, 160, 164 and 165) that ADM did indeed communicate its sales figures. Unlike Sewon, which at the beginning of 1995 ceased informing the other producers about its sales volumes, a step which hampered operation of the cartel, ADM 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 in the market. By so doing, ADM implemented the agreement in question, irrespective of whether the information supplied was incorrect, as alleged.

2. ADM's adoption of a code of conduct

280 It should be borne in mind that, whilst it is important that an undertaking should take steps to prevent fresh infringements of Community competition law from being committed in the future by members of its staff, that does not alter the fact that an infringement has been committed. Thus, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in any given case (Case T-7/89 *Hercules Chemicals* v *Commission*, cited above, paragraph 357, and *Mo och Domsjö* v *Commission*, cited above, paragraphs 417 and 419), especially where the infringement in question is, as in the present case, a clear infringement of Article 81(1)(a) and (b) EC.

281 The Commission is therefore not required to take a circumstance such as that into account as a mitigating factor, provided that it adheres to the principle of equality of treatment, which requires that it should not assess the matter differently for any undertaking addressed by the same decision. That, however, was not the case here.

282 It follows from the whole of the foregoing considerations that the Court must reject the applicants' claim for reduction of the fine on account of the mitigating circumstances of its non-implementation in practice of the anti-competitive agreements and its adoption of a code of conduct.

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

Arguments of the parties

283 The applicants submit that the 10% reduction in ADM's fine allowed under the second indent of Section D.2 of the Leniency Notice is insufficient because it fails to take account of the extensive assistance given by ADM.

284 On this point the applicants begin by observing that ADM was the first to provide the Commission with evidence of the following facts: a cartel among lysine producers had existed for 17 years before ADM entered the market; Ajinomoto had always dominated the cartel and, lastly, Ajinomoto personnel in Japan and Europe had destroyed all documents relating to its membership of the cartel immediately after the first searches were carried out in the United States. The Commission relied on these findings in paragraphs 50, 330 and 414 of the Decision and was also able to reappraise the cooperation offered by Ajinomoto. Furthermore, ADM provided documentary proof of the first contacts between Ajinomoto and Sewon in 1990 (paragraph 52 of the Decision) and this enabled the Commission to adopt a supplementary statement of objections on that matter. Lastly, ADM offered to submit to a summary decision procedure so as to expedite the case.

285 The Commission's refusal to allow an additional reduction in the fine is mistaken for two reasons.

286 First, it is inconsistent with the Leniency Notice to take the view that a reduction cannot be allowed where information such as that provided by ADM relates to an earlier cartel of which the undertaking was not a member. The Leniency Notice makes no such distinction. Moreover, the Commission treated the lysine cartel as a single infringement, without taking account of the date when ADM entered the market.

287 Secondly, even if ADM's cooperation does not fall within the ambit of the Leniency Notice, it falls squarely within the sixth indent of Section 3 of the Guidelines, which includes among mitigating circumstances 'effective cooperation by the undertaking in the proceedings, outside the scope of the [Leniency] Notice'. Any other conclusion would amount to unequal treatment in relation to ADM's assistance, as compared with cartel members whose fine was reduced by 10% simply because they did not dispute the statement of objections.

288 The Commission replies that the extensive assistance which ADM alleges did not relate to its membership of the cartel. Furthermore, the Commission's supplementary statement of objections was based mainly on information furnished by Sewon and, to a lesser extent, Ajinomoto and Kyowa.

Findings of the Court

289 It must be observed at the outset that, as noted in paragraph 406 of the Decision, ADM has not satisfied the conditions for application of either Section B or Section C of the Leniency Notice and consequently its conduct must be assessed under Section D, which is headed 'Significant reduction in a fine'.

290 Under paragraph 1 of Section D, '[w]here an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated'.

291 Paragraph 2 of Section D provides:

'Such cases may include the following:

— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

292 In the present case the Commission concluded that ADM qualified, under the second indent of paragraph 2 of Section D, for a 10% reduction in the amount of its fine because, after receiving the Commission's statement of objections on 29 October 1998, it informed it that it did not substantially contest the facts for the purposes of the Commission's procedure (paragraphs 433 to 435 of the Decision).

293 It is appropriate to determine whether, in view of the other information which ADM provided during the administrative procedure, a further reduction is warranted pursuant to Section D of the Leniency Notice or, if Section D does not apply, under the sixth indent of Section 3 of the Guidelines.

294 In addition to having expressly admitted involvement in the cartel, ADM gave the Commission, in its reply to the statement of objections or thereafter, information concerning the conduct of lysine producers before its entry into the market in 1992 (cooperation between producers during the 1970s and 1980s, the cartel's coming into effect in July 1990 and Ajinomoto's dominant role until 1992) and during the period of the investigation (Ajinomoto's destruction of documents).

295 As the Commission rightly observes in paragraph 404 of the Decision, that information related to facts for which ADM could not be fined under Regulation No 17 either because they occurred at a time when ADM was not yet a member of the cartel or because they concerned the conduct of an undertaking other than itself.

296 Now, according to the first sentence of paragraph 3 of Section A of the Leniency Notice, the notice 'sets out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been

imposed upon them'. Thus, paragraph 1 of Section D of the notice provides for a reduction of 10% to 50% of 'the fine that would have been imposed [on the undertaking concerned] if it had not cooperated'.

297 Therefore, where, in the course of the Commission's investigation of a cartel, an undertaking makes available to it information concerning actions for which it could not in any event have been required to pay a fine under Regulation No 17, that does not amount to cooperation falling within the scope of the Leniency Notice or, *a fortiori*, Section D thereof.

298 Consequently, the applicants cannot validly claim, under Section D of the Leniency Notice, any further reduction in the amount of the fine imposed on them.

299 It nevertheless remains to be considered whether ADM's providing the information in question to the Commission constitutes 'effective cooperation by the undertaking in the proceedings, outside the scope of the [Leniency] Notice', within the meaning of the sixth indent of Section 3 of the Guidelines, and thus a mitigating circumstance that must be taken into account for the purposes of any reduction in the basic amount of the fine.

300 It is clear from settled case-law that a reduction in a fine on grounds of cooperation during the administrative procedure is justified only if the conduct of the undertaking in question enabled the Commission to establish the existence of an infringement more easily and, where relevant, to bring it to an end (see Case C-297/98 P *SCA Holding* v *Commission*, cited above, paragraph 36, and *BPB de Eendracht* v *Commission*, cited above, paragraph 325, and the case-law cited).

301 In the present case, the information supplied by ADM concerning the supposed existence of collusion between lysine producers in the 1970s and 1980s did not enable the Commission to establish the existence of any infringement whatsoever inasmuch as the Decision is concerned only with the existence of the cartel between the producers in question from July 1990 onwards.

302 On the other hand, it is clear from paragraph 52 of the Decision, and also from the file, that it was on the basis of a letter dated 6 December 1990 from Sewon to Ajinomoto, produced by ADM after the Commission sent its first statement of objections (facsimile of 28 February 1999 from ADM to the Commission) that the Commission was able to adopt its supplementary statement of objections of 16 August 1999 and subsequently establish, in the Decision, that the cartel between Ajinomoto, Kyowa and Sewon had started in July 1990, and not September 1990.

303 As far as Ajinomoto's dominant role in the cartel is concerned, neither the file nor the matters on which ADM relies (paragraph 2.3.4.4 of its reply to the statement of objections) show that ADM provided useful information or evidence in this regard. Indeed, in its reply to the statement of objections, ADM merely mentions certain statements made by other producers or the comments which the Commission made on the subject in its statement of objections. The applicants cannot therefore claim to have assisted the Commission in its task in this respect.

304 As regards Ajinomoto's destruction of documents when the American authorities were carrying out their investigation, it is clear from the file that ADM did in fact inform the Commission on this point, sending it an extract of the witness evidence given by a member of Ajinomoto's staff in the proceedings in the United States (paragraph 2.5.3.1 of ADM's reply to the statement of objections). The Commission noted the fact in paragraph 414 of the Decision and used it to deduce that Ajinomoto's cooperation had not been complete, within the meaning

of paragraph (d) of Section B of the Leniency Notice, and did not, therefore, justify a reduction of the fine under that head.

305 That last piece of information did not therefore, as such, assist the Commission in establishing the existence of an infringement, within the meaning of the case-law mentioned, but it did enable it to evaluate more precisely the degree of cooperation offered by Ajinomoto during the administrative procedure for the purposes of determining the amount of its fine. Interpreting the case-law in accordance with its spirit, this Court finds that this information did assist the Commission in its investigation.

306 In view of those considerations, it is apparent that ADM provided the Commission with useful information on two points, namely the duration of the infringement and Ajinomoto's cooperation. The provision of information of that kind cannot be regarded as cooperation falling within the scope of the Leniency Notice, but it does, on the other hand, constitutes 'effective cooperation outside the scope of the [Leniency] Notice', within the meaning of the sixth indent of Section 3 of the Guidelines.

307 Therefore, in order to comply with that provision, a further reduction in the amount of the fine ought to have been given by reason of mitigating circumstances.

308 That conclusion is all the more necessary because, when appraising the cooperation offered by undertakings, the Commission is not entitled to disregard the principle of equal treatment (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, cited above, paragraph 237).

309 Indeed, an undertaking which, in addition to having expressly admitted the substantive truth of the facts in its reply to a statement of objections, has assisted the Commission on other points, offering 'effective cooperation' within the meaning of the sixth indent of Section 3 of the Guidelines, cannot be compared to an undertaking which has admitted the substantive truth of the facts but has provided no other information.

310 Consequently, the sixth indent of Section 3 of the Guidelines having been infringed in this case, it is incumbent upon the Court to determine what reduction ought to have been allowed ADM under that provision in addition to the 10% reduction already granted. In so far as the present action is directed against a Commission decision imposing a fine on an undertaking for infringement of the competition rules, the Community Court 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 fine (Case C-297/98 P *SCA Holding* v *Commission*, cited above, paragraph 55).

311 In the present case, the information which ADM provided, whilst certainly justifying a further reduction in its fine if the force of the Guidelines is to be preserved, was in fact of limited use. First, the information concerning the duration of the infringement merely enabled the Commission to establish that the cartel had begun in July 1990, rather than in September of that year (which, incidentally, ought, in accordance with the principle stated by the Commission in paragraph 313 of the Decision, to have entailed an increase of 50%, rather than 40% on account of duration in the case of Ajinomoto, Kyowa and Sewon, given that the information gave grounds for finding that the infringement went on for five full years). Secondly, the information concerning the cooperation offered by Ajinomoto admittedly protected the Commission from reducing excessively the fine imposed on that undertaking, by reason of its cooperation, but the fact remains that it did not, as such, assist the Commission in proving the infringement.

312 In those circumstances, an additional 10% reduction in the basic amount of the fine imposed on ADM appears to be quite appropriate.

VIII — *Defects in the administrative procedure*

Arguments of the parties

313 The applicants submit that the Decision infringes essential procedural requirements in several respects, to the detriment of ADM.

314 In the first place, they contend that, during the administrative procedure, they were not given an opportunity to submit their observations concerning two matters on which the Commission relied in the Decision in connection with calculating the fine.

315 First, the Connor report, mentioned in paragraph 276 of the Decision, was never produced to ADM so that it could submit observations. Yet the report is the only piece of evidence upon which the Commission relies to prove that lysine prices would have been lower had there been no cartel. According to the applicants, this breach of an essential procedural requirement wholly undermines the Commission's case concerning the actual impact of the cartel on the market, which was a key factor in determining the level of the fine.

316 Moreover, the Commission did not give the parties an opportunity to submit their observations on the Commission's mistaken conclusion, set out in paragraph 311 of the Decision, that the fines imposed in the United States and Canada related only to offences committed within the jurisdiction of the national courts of those two countries.

317 Secondly, the applicants argue that some of the evidence used by the Commission was inadmissible.

318 They claim that, in the statement of objections (documents 4187 to 4240 of the annex to the statement of objections), the Commission relied on statements which a participant in the cartel made to an American court in the case of *USA vs. Andreas and Others*. However, according to settled case-law (Case C-60/92 *Otto* [1993] ECR I-5683, paragraph 20), information obtained in the course of national proceedings cannot be used by the Commission to establish an infringement of the competition rules. Furthermore, the statements in question have no probative force in American law as they were made at a preliminary stage in the context of the public prosecutor's address to the court.

319 The applicants add that, included with the other information passed to the Commission by the American authorities, were clandestine audio and video recordings, the Commission's use of which violates the right to privacy protected by Article 8 of the ECHR. According to the case-law of the European Court of Human Rights (Eur. Court HR *Niemietz* v *Germany* [1992] [Series A No 251-B / 16 EHRR 97]) and a decision of the Commission (Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty — Case IV/33.884 — Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnis Gebied and Technische Unie (FEG and TU)

(OJ 2000 L 39, p. 1), paragraphs 32 and 151), the use of unauthorised recordings may violate ADM's right to privacy under Article 8 of the ECHR.

320 In the Decision the Commission relied on several of the recordings, which, according to the applicants, are inadmissible. Thus, the Commission concluded that ADM's actions were intentional from the fact that it had warned the other undertakings 'to watch their telephones' (paragraph 252 of the Decision). The Commission also relied on what was said at the meetings between ADM and Ajinomoto on 30 April 1993 in Decatur, on 14 May 1993 in Tokyo and on 25 October 1993 in Irvine as a basis for concluding that ADM and Ajinomoto were 'the driving forces behind the global cartel' (paragraphs 98, 100, 101 and 332 of the Decision) and for increasing the basic fine by 50%. The recordings, the earliest of which was made in November 1992, were thus used as the basis for the Commission's erroneous view that the aim of the price-cutting in early 1992 was to force the Asian producers to conclude an agreement (paragraph 331 of the Decision) and that the cartel had an actual impact on the market (paragraph 269 of the Decision).

321 The Commission denies any breach of essential procedural requirements.

322 With regard to the first limb of this argument, the Commission begins by observing that it did not rely on the Connor report to prove that the cartel had an impact in the EEA because the report was concerned with the American market. The report is cited, as a simple observation, merely to confirm the Commission's conclusion as to the undertaking's ability to fix prices. It is therefore immaterial that the report was not produced to ADM during the administrative procedure, particularly as the author gave evidence in the proceedings in the United States and ADM would have amply commented on his work.

323 With regard to the applicants' assertion that the fines imposed by the American and Canadian courts did not only relate to offences under the national law of those countries, the Commission reiterates that it regards this argument as irrelevant.

324 As for the second limb of the argument, the Commission points out that it conducted its own enquiry and gathered relevant information using its powers under Regulation No 17. Since the results of the enquiry were set out in the statement of objections ADM did have an opportunity to defend its position.

325 The Commission adds that, after receiving the statement of objections of 29 October 1998, ADM chose not to contest the substantive accuracy of the facts as described by the Commission so as to obtain a reduction in the fine, which was in fact granted. For it now to claim that some of that information was inadmissible amounts to going back on its acceptance of the Commission's case, which removes the justification for the reduction in the fine granted by the Commission. Furthermore, it is inconsistent to maintain that the recordings of the meetings in question, at which ADM was represented by Mr Whitacre, infringed the undertaking's right of privacy, and at the same time claim that Mr Whitacre was working not for ADM but for the FBI.

Findings of the Court

326 In the first limb of their argument concerning defects in the administrative procedure, the applicants complain that the Commission failed to allow them to submit their observations concerning two matters on which the Commission relied in the Decision in connection with calculating the fine.

327 As regards, first of all, the applicants' argument that ADM was unable to submit its observations on the Connor report, suffice it to point out that any remarks that ADM might have been able to make during the administrative procedure on the basis of the extract of this document would not have enabled it to counter the specific conclusions drawn by the Commission concerning the actual effect of the infringement on the market and, in particular, the artificial increase in prices, which are based on considerations other than the report (see paragraphs 150 to 169 of the present judgment) (see, to that effect, *Cimenteries CBR and Others* v *Commission*, cited above, paragraphs 5090 to 5096).

328 Next, the applicants' complaint that ADM was unable to dispute the Commission's assertion that the American and Canadian courts imposed fines on it solely in respect of the anti-competitive effects of the cartel in those jurisdictions is plainly groundless. It is in fact clear from the Decision itself that ADM disputed that conclusion during the administrative procedure, arguing, amongst other things, that the fine was imposed in the United States for 'fixing the price and allocating the sales volumes of lysine offered for sale to customers in the United States and elsewhere' (paragraph 307 of the Decision).

329 The first limb of the applicants' argument must therefore be rejected.

330 Under the second limb of their argument the applicants allege that certain of the pieces of evidence gathered by the Commission are inadmissible. In the present case it is necessary to distinguish between the two categories of evidence whose admissibility is in dispute.

331 The first of these includes the evidence contained in the 'Government's proffer of co-conspirator statements', which are a summary of the evidence gathered by the American Department of Justice and produced before the United States District Court of Illinois in criminal proceedings brought by the United States Government against three directors of ADM and an employee of Ajinomoto for infringement of the competition laws, those proceedings ending with the former ADM directors being sentenced to terms of imprisonment.

332 It is apparent from the file that this document (volume 2 of the annexes to the application, pages 4187 to 4237) was included as an annex to the statement of objections (annex 6 — volume 1 of the annexes to the application). Similarly, it is clear from the statement of objections that the Commission relied on it on a number of occasions.

333 The applicants contend that this evidence is inadmissible on the ground that information obtained in the course of national proceedings cannot, according to settled case-law, be used by the Commission to establish an infringement of the competition rules (*Otto*, cited above, paragraph 20). In so doing, the applicants implicitly draw an analogy between cases where information is obtained from national jurisdictions within the Community and those, like the present case, where information is obtained from authorities outside the Community.

334 Without it being necessary at this stage for the Court to rule on the question whether the document which the applicants allege to be inadmissible in evidence was used by the Commission in a manner consistent with Community law, this argument must be rejected.

335 It is important, first of all, to bear in mind that, according to case-law, where the Court upholds a plea that certain pieces of evidence are inadmissible, the evidence in question must be disregarded and the legality of the decision assessed without it (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30). Now, it is clear from the statement of objections that the Commission relied on evidence other than that contained in the documents in question in proving ADM's participation in the cartel and the particular role it played, in particular information which the cartel members provided from July 1996 onwards as part of their cooperation with the Commission. In addition, it is important to remember that, in the present action, the applicants do not seek annulment of the Decision as such, but annulment of the provision imposing the fine, or a reduction in the fine imposed.

336 Next, and most importantly, it should be pointed out that ADM expressly indicated in its reply to the statement of objections that it did not dispute the facts set out therein (paragraph 1.1 of ADM's reply, annex 7 to the application, volume 3 of the annexes), an admission which, taken with other factors, enabled the Commission to conclude that ADM had infringed Article 81 EC.

337 Now, as already indicated in paragraph 227 of the present judgment, according to the case-law of the Court of Justice, '[w]here the undertaking involved does not expressly acknowledge the facts, the Commission will have to prove those facts and the undertaking is free to put forward, at the appropriate time and in particular in the procedure before the Court, any plea in its defence which it deems appropriate' (C-297/98 P *SCA Holding* v *Commission*, cited above, paragraph 37). It follows, by contrast, that this cannot be the case where the undertaking in question acknowledges the facts. Thus, where, as in the present case, the undertaking expressly admits, during the administrative procedure, the substantive truth of the facts which the Commission alleges against it in its statement of objections, those facts must thereafter be regarded as established and the undertaking barred from disputing them during the procedure before the Court.

338 Consequently, the applicants' argument for a declaration that one of the pieces of evidence of ADM's participation in the cartel is inadmissible must be rejected. Even if that argument were to be accepted, the facts alleged against ADM in the statement of objections remain established facts because, amongst other things, they were expressly admitted by ADM.

339 The second category of evidence which the applicants say is inadmissible includes the clandestine audio and video recordings made by the FBI in the course of its inquiry. According to the applicants, the Commission's use of these, when determining the amount of the fine, violates the fundamental right to respect for private life protected by Article 8 of the ECHR.

340 In so far as that right to respect for private life is concerned, it should be remembered that the Court has acknowledged the existence of a general principle of Community law ensuring protection against intervention by the public authorities in the sphere of the private activities of any person, whether natural or legal, which is disproportionate or arbitrary (Joined Cases 97/87, 98/87 and 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 16). It is in light of that principle that the Court of Justice and the Court of First Instance must review the exercise of the Commission's investigatory powers under Regulation No 17.

341 Compliance with that general principle implies, amongst other things, that any intervention by the public authorities must have a legal basis and be justified on grounds laid down by law (*Dow Chemical Ibérica and Others* v *Commission*, paragraph 16). However, there is no provision in Regulation No 17 that addresses the question whether clandestine audio and video recordings may be made and used.

342 By a written question sent on 7 February 2002, the Court called upon the Commission to state whether it had used these recordings for the purposes of adopting its Decision. In its reply, the Commission indicated that, in the course of its inquiry into the cartel, the American Department of Justice had sent it, on its own initiative, not on request, audio and video recordings made by the FBI in the course of the investigation which it carried out in the United States. The Commission stated that it had not 'used the recordings to support its own inquiry' and that it did not take them into account 'in adopting the Decision or in calculating the fines'. That being so, it must be held that the applicants' argument concerning the Commission's use of recordings obtained in breach of the right to respect for private life is based on a false premiss and must therefore be rejected.

343 In any event, and to the extent that, by the argument mentioned in paragraph 339 of the present judgment, the applicants allege that, when calculating the fine, the Commission indirectly and illegally used the recordings in question inasmuch as the Government's proffer of co-conspirator statements incorporated extracts from them (as the Commission's representative indicated at the hearing), it must be held that that argument cannot succeed.

344 It should be borne in mind that where the Court upholds a party's plea that certain evidence is inadmissible, the evidence in question must be disregarded.

345 In the present case, the applicants argue that the recordings made of certain meetings served as the basis for the Commission's conclusion that the infringement was intentional (paragraph 252 of the Decision), that the cartel had had an actual effect on the market in that it had led to a price increase

(paragraph 269 of the Decision) and that ADM had acted as ringleader (paragraphs 331 and 332 of the Decision).

346 Even leaving aside the content of the discussions at the meetings which ADM attended and which were recorded, it is clear from the evidence already considered in relation to the earlier pleas that the Commission took other circumstances into account in forming its conclusions. In particular, it decided that the infringement had had an effect on the market on the basis, *inter alia*, of the increase in prices. The fact that ADM acted as ringleader of the cartel is confirmed both by the various initiatives which it took in order to establish how the cartel should operate and by the threats which it made to other producers.

347 As regards intention, it is also clear from the Decision that all the participants in the cartel intended to conclude agreements to fix prices, to partition markets and to exchange information (paragraph 251) and that their meetings were organised covertly (paragraph 253). It is settled case-law that, for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing the rules, merely that it could not have been unaware that its conduct was aimed at restricting competition (see, in particular, Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41). That is clearly so in the present case, given the circumstances mentioned above.

348 Thus, even if the applicants' argument regarding the admissibility of the evidence contained in the recordings at issue could be accepted, the Commission's conclusions as to the actual effect of the infringement and regarding the questions whether ADM's infringing conduct was intentional and whether it acted as ringleader would remain well founded, given the evidence mentioned in paragraphs 346 and 347 of the present judgment.

IX — *The allegation of breach of the duty to state reasons in connection with the calculation of the fine*

349 The applicants claim that the Decision contains an insufficient statement of reasons for certain points connected with the calculation of the fine, namely:

— the Commission's refusal to take account of the fines imposed in non-member States;

— the Commission's failure to take account of the absence of any real effect on the market due to the cartel;

— its failure to take account of turnover from lysine sales in the EEA;

— the role of ringleader attributed to ADM and the 50% increase assessed as a result;

— the Commission's interpretation of the quota agreements as being agreements on minimum quotas;

— the Commission's assertion that the exchange of incorrect information constitutes implementation of an agreement for the exchange of information.

350 It apparent from their application that the applicants complain that the reasons given for the Commission's conclusions were 'inadequate' or 'inappropriate' and in fact seek to dispute the merits of the grounds on which the aspects of the Decision just mentioned are based. It is therefore sufficient to point out that, leaving aside the complaint concerning the Commission's treatment of the quota agreements as agreements for minimum quotas, all of the complaints set out in the preceding paragraph have been rejected by the Court in its assessment of the merits of the Decision.

351 Moreover, in so far as the applicants' arguments may be interpreted as a plea that the Commission has in fact infringed essential procedural requirements, it must be observed that, on each of the points listed in paragraph 349 of the present judgment, the Decision satisfies the requirements of Article 253 EC. The grounds of the Decision clearly show the Commission's line of reasoning and thus enable the applicants to apprise themselves of the factors which the Commission took into account to determine the gravity and duration of the infringement for the purposes of calculating the fine, and the Court to exercise its review.

The applicants' alternative claim for reimbursement of the costs of providing security

Arguments of the parties

352 The Commission submits that this claim is inadmissible because it is not a ground for annulment of the Decision or for cancellation or reduction of the fine. In any event, there are no pleas or submissions in support of the claim in the body of the application.

353 The applicants contend that their claim clearly follows on from their claim for costs, including the cost of providing security for payment of the fine, to be awarded against the Commission.

354 In its rejoinder the Commission submits that the claim should be treated as having been withdrawn since the applicants say that it forms part of their application for costs, adding that, in any event, the cost of providing security is not a recoverable cost (see *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 5133).

Findings of the Court

355 It must be observed, first of all, that, in addition to the plea for an order on costs against the Commission, the applicants have expressly asked the Court to order that institution to reimburse them all their costs in connection with providing a bank guarantee for payment of the fine. In their reply, the applicants ask the Court to uphold the plea set out in the application.

356 Suffice it to recall that, according to case-law, a request such as that, made independently from the application for an order on costs, must be rejected as inadmissible because it in fact concerns enforcement of the judgment. Under Article 233 EC it is for the Commission to take the necessary measures to comply with the judgment (see *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 5118, and the case-law cited).

The Commission's counterclaim for an increase in ADM's fine

Arguments of the parties

357 The Commission urges the Court to exercise its unlimited jurisdiction and increase the fine payable by ADM on the ground that, in its application in this action, it has clearly gone back on its acknowledgement of the substantive truth of the facts, in recognition of which the fine was reduced. The increase should be at least equal to the 10% reduction consequently allowed in the Decision (paragraphs 433 and 434).

358 The Commission adds that this request is justified, first, by the fact that paragraph 4 of Section E of the Leniency Notice informs undertakings whose fine has been reduced that it will make such a request if the facts are contested before the Court. Secondly, the Community system for enforcing competition law should not be mocked, as it certainly would be if undertakings could secure a substantial reduction in their fines at the stage of adoption of a decision and then, without the slightest risk, bring proceedings which attempt to subvert the entire factual basis of that decision.

359 The applicants state that they do not dispute the Commission's material findings of fact, but criticise its legal analysis and interpretation of matters relating to the fine, such as the cartel's actual impact on the market and ADM's leadership.

Findings of the Court

360 Pursuant to Article 17 of Regulation No 17, '[the Court of First Instance] shall have unlimited jurisdiction within the meaning of Article [229 EC] to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.'

361 Moreover, the second subparagraph of paragraph 4 of Section E of the Leniency Notice states that '[s]hould an enterprise which has benefited from a reduction in a fine for not substantially contesting the facts then contest them for the first time in proceedings for annulment before the Court of First Instance, the Commission will normally ask that court to increase the fine imposed on that enterprise.'

362 Given the Court's power to increase fines imposed pursuant to Regulation No 17, it is appropriate to establish whether, as the Commission essentially maintains, the circumstances of the present case warrant cancellation of the 10% reduction granted to ADM for its cooperation and thus increasing the final amount of the fine.

363 Pursuant to the second indent of paragraph 2 of Section D of the Leniency Notice, an undertaking will benefit from a reduction in a fine where 'after receiving a statement of objections, [it] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations'.

364 In the present case, it is important to note that, in their action, the applicants do not directly dispute the facts alleged against ADM in the statement of objections

on the basis of which the Commission concluded that Article 81 EC had been infringed, because their pleas relate not to annulment of the Decision as such, but to cancellation or reduction of the fine.

365 Nevertheless, according to the Commission, the applicants indirectly dispute a number of points. The Commission refers explicitly to the applicants' arguments relating to the cartel's lack of effect on prices, the duration of the infringement and the inadmissibility of evidence of ADM's participation in the cartel.

366 On the first of these points, the Commission's argument must be rejected. Disputing its assessment of the cartel's effect on prices does not equate to substantially disputing the facts. That is all the more true in the present case because, in reaching its view that the agreements in question were contrary to Article 81(1) EC, the Commission relied in the Decision only on their object, not on their restrictive effect (see paragraphs 228 to 230 of the Decision). Consequently, even if the applicants' argument were accepted, that could in no way call into question the legality of the Decision in so far as it found there to be a cartel contrary to Article 81 EC. The argument cannot, therefore, be treated as a disguised attempt to dispute the fact of the infringement or the legality of the Decision on that point.

367 On the other hand, the applicants' arguments contesting the increase in the starting amount of the fine applied by the Commission on account of the duration of the infringement do amount to disputing the duration of ADM's participation in the cartel. The applicants in fact claim that they did not subscribe to the price agreements in June 1992 but some time later. However, it was clearly alleged in the statement of objections (see, in particular, paragraph 176) that ADM was a party to those agreements from 23 June 1992 onwards. Given that it expressly acknowledged the substantive truth of the facts alleged against it in the statement of objections, that argument does, therefore, cast doubt upon its cooperation on this point.

368 The same conclusion must be drawn with regard to the applicants' arguments in relation to the admissibility of evidence of ADM's participation in cartel meetings because that too is a fact which ADM expressly acknowledged in its reply to the statement of objections.

369 Nevertheless, it should be observed that the Court rejected these two arguments (see paragraphs 226 to 227 and 336 to 338 of the present judgment) on applying the authority in Case C-297/98 P *SCA Holding* v *Commission* (paragraph 37), according to which the facts must be regarded as established where an undertaking expressly acknowledges them during the administrative procedure and the undertaking becomes barred from putting forward pleas in defence disputing the facts in proceedings before the Court.

370 That being so, there are no grounds for cancelling the minimum reduction of 10% allowed ADM under the second indent of paragraph 2 of Section D of the Leniency Notice and the Commission's counterclaim must therefore be rejected.

The method employed in calculating the final amount of the fine

371 In the Decision the Commission increased the basic amount of the fine on ADM by 50% on account of the aggravating circumstance that it acted as ringleader of the cartel. It then reduced the resulting figure by 10%, or EUR 5.85 million, to reflect the single mitigating circumstance of which ADM was given the benefit, namely the fact that it terminated the infringement as soon as the first public

authority to do so intervened (paragraph 384). That equates to a reduction in the basic amount of 15%.

372 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 its 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 severity and duration of the infringement.

373 As far as ADM is concerned, the Commission followed the order specified in the Guidelines and applied first an increase on account of one aggravating circumstance then a reduction to reflect the mitigating circumstance of which it was given the benefit. Nevertheless, as the Court observed in paragraph 371 of the present judgment, the reduction was clearly applied to the figure resulting from the 50% increase, rather than to the basic amount of the fine.

374 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.

375 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.

376 At the hearing the applicants made no observation about the method used to calculate the fines which the Commission described in its letter of 27 February 2002.

377 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.

378 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 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.

379 In the exercise of its unlimited jurisdiction, the Court therefore finds that it is necessary to add to the 15% reduction mentioned in paragraph 371 of the present judgment — the size of which is appropriate — the 10% reduction to reflect ADM's effective cooperation in the proceedings outside the scope of the Leniency Notice within the meaning of the sixth indent of Section 3 of the Guidelines. This gives a total reduction on account of mitigating circumstances of 25% of the basic amount of the fine of EUR 39 million, that is to say EUR 9.75 million. That figure must then be subtracted from the basic amount of the fine as increased by 50% on account of the aggravating circumstance that ADM acted as ringleader, being EUR 58.5 million, leaving a figure of EUR 48.75 million before application of the provisions of the Leniency Notice. It should be observed that the same result may be reached by applying to the basic amount of the fine the difference between the percentage increase and the percentage reduction applied to reflect aggravating and mitigating circumstances, which, in this case, is a 25% increase in the basic amount of the fine of EUR 39 million.

380 It must be remembered that, pursuant to Section D of the Leniency Notice, the Commission allowed ADM a 10% reduction in the fine which would have been imposed on it had there been no cooperation, equating to a reduction of EUR 4 875 000. The final amount of the fine imposed on the applicants must, consequently, be EUR 43 875 000.

Costs

381 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 or that each party should bear its own costs. In this case, it is appropriate to order the applicants to bear their own costs and three quarters 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 Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd jointly and severally at EUR 43 875 000;**

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

3. **Orders Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd to bear their own costs and to pay three quarters of the Commission's costs and orders the Commission to bear one quarter 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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